JUDGMENT OF THE GENERAL COURT (Second Chamber)

3 March 2011 *

In Cases T-117/07 and T-121/07,

Areva, société anonyme, established in Paris (France),

Areva T&D Holding SA, established in Paris,

Areva T&D SA, established in Paris,

Areva T&D AG, established in Oberentfelden (Switzerland),

represented by A. Schild and J.-M. Cot, lawyers,

Alstom, société anonyme, established in Levallois-Perret (France), represented initially by J. Derenne, lawyer, W. Broere, Solicitor, A. Müller-Rappard and C. Guirado, lawyers, and then by J. Derenne and A. Müller-Rappard, lawyers,

applicants,

* Language of the case: French.

European Commission, represented initially by X. Lewis and F. Arbault, then by X. Lewis, and finally by V. Bottka and N. Von Lingen, acting as Agents,

defendant,

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

THE GENERAL COURT (Second Chamber),

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

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 24 March 2009,

gives the following

Judgment

Background to the dispute

1 The background to the dispute is set out, in essence, in the findings made by the Commission of the European Communities in Commission Decision C (2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear) ('the contested decision'). In so far as those factual elements have not been disputed or, at least, not properly disputed by the parties, they must be regarded as established for the purposes of the present action.

Product concerned

2 Gas insulated switchgear ('GIS') is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power sub-stations.

3 Substations are auxiliary power stations where electrical current is converted. In addition to the transformer, other essential components for substations are control systems, relays, batteries, chargers and switchgear. The function of switchgear is to protect the transformer from overload and/or insulate the circuit and the faulty transformer.

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

5 The contested decision concerns GIS projects involving a voltage from 72.5 kV upwards ('GIS projects'), which includes GIS as a stand-alone product, including all associated services (transport, erection, testing, insulation etc.) and GIS based turnkey power substations, including GIS and other parts of the substation such as transformers, and all associated services (transport, cabling, erection, insulation etc.).

Undertakings in question

6 Alstom (formerly Alsthom), a limited liability company under French law, is the parent company of a group of companies ('the Alstom Group'). Throughout the period from 15 April 1988 to 8 January 2004, the Alstom Group was active in the electricity transmission and distribution sector ('the T&D sector') and, in particular, in GIS.

7 The Alstom Group's GIS activities in France were carried out by Alsthom SA (France) until 1989, when Alsthom SA (France) was renamed GEC Alsthom SA, which was a wholly-owned subsidiary of GEC Alsthom NV. On 16 November 1992, Kléber Eylau SA was created and was granted the French GIS activities by an agreement which took effect on 7 December 1992. GEC Alsthom SA owned 99.76% of Kléber Eylau and Etoile Kléber owned 0.04%. In June 1993 Kléber Eylau's name was changed to GEC Alsthom T&D SA which, in June 1998, became Alstom T&D SA. Alstom T&D SA was a wholly-owned subsidiary of Alstom Holdings (France), which was in turn a wholly-owned subsidiary of Alstom.

8 From January 1986, Alstom's GIS activities in Switzerland ran parallel to those in France, when Sprecher Energie AG became a wholly-owned subsidiary of Alsthom. In November 1993, Sprecher Energie became GEC Alsthom T&D AG, which, in July 1997, became GEC Alsthom AG and, in June 1998, became Alstom AG ('Alstom Switzerland'). On 22 December 2000, the latter was acquired by Alstom Power (Schweiz) AG. The new entity was called Alstom (Schweiz) AG. In November 2002, a new legal entity was created within the Alstom Group, to which the activities in the T&D sector in Switzerland were transferred. Initially named Alstom (Schweiz) Services AG, that new entity was subsequently renamed Alstom T&D AG.

9 All of the Alstom Group's T&D sector activities were transferred, on 8 January 2009, to a group of which Areva, a limited liability company under French law with a management board and a supervisory board, is the parent company ('the Areva Group'). From 9 January to 11 May 2004, the Areva group's GIS activities were carried out by Areva T&D SA and by Areva T&D AG, wholly-owned subsidiaries of Areva T&D Holding SA, which is itself wholly-owned by Areva (taken as a whole, 'the companies of the Areva Group').

Administrative procedure

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

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

12 The oral application for immunity made by ABB was supplemented, inter alia on 7 May 2004, with oral statements and documentary evidence. On 25 April 2004, the Commission had granted conditional immunity to ABB.

13 On the basis of ABB's statements, the Commission launched an investigation and, on 11 and 12 May 2004, it carried out inspections at the premises of a number of companies operating in the GIS sector.

14 Between 14 and 25 May 2004, the Areva Group cooperated with the Commission and, pursuant to the Leniency Notice, provided it with various documentary evidence and information.

15 On 4 October 2004, ABB replied to a request for information from the Commission.

16 On 6 February 2006, the Commission sent a request for information to Alstom, to which the latter replied on 24 February 2006.

17 On 20 April 2006, the Commission adopted a statement of objections which, in addition to Alstom and the companies of the Areva Group, was addressed to ABB, Fuji Electric Holdings Co., Ltd and Fuji Electric Systems Co., Ltd (together 'the companies of the Fuji Group'), Hitachi and Hitachi Europe Ltd (together 'Hitachi'), Japan AE Power Systems Corp. ('JAEPS'), Mitsubishi Electric System Corp. ('Melco'), Nuova Magrini Galilieo SpA, Schneider Electric SA ('Schneider'), Siemens AG, Toshiba Corp. and five other companies — the parent company of which was VA Technology AG — ('the VA Tech Group') including VA Technology itself.

18 On 5 May 2006, Alstom was able to inspect the oral statements made by the other companies implicated, in accordance with the Leniency Notice.

19 On 30 June 2006, Alstom and the companies of the Areva Group sent to the Commission, within the prescribed time-limit, their respective observations in reply to the statement of objections. Annexed to its reply to the statement of objections, Alstom produced a number of the Alstom Group's internal documents in respect of which

confidential treatment was requested for all third-parties except for the Commission. Likewise, ABB, the companies of the Fuji Group, Hitachi and JAEPS, Melco, Schneider, Siemens AG Österreich, Siemens and Toshiba replied, in writing, to the statement of objections within the prescribed time-limits.

20 By letter of 12 July 2006, the companies of the Fuji Group cooperated with the Commission and, pursuant to the Leniency Notice, provided it with various documentary evidence and information.

21 On 14 July 2006, ABB sent the Commission a 'supplementary reply to the statement of objections.'

22 On 18 and 19 July 2006, the Commission held hearings of the companies to which the statement of objections had been sent.

23 On 25 August 2006, the Commission made available to the parties to the proceeding, for comment, extracts from the non-confidential version of the reply to the statement of objections from the companies of the Fuji Group, the Fuji Group's application of 12 July 2006 pursuant to the Leniency Notice (see paragraph 20 above), the supplementary reply from ABB to the statement of objections and additional documents. Alstom submitted its observations on those documents on 15 September 2006, and provided a statement from one of its employees, Mr S., who had direct knowledge of the facts at issue.

24 On 20 September 2006, the Commission sent a request for information to the companies of the Areva Group, to which they replied on 6 October 2006 producing numerous documents relating to the reorganisation of operations in the T&D sector within the Alstom Group for the purpose of the intergroup transfer referred to in paragraph 9 above.

25 On 14 November 2006, the Commission sent its view, in English, to Alstom, on the additional documents referred to in paragraph 23 above, and, as a result of a request from Alstom on 17 November 2006, sent that view to it, in French, on 22 November 2006. On 27 November 2006, Alstom submitted its observations in relation to that view.

26 On 4 December 2006, Alstom sent to the Commission a letter regarding the determination of the legal persons concerned by the facts at issue. That letter contained, inter alia, numerous schedules illustrating the various operations for restructuring the T&D sector activities within the Alstom Group.

Contested decision

27 On 24 January 2007, the Commission adopted the contested decision, a summary of which was published in the Official Journal of 10 January 2008 (OJ 2008 C 5, p. 7). Alstom and the companies of the Areva Group were notified of the contested decision on 8 February 2007.

28 In addition to Alstom and the companies of the Areva Group, the contested decision was addressed to ABB, the companies of the Fuji Group, the companies of the Hitachi Group, JAEPS, Melco, Nuova Magrini Galileo, Schneider, Siemens, Siemens AG Österreich, Siemens Transmission & Distribution Ltd ('Reyrolle'), Siemens Transmission & Distribution SA, Toshiba and VA Tech Transmission & Distribution GmbH & Co. KEG.

29 In recitals 113 to 123 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had coordinated the allocation of GIS projects worldwide — except for specific markets — according to agreed rules in order to maintain quotas largely reflecting estimated historic market shares. It pointed out that the allocation of GIS projects had been carried out on the basis of a joint 'Japanese' quota and a joint 'European' quota, which the Japanese and European producers then had to distribute amongst themselves. An agreement signed in Vienna on 15 April 1988 ('the GQ Agreement') established rules allowing the allocation of GIS projects to either Japanese producers or to European producers and to set their value against the corresponding quota. In addition, in recitals 124 to 132 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had entered into an unwritten agreement ('the common understanding'), under which GIS projects in Japan, on the one hand, and in the countries of European members of the cartel, on the other — together described as the 'home countries' for GIS projects — were reserved to Japanese members and European members of the cartel respectively. GIS projects located in the 'home countries' were not the subject of information exchanges between the two groups and were not charged to their respective quotas.

30 The GQ Agreement also contained rules relating to the exchange of information necessary for operation of the cartel between the two groups of producers, carried out in particular by their respective secretaries, and to the manipulation of the bidding procedures concerned and the fixing of prices for GIS projects which could not be allocated. Under the terms of Annex 2 to the GQ Agreement, it applied across the world,

except in the United States, Canada, Japan and 17 Western European countries. Furthermore, under the common understanding, GIS projects in European countries other than the 'home countries' were also reserved for the European group, as the Japanese producers had undertaken not to submit bids for GIS projects in Europe.

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

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

33 In Article 1(b) of the contested decision, the Commission found that Alstom had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area ('the EEA Agreement') by participating in a complex of agreements and concerted practices in the GIS sector in the EEA for the period from 15 April 1988 to 8 January 2004. In Article 1(c), (d), (e) and (f) of the contested decision, it also found that Areva and Areva T&D Holding had committed that double infringement for the period from 9 January 2004 until 11 May 2004, that Areva T&D AG had committed that double infringement for the period from 22 December 2003 until 11 May 2004, and that Areva T&D SA had committed that double infringement for the period from 7 December 1992 until 11 May 2004.

34 In Article 2(b) and (c) of the contested decision, in respect of the infringements referred to in Article 1 of the contested decision, Alstom individually was fined a sum of EUR 11 475 000 and it was also fined EUR 53 550 000 for which it was jointly and severally liable with Areva T&D SA.

35 In Article 2(c) of the contested decision, in respect of the infringements contained in Article 1 of the contested decision, Areva T&D SA was fined a sum of EUR 53 550 000 for which it was jointly and severally liable with Alstom and, in addition, it was fined EUR 25 500 000 for which it was jointly and severally liable with Areva, Areva T&D Holding and Areva T&D AG.

Procedure and forms of order sought

36 By documents lodged at the Registry of the General Court on 18 April 2007, the companies of the Areva Group and Alstom brought the present actions, which were registered as Cases T-117/07 and T-121/07 respectively.

37 Upon hearing the Report of the Judge-Rapporteur, the General Court (Second Chamber) decided to open the oral procedure in Cases T-117/07 and T-121/07.

38 After the parties had been heard on the matter, the President of the Second Chamber, by order of 12 March 2009, joined Cases T-117/07 and T-121/07 for the purposes of the oral proceedings in accordance with Article 50 of the Rules of Procedure of the General Court. Furthermore, he granted confidential treatment in relation to

the documents annexed to Alstom's reply to the statement of objections (see paragraph 19 above), contained in the case file of Case T-121/07.

39 At the hearing held on 24 March 2009, the parties presented oral argument and their answers to the questions put by the Court. The applicants confirmed that their pleas in law and grounds of complaints alleging infringement of Article 81 EC should also be understood to cover Article 53 of the EEA Agreement. The Commission took the view that joint and several liability for an infringement of competition law is presumed to be liability in equal shares where the operative part of the decision finding that liability does not specify differently. The applicants, by contrast, disputed whether such a presumption could operate. Lastly, the Commission stated that, in assessing the role of leader in an infringement of competition law, it had been necessary to weigh all the criteria, including the duration and intensity of that role of leader. Those observations were recorded in the minutes of the hearing. In their final observations, the companies of the Areva Group criticised an alleged material error which consisted in considering Areva T&D AG to be the same company as Alstom T&D AG, for which only the business name had been altered.

40 By letters lodged at the Registry of the Court on 29 and 30 April 2009, Alstom and the companies of the Areva Group respectively made a number of observations on the content of the minutes of the hearing as regards the Commission's replies to questions put by the Court on the arrangement for joint and several liability for infringement of competition law.

41 By order of the Court of 3 June 2009, the oral procedure was re-opened. Pursuant to Article 7(2) of the Instructions to the Registrar of the General Court, the President of the Second Chamber of the General Court decided to add the letters lodged on 29 and 30 April 2009 to the case-file.

42 By letter lodged at the Registry of the Court on 18 June 2009, the Commission submitted its observations on those letters. In that context, it contended that, where it imposes a fine on a number of undertakings, for which they are jointly and several liable, and does not specify further in the operative part of its decision, then it does not seek to govern the issue of the respective contributions to payment of that fine as between the various debtors.

43 By decision of 1 July 2009, the President of the Second Chamber of the General Court rejected the application to amend the minutes of the hearing, after having checked them against the exact wording of the oral replies given by the Commission at that hearing.

44 Alstom claims that the Court should:

— annul Article 1(b) and Article 2(b) and (c) of the contested decision;

— in the alternative, substantially reduce the fine which was imposed on it in Article 2(b) and (c) of the contested decision;

— order the Commission to pay the costs.

45 The companies of the Areva Group claim that the Court should:

— annul Article 1 of the contested decision, inasmuch as, first, it attributes joint and several liability for the infringement to Areva T&D SA and Alstom for the period from 7 December 1992 to 8 January 2004 and, second, it attributes joint and several liability to them for the infringement for the period from 9 January to 11 May 2004;

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

— order the Commission to pay the costs.

46 The Commission contends that the Court should:

— dismiss the applications as unfounded;

— order the applicants to pay the costs.

Law

47 Since the present cases are related, and after hearing the views of the parties on that matter, the Court considers that they should be joined for the purposes of the judgment, in accordance with Article 50 of the Rules of Procedure of this Court.

48 The applications seek (i), primarily, the annulment of Article 1(b), (c), (d), (e) and (f) of the contested decision, (ii) primarily or in the alternative, the annulment of Article 2(b) and (c) of the contested decision and (iii), in the alternative, amendment of Article 2(b) and (c) of the contested decision.

49 It is first necessary to examine the heads of the forms of order seeking annulment of Article 1(b), (c), (d), (e) and (f) of the contested decision. Then, the heads seeking annulment of Article 2(b) and (c) of the contested decision will, in so far as necessary, be examined. Lastly, in so far as necessary, the heads seeking amendment of Article 2(b) and (c) of the contested decision will be examined.

50 In support of the form of order which they seek in Case T-117/07, the companies of the Areva Group have raised seven pleas in law. The first plea alleges breach of the duty to state reasons laid down in Article 253 EC. The second plea is based, in essence, on infringement of the rules on attributing liability for infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement and breach of the general principles of legal certainty and non-retroactivity. The third plea alleges, in essence, infringement of the rules on attributing liability for infringements of Article 81(1) EC and Article 53(1) of the EEA Agreement. The fourth plea is based, in essence, on infringement of the rules on attributing liability for infringements and on joint and several liability for the

payment of fines resulting from Article 81(1) EC and Article 53(1) of the EEA Agreement, infringement of Article 7 EC and breach of the general principles of equal treatment, proportionality, legal certainty, non-retroactivity of legal penalties and effective judicial protection. The fifth plea alleges infringement of the rules on joint and several liability for the payment of fines resulting from Article 81(1) EC and Article 53(1) of the EEA Agreement. The sixth plea alleges, in essence, infringement of Article 23(2)(a) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) and of Section 2 of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC (OJ 1998 C 9, p. 3; 'the Guidelines'), an error of assessment and breach of the general principles of equal treatment and proportionality. Lastly, the seventh plea is based, in essence, on an error of assessment and infringement of Article 81 EC and Article 53(1) of the EEA Agreement, and of the Leniency Notice.

51 In support of the form of order which it seeks in Case T-121/07, Alstom has raised eight pleas in law. The first plea alleges infringement of the right to an effective remedy. The second plea is based, in essence, on infringement of the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement, on breach of the general principle of legal certainty and the general principle that the penalty must be specific to the offender and to the offence and on breach of the duty to state reasons. The third plea alleges breach of the duty to state reasons laid down in Article 253 EC. The fourth plea is based, principally, on infringement of the rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA Agreement and on an error in law or, in the alternative, on an infringement of Article 25 of Regulation No 1/2003. The fifth plea is based, in essence, on an error of assessment, infringement of the Guidelines, breach of the principles of equal treatment and proportionality and of the duty to state reasons. The sixth plea alleges, in essence, infringement of the rules on proving the continuous nature of the infringement resulting from Article 23(3) of Regulation No 1/2003 and Article 15(2) of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles [81 EC] and [82 EC], as amended (OJ 1962 English Special Edition Series I, p. 87),

and breach of the principle of legal certainty. The seventh plea is based on a failure to observe the rights of the defence and infringement of Article 27(1) of Regulation No 1/2003. The eighth plea is based, in essence, on infringement of the Guidelines and, in the alternative, on breach of the principle of proportionality.

52 To the extent that some of the pleas raised by the applicants overlap, they will be considered together in the interests of the sound administration of justice.

Heads of the forms of order seeking annulment of Article 1(b), (c), (d), (e) and (f) of the contested decision

53 These pleas and grounds of complaint contesting the Commission's finding that the companies of the Areva Group and Alstom infringed Article 81 EC and Article 53 of the EEA Agreement on account of their participation in a complex of agreements and concerted practices in the EEA for the periods mentioned in Article 1 of the contested decision are directed against Article 1(b), (c), (d), (e) and (f) of that decision (see paragraph 33 above).

54 In Case T-117/07, those heads of the form of order seeking annulment of Article 1(c), (d), (e) and (f) of the contested decision are supported by the pleas and grounds of complaint, raised in the application, which challenge the Commission's findings that Areva T&D SA, for the period from 7 December 1992 to 11 May 2004, Areva T&D AG, for the period from 22 December 2003 to 11 May 2004, and Areva and Areva T&D Holding SA, for the period from 9 January to 11 May 2004, are personally liable for the participation of their GIS activities division, or the participation of their subsidiaries, in a complex of agreements and concerted practices in the EEA (second,

third, fourth and fifth pleas), or which claim infringement of essential procedural requirements which may have had an effect on those findings (first plea).

55 In Case T-121/07, those heads of the form of order seeking annulment of Article 1(b) of the contested decision are supported by the pleas and grounds of complaint, raised in the application, which challenge the Commission's finding that Alstom is personally liable for the participation of its GIS activities division, or the participation of its subsidiaries, in a complex of agreements and concerted practices in the EEA for the period from 15 April 1988 until 8 January 2004 (fourth and sixth pleas), or which claim infringement of essential procedural requirements which may have had an effect on that finding (third and sixth pleas).

Preliminary observations

56 It is apparent from the pleas and complaints raised in the applications that the companies of the Areva Group, on the one hand, and Alstom, on the other, make diametrically opposed claims as regards the attribution of liability for the infringement for all or part of the period from 15 April 1988 to 11 May 2004.

57 Alstom claims, in essence, that the personal liability which it incurs by reason of the participation of its GIS activities division in the infringement for the period from 15 April 1988 to 8 January 2004 was transferred to Alstom T&D SA and Alstom T&D AG as a result of restructuring operations in the T&D sector within its group. It claims, furthermore, that no personal liability can be attributed to it by reason of the participation of those subsidiaries in the infringement for the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004

respectively, in so far as Alstom T&D SA and Alstom T&D AG, to which those activities had been transferred, determined their conduct on the market independently. Lastly, Alstom claims that the personal liability attributed to it by reason of the participation of its GIS activities division, of Alstom T&D SA and of Alstom T&D AG in the infringement for the period from 15 April 1988 to 8 January 2004 was transferred, with that sector and those subsidiaries (which then became Areva T&D SA and Areva T&D AG), to the companies of the Areva Group by way of an intergroup transfer of T&D sector activities.

58 On the other hand, the companies of the Areva Group claim that no personal liability can be attributed to them on account of the participation of companies of the Alstom Group in the infringement for the period from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively, in so far as the conduct on the market of Alstom T&D SA and Alstom T&D AG, to which the GIS activities had been transferred, was determined by Alstom. In addition, Areva and Areva T&D Holding SA claim that no personal liability can be attributed to them on account of the participation of their subsidiaries in the infringement for the period from 9 January to 11 May 2004, inasmuch as Areva T&D SA and Areva T&D AG, to which those activities had been transferred, determined their conduct on the market independently.

59 It must be noted that, in their written pleadings, the applicants rely on the fact that Areva T&D SA and Areva T&D AG are merely new business names which were given to Alstom T&D SA and Alstom T&D AG after their transfer to the Areva Group on 8 January 2004. In that regard, the assertions made by the companies of the Areva Group in their final observations at the hearing, that the Commission made a material error in considering Areva T&D AG to be the same company as Alstom T&D AG, cannot be taken into account. Inasmuch as those assertions are the basis for a plea claiming that the contested decision is vitiated by a factual error on that point, it must be recalled that, pursuant to the first subparagraph of Article 48(2) of the Rules

of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. In so far as, in the present case, the companies of the Areva Group have not detailed the essential factual elements on which their new plea is based or, *a fortiori*, claimed that those factual elements came to light in the course of the procedure, the assertions referred to above must be rejected as inadmissible. Therefore, it must be held, in Cases T-117/07 and T-121/07, that Alstom T&D AG and Areva T&D AG represent, under different business names, one and the same legal person.

The transfer, to Areva T&D SA and Areva T&D AG, of the personal liability incurred by Alstom on account of the participation of its GIS activities division in the infringement for the period from 15 April 1988 to 6 December 1992

— Arguments of the parties

60 In the context of the second part of its fourth plea, Alstom, alleging an error of law, claims that in the contested decision the Commission did not transfer, to Areva T&D SA and Areva T&D AG, the personal liability which it incurred on account of the participation of part of its 'T&D division' in the infringement for the period from 15 April 1988 to 6 December 1992.

61 According to Alstom, the Commission made an error of law when applying the rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA

Agreement by not applying, to the relationship between Alstom and its former subsidiaries operating in the T&D sector, the criterion of 'economic continuity', as identified in the case-law in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 356 to 359, and in Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 132, and by holding it personally liable for the participation of a part of its 'T&D division' in the infringement for the period from 15 April 1988 to 6 December 1992, without taking account of the fact that that undertaking had been transferred to its former subsidiaries active in the T&D sector, following restructuring operations within the Alstom Group. It takes the view, in essence, that while the Alstom Group's 'T&D division' did not have legal personality prior to 7 December 1992, the creation, on that date, of a subsidiary specifically responsible for it, outside Switzerland, namely Kléber Eylau (subsequently Alstom T&D SA, then Areva T&D SA), should have allowed the Commission to identify — on the date when the contested decision was adopted — a legal person to which the undertaking which had participated in the infringement had been transferred and to which the infringement could thus be attributed. An analogous reasoning can be applied in respect of the transfer, on 22 December 2003, of the Alstom Group's activities in the T&D sector in Switzerland to Alstom (Schweiz) Services AG (formerly Alstom T&D AG, then Areva T&D AG).

62 The Commission disputes Alstom's arguments and contends that the ground of complaint should be rejected.

— Findings of the Court

63 In competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the infringement in question (see, to that effect, Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11;

Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124, and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85). In prohibiting undertakings inter alia from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, Article 81(1) EC is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see, to that effect, Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraph 235, and Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 311).

64 In order to be applied and enforced, decisions taken pursuant to Article 81 EC must, however, be addressed to entities possessing legal personality (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission ('PVC II')* [1999] ECR II-931, paragraph 978, and Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 59). Thus, when the Commission adopts a decision pursuant to Article 81(1) EC, it must identify the natural or legal person or persons who can be held responsible for the conduct of the relevant undertaking and can be penalised for that conduct and the decision will be addressed to them (see, to that effect, *Hydrotherm Gerätebau*, paragraph 63 above, paragraph 11).

65 In accordance with the principle of personal liability (Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 131 to 141; Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 78; Case C-280/06 *ETI and Others* [2007] ECR I-10893, paragraph 39; see, also, Opinion of Advocate General Kokott in *ETI and Others* [2007] ECR I-10892, paragraphs 71 et seq.), under which a person can be held liable only for his own acts (Opinion of Advocate General Cosmos in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1990] ECR I-4130, paragraph 74), it

falls, in principle, to the person managing the undertaking when the infringement was committed to answer for that infringement, even if, at the date of the decision finding the infringement, that undertaking is the responsibility or under the management of a different person (Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraph 27, and Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 37; see, also, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraph 79).

66 In certain exceptional circumstances, the case-law accepts that it is possible to derogate from the principle of personal liability under the so-called 'economic continuity' criterion, under which an infringement of the rules on competition may be imputed to the economic successor of the legal person which committed it, even where the latter has not ceased to exist on the date of adoption of the decision finding the infringement, in order that the effectiveness of those rules will not be compromised owing to the changes to, inter alia, the legal form of the undertakings concerned (Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraphs 105 and 106).

67 In *Aalborg Portland and Others* v *Commission*, paragraph 61 above (paragraphs 356 to 359), the Court of Justice held that the General Court had not erred in holding that the Commission was entitled, in the context of an intragroup transfer of an undertaking, to hold the transferee company liable for the infringement committed by the undertaking, before its transfer, even where the transferor company continued to exist as a legal entity. To distinguish the situation outlined in paragraph 145 of *Commission* v *Anic Partecipazioni*, paragraph 65 above, under which there can be 'economic continuity' only where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed, the Court of Justice relied on the fact that the transferor company had transferred all of its economic activities to the transferee company while maintaining a structural link with the latter, in which it had a 50 % shareholding.

68 In *Jungbunzlauer* v *Commission*, paragraph 61 above (paragraphs 132 and 133), the General Court held, with reference to *Aalborg Portland and Others* v *Commission*, paragraph 61 above, that the fact that a company continues to exist as a legal entity does not exclude the possibility that, pursuant to competition law, there may be a transfer of part of the activities of that company — constituting an undertaking for the purposes of competition law — to another company which becomes responsible for the acts of that undertaking. Therefore, the General Court held that the Commission had not erred in finding, in the context of an intragroup transfer of an undertaking, that the infringement committed, prior to that transfer, by that undertaking had to be attributed to the transferee company, even though the transferor company continued to exist as a legal entity. In that case, while the transferor company had retained the production activities of the relevant undertaking, it had inter alia transferred the management and governance of that undertaking to the transferee company, which could, to that extent, be regarded as the economic successor of the transferor company.

69 In paragraphs 38 to 42 of *ETI and Others*, paragraph 65 above, the Court of Justice justified the so-called 'economic continuity' criterion by the need to ensure that penalties for infringements of competition law have deterrent effect. With reference to *Aalborg Portland and Others* v *Commission*, paragraph 61 above, the Court of Justice indicated, in paragraphs 48 to 51 of *ETI and Others*, that applying penalties in this way is permissible and does not breach the principle of personal responsibility, even if the entity that committed the infringement still exists on the date on which the entity to which it transferred its economic activities is penalised, where those two entities have been under the control of the same person and, given the close economic and organisational links between them, have carried out, in all material respects, the same commercial instructions. It thus held that Article 81 EC et seq. must be interpreted as meaning that, in the case of entities answering to the same public authority, where conduct amounting to one and the same infringement of the competition rules was adopted by one entity and subsequently continued until its cessation by another entity which succeeded the first, which has not ceased to exist, that second entity may be penalised for that infringement in its entirety if it is established that those two entities were subject to the control of the said authority.

70 The case-law cited is applicable, by analogy, to Article 53(1) of the EEA Agreement.

71 In the present case, at the outset, it is important to identify the 'undertaking', for the purposes of competition law, which participated in the infringement for which Alstom was held liable in Article 1(b) of the contested decision. It is apparent from the description given in recitals 5 to 87 of the contested decision, relating to 'the industry subject to the proceeding', and in recitals 16 to 22, relating to 'the undertakings subject to the proceedings', that the relevant undertaking corresponds to the unitary organisation of personal, tangible and intangible elements which, first within the Alstom Group and, then, after the intergroup transfer on 8 January 2004 (see paragraph 9), within the Areva Group, operated in the GIS sector ('the undertaking in question'). Therefore, Alstom is wrong to assert that the undertaking in question consists of the Alstom Group's 'T&D division' or, more broadly, of all the elements which contributed, at the material times, to activities in that sector.

72 It is also apparent from recitals 357 and 358 of the contested decision that, to find Alstom liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992, the Commission observed that, before 7 December 1992, GIS activities within the Alstom Group were carried out directly by Alsthom SA, then GEC Alsthom SA, and not by its predecessors Areva T&D SA and Areva T&D AG. The Commission also noted that, before December 2002, the Alstom Group's activities in the T&D sector in Switzerland had been carried out by Sprecher Energie (acquired by Alstom SA in January 1986), which became Alstom AG (Switzerland). After having found that the legal entities in question still existed within the Alstom Group under new business names, the Commission considered that Alstom, as parent company of those various wholly-owned subsidiaries, retained responsibility for their activities before the creation of Areva T&D SA's and Areva T&D AG's predecessors. The Commission inferred therefrom that Areva T&D SA and Areva T&D AG should not be held liable for the participation of

the undertaking in question in the infringement for the relevant period, as legal and economic successors, despite the fact that the Alstom Group's activities in the T&D sector had then been transferred to their respective predecessors.

73 Alstom raises no specific plea or complaint disputing the grounds of the contested decision which attribute liability to it for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992, on the ground that, at the material time, it controlled that undertaking through the intermediary of wholly-owned or majority-owned subsidiaries. Alstom merely claims that the liability it incurred in that regard was transferred to Areva T&D SA and Areva T&D AG in accordance with the so-called 'economic continuity' criterion identified in *Aalborg Portland and Others* v *Commission* and *Jungbunzlauer* v *Commission*, paragraph 61.

74 It must first be stated that recital 339 of the contested decision, to which recital 357 refers, cannot be considered as supporting the Commission's decision not to transfer, to Areva T&D SA and Areva T&D AG, liability for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992. Recital 339 of the contested decision concerns the possibility, in the light of the principles identified in paragraphs 356 to 359 of *Aalborg Portland and Others* v *Commission* and in paragraph 132 of *Jungbunzlauer* v *Commission*, paragraph 61, of transferring liability between the companies of the same group pursuant to the so-called 'economic continuity' criterion. In that recital, the Commission states that the fact that a company retains legal personality, after having transferred part of its activities to another company within the same group, does not prevent the Commission from holding the latter company liable for the infringement committed by the former. It follows that the reference to recital 339 of the contested decision, which is made in recital 357, cannot be taken into account when assessing the validity of the finding that there was no transfer, to Areva T&D SA and Areva T&D AG, of liability for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992.

75 In its defence in Case T-121/07, the Commission contends that it restricted itself, in the contested decision, to applying the rules resulting from the principle of personal liability (see paragraph 65). If follows from recitals 357 and 358 of the contested decision, the content of which is summarised in paragraph 72, that Alstom is held liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992 on the ground that, at the material time, Alstom managed that undertaking through the intermediary of wholly-owned or majority-owned subsidiaries still existing within the Alstom Group.

76 It is therefore necessary to decide whether, as Alstom claims, the liability for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992 must be transferred to Areva T&D SA and Areva T&D AG on the ground that the undertaking in question was transferred to their respective predecessors, namely Kléber Eylau and Alstom (Schweiz) Services, by GEC Alstom SA on 7 December 1992, and by Alstom AG (Suisse) on 22 December 2003.

77 In that regard, it must be noted that Alstom's line of argument would mean that Areva T&D SA and Areva T&D AG would be answerable for an infringement personally attributable to GEC Alsthom SA and Alstom AG (Suisse), which, as part of the Alstom Group, were, at the material times, wholly-owned or majority-owned subsidiaries of Alstom or its predecessors.

78 In such a situation, the so-called 'economic continuity' criterion can, however, be applied only to the extent that the undertaking in question was no longer the responsibility or under the management of Alstom following the restructuring operations within the Alstom Group on 7 December 1992 and 22 December 2003. In the event that, on the other hand, Alstom never ceased, through the medium of its wholly-owned or majority-owned subsidiaries, to manage the undertaking in question up until the intergroup transfer on 8 January 2004, it would remain personally liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992 and the Commission would not have

committed an error of law by not invoking, with regard to the relationship between Alstom and its subsidiaries in the T&D sector, the 'economic continuity' criterion, in the light of the intragroup restructuring operations referred to above (see, to that effect, Opinion of Advocate General Mischo in *SCA Holding* v *Commission*, paragraph 65, [2000] ECR I-10104, paragraph 26).

79 For all of those reasons, it is appropriate, before ruling on the present ground of complaint, to reply to the pleas and grounds of complaint disputing the finding, in Article 1(b) of the contested decision, that Alstom, as the parent company of the wholly-owned subsidiaries Alstom T&D SA and Alstom T&D AG, is liable for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004.

The personal liability incurred by Alstom, as the parent company of the wholly-owned subsidiaries Alstom T&D SA and Alstom T&D AG, on account of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004

— Arguments of the parties

80 Alstom, in the first part of its fourth plea, alleging infringement of the rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA Agreement, claims that, in the contested decision, the Commission attributed liability to it, as the parent company of the wholly-owned subsidiaries Alstom T&D SA and Alstom T&D AG, for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004.

81 By its third plea, Alstom claims that the Commission infringed Article 253 EC by not reasoning, to the requisite legal standard, the finding that Alstom should be held liable, as the parent company of the wholly-owned subsidiaries Alstom T&D SA and Alstom T&D AG, in view of the evidence which it submitted during the administrative procedure. At the hearing, it also alleged, in that regard, failure to observe the rights of the defence and breach of the principle of equality of arms in proceedings before the judicature of the European Union.

82 In the context of its seventh plea, Alstom alleges failure to observe the rights of the defence and infringement of Article 27(1) of Regulation No 1/2003 on the basis that the Commission, in attributing liability to Alstom, as the parent company of the wholly-owned subsidiaries Alstom T&D SA and Alstom T&D AG, for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, accepted in the contested decision factual evidence concerning Alstom, submitted by the companies of the Areva Group, without having informed it beforehand that that evidence might be used against it and without allowing it to give its point of view. That applies to the evidence, referred to in recitals 351 and 354 of the contested decision, relating to the finding against Alsthom SA — one of it predecessors — in a decision of the French Competition Board (*Conseil de la concurrence français*) of 1 March 1988 and the fact that six members of the board of Alsthom T&D SA, simultaneously or consecutively, held management posts within Alstom SA.

83 The Commission disputes Alstom's arguments and contends that those pleas and grounds of complaint should be rejected.

— Findings of the Court

84 For the purposes of applying competition law, the formal separation of two companies as a result of their having distinct legal identity is not decisive. The test is

whether or not there is unity in their conduct on the market (see, to that effect, *ICI* v *Commission*, paragraph 65 above, paragraph 140). Thus, it may be necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (*DaimlerChrysler* v *Commission*, paragraph 63 above, paragraph 85).

85 Thus, according to settled case-law, the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, particularly where the subsidiary does not determine independently its conduct on the market but in all material respects carries out the instructions given to it by the parent company (*ICI* v *Commission*, paragraph 65 above, paragraphs 132 and 133, and *PVC II*, paragraph 64 above, paragraph 960). Where a subsidiary does not enjoy real autonomy in determining its course of action in the market, the prohibitions set out in Article 81(1) EC may be considered inapplicable in the relationship between it and the parent company with which it forms one economic unit (*ICI* v *Commission*, paragraph 65 above, paragraph 134; Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 51).

86 In that context, it is, in principle, for the Commission to demonstrate that the parent company exercises a decisive influence on its subsidiary's conduct on the market on the basis of factual evidence, including, in particular, any management power which the parent company exerted over its subsidiary (see Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136, and the case-law cited). However, the settled case-law of the Court of Justice and the General Court is that the Commission may reasonably presume that a wholly-owned subsidiary carries out, in all material respects, the instructions given to it by its parent company and that that presumption implies that the Commission is not required to check whether the parent company has actually exercised that controlling power over its subsidiary. When, in the statement of objections, the Commission indicates its intention to hold a parent company personally liable for an infringement for which its subsidiary was responsible, relying on the presumption of liability which results from the fact that the parent company

holds all the capital of that subsidiary, it is for the parent company which intends to dispute the liability attributed to it to produce, during the administrative procedure or, at the latest, before the Court, sufficiently conclusive evidence to rebut the presumption by demonstrating that, despite the parent company holding all of its capital, the subsidiary actually determined its conduct on the market independently (see Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraphs 82 and 83, and the case-law cited).

87 The Commission must be able to take into account, in the decision finding an infringement, the replies by the undertakings concerned to the statement of objections. In that regard, it must be able not only to accept or reject the arguments of the undertakings concerned but also make its own analysis of the matters put forward by them in order either to abandon such objections as have been shown to be unfounded or to supplement or adapt its arguments both in fact and in law in support of the complaints which it maintains (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 93; see, also, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 91 and 92; Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 437 and 438, and Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 68).

88 As regards the duty on the Commission to state reasons, in particular where it adopts a decision finding an infringement of competition rules, it is important to bear in mind that, according to settled case-law, the complaint alleging an absence of reasons or inadequacy of the reasons stated must be distinguished from an objection based on the inaccuracy of the grounds of the decision (by reason of an error in fact or in the legal assessment). The latter falls within the assessment of the substantive legality of the contested decision and not of essential procedural requirements and cannot therefore constitute an infringement of Article 253 EC (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 67 and 72;

Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 114; Joined Cases C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P *International Power and Others* v *NALOO* [2003] ECR I-11421, paragraph 145, and Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47). As an essential procedural requirement, the statement of reasons required under Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution that adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it in order to defend their rights and to enable the competent court to exercise its power of review (Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 124). Although the Commission is required under Article 253 EC to set out all the matters of fact and law justifying the adoption of a decision and the legal considerations which led it to adopt that decision, that article does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative procedure (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22; Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 55, and *Volkswagen* v *Commission*, paragraph 127). The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see *Commission* v *Sytraval and Brink's France*, paragraph 63, and the case-law cited).

89 The foregoing case-law is applicable, by analogy, to the decisions of the Commission finding an infringement of Article 53(1) of the EEA Agreement.

90 In the present case, in paragraphs 331 and 337 of the statement of objections, the Commission indicated its intention to find Alstom jointly and severally liable with Areva T&D SA and Areva T&D AG for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004, on the

basis of the presumption of liability resulting from the fact that the parent company held the entire capital of the subsidiaries (see paragraph 86).

91 It follows from recitals 335, 348 to 356 and 358 of the contested decision that, to find Alstom jointly and severally liable with Areva T&D SA for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, the Commission, in the final analysis, relied not only on the presumption of liability resulting from the fact that the parent company held the entire capital of the subsidiaries, but also on factual evidence submitted during the administrative procedure. The Commission thus referred, in recital 351 of the contested decision, to a decision of the French Competition Council of 1 March 1998, fining Alsthom under French competition law for bid-rigging practices also concerning electrical equipment (medium voltage transformers). It also referred, in recital 353 of the contested decision, to evidence submitted by Alstom itself, which tended to show that, within the Alstom Group, the operative organisation had primacy over the legal structure and that, as with the T&D division, GIS project activities were managed, at the highest level, by Alstom and its predecessors. Lastly, it referred, in recitals 354 and 355 of the contested decision, to the evidence submitted by the companies of the Areva Group, which allowed it to identify six members of the board of Alstom T&D SA who had been, either simultaneously or consecutively, members of the board of the 'ultimate parent companies' of the Alstom Group, prior to January 2004, up to the post of chief executive.

92 Alstom does not dispute the assessments of fact in the contested decision, according to which Alstom T&D SA and Alstom T&D AG were wholly-owned subsidiaries throughout the period from 7 December 1992 to 8 January 2004. Contrary to what Alstom claims, those findings alone allowed the Commission to presume that Alstom T&D SA and Alstom T&D AG did not enjoy real autonomy vis-à-vis Alstom in

determining their course of action on the market and that those companies therefore constituted, with Alstom, one and the same undertaking for the purposes of competition law. In accordance with the case-law cited in paragraph 86, it is therefore for Alstom — which claims that those subsidiaries, operating in the T&D sector, determined their conduct on the market independently for the period at issue — to rebut the presumption of liability resulting from the fact that the parent company held the entire capital of the subsidiaries, by producing evidence of sufficient probative value in that regard.

93 In paragraphs 90 to 150 of its reply to the statement of objections, Alstom contended that the undertaking in question corresponded to the 'T&D division' of the Alstom Group and that, since that division determined its own conduct on the market independently, only the operational subsidiaries responsible for that sector could be held liable for that conduct. According to Alstom, the dichotomy existing within the Alstom Group, between the operational organisation and the legal structure, confirms the lack of a relationship between the capital strands and the conduct on the market of the divisions and their different activities, which functioned and took their decisions in a wholly decentralised and autonomous manner. Alstom, as the parent company of the Alstom Group, had not the means, in terms of personnel, organisation, or expertise, to influence decisively commercial policy within its divisions. It therefore restricted itself to deciding and supervising, through its executive committee, global strategy and financial objectives to be implemented by those divisions, the business risks inherent in their activities and the decisions of operational subsidiaries responsible for those risks, where they were capable of giving rise to a financial risk for the entire Alstom Group. The 'T&D division' of the Alstom Group thus elaborated its own rules, determining the way in which its various commercial activities should be structured and managed. As regards, in particular, the conduct of activities in the GIS sector, Alstom's role was limited to approval, within the executive committee and on the basis of summary information, of proposed bids for GIS projects above a certain threshold or involving specific 'substantial risks' for the Alstom Group. In that context, it was strictly impossible for Alstom, having regard to the limited commercial information which was made available to it, to have been aware of the participation of one part of the 'T&D division' of the Alstom Group in the infringement. The few individuals, participating in activities in the GIS sector and belonging to the operational

subsidiaries responsible for those activities, that is to say, Alstom T&D SA and Alstom T&D AG, who had attended the cartel meetings thus had done so without the knowledge of Alstom and its directors.

94 In support of its line of argument in reply to the statement of objections, Alstom produced various documents, which were added to the case-file in Case T-121/07, and for which confidential treatment was granted (see paragraphs 19 and 38). They include the 'Information Memorandum' drafted in March 2003 for the sale of the Alstom Group's 'T&D division' to the Areva Group, a copy of that division's internal instructions which were available, from 1999, on the website of the Alstom Group, Alstom's 'e-Book', two blank forms for approval of bids for GIS projects and, lastly, a copy of the minutes of all the meetings of the Alstom Group's executive committee which took place between the beginning of 1999 and the end of 2003.

95 In recital 348 of the contested decision, the Commission stated that, in paragraphs 90 to 150 of its reply to the statement of objections, as summarised in recitals 345 to 347 of the contested decision, Alstom did not provide valid explanations or convincing arguments which would have allowed the conclusion that it had not been in a position to exercise decisive influence on the commercial policy of its subsidiaries which were active in the T&D sector.

96 The parties disagree, first, on the issue whether the Commission reasoned, to the requisite legal standard, its rejection of evidence submitted by Alstom during the administrative procedure as not being of sufficient probative value.

97 In recitals 350 to 356 of the contested decision, the Commission explained, in a detailed manner, the reasons for which it considers that the evidence submitted by Alstom during the administrative procedure was not of sufficient probative value, in particular, in the light of contrary evidence submitted by the companies of the Areva Group. In recitals 350 to 353 of the contested decision, the Commission stated that the delegation of commercial functions at the level of the 'T&D division', or relating to the Alstom Group's activities in the GIS sector, could not relieve Alstom of its responsibility, since, as it admitted itself, at the time of the infringement, it had to approve every proposed bid for GIS projects above a certain threshold or comprising certain 'substantial risks' for the Alstom Group. Taking account of the substantial fine imposed on Alsthom by the French Competition Council by decision of 1 March 1988, it was unlikely that Alstom would not have identified infringement of competition law as a substantial risk requiring heightened scrutiny. Furthermore, the evidence submitted by Alstom to establish the primacy, within the Alstom Group, of the operational organisation over the legal structure also tended to establish that, through the intermediary of operational directors of the 'T&D division' of the Alstom Group, which was part of the group and accountable to it, Alstom exercised decisive influence on the GIS-sector activities of its subsidiaries which were active in the T&D sector. In recitals 354 to 356 of the contested decision, the Commission, moreover, considered that Alstom's contention, that its directors were not informed of the participation of the undertaking in question in the infringement, was not credible, in the light of the evidence submitted by the companies of the Areva Group, which established that a number of individuals occupied, simultaneously or consecutively, managing positions within Alstom or the ultimate parent companies and within the subsidiaries of the Alstom Group, and in the light of the fact that the various subsidiaries, which had continuously carried out the GIS-sector activities within the Alstom Group, had always been, directly or indirectly, wholly-owned by Alstom or its predecessors.

98 While Alstom points out, correctly, that in recitals 350 to 356 of the contested decision the Commission does not discuss, in detail, all the matters of law and fact which it submitted during the administrative procedure, it is nevertheless the case that the contested decision contains sufficient reasoning to allow Alstom to understand that

the Commission considered that that evidence had no probative value and, consequently, that the Commission found it to be personally liable for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004. The alleged lack of reasoning did not, in the present case, prevent Alstom from presenting, before this Court, its argument that the matters of law and fact which it submitted during the administrative procedure showed that its subsidiaries which were active in the T&D sector determined their conduct on the market independently during the period at issue and that, therefore, the presumption of liability resulting from the fact that the parent company held all the capital of the subsidiaries had been rebutted before the Commission. Likewise, the alleged lack of reasoning did not prevent this Court from carrying out its review of the lawfulness of the contested decision, in so far as it relies on that presumption to find Alstom liable for the infringement.

99 The complaint alleging breach of the duty to state reasons, set out in the context of the third plea raised by Alstom must, therefore, be rejected as unfounded.

100 Inasmuch as, at the hearing, Alstom attempted to extend the grounds of complaint which it had initially set out on that aspect of the contested decision, by claiming failure to observe the rights of the defence and breach of the principle of equality of arms in proceedings before the judicature of the European Union, Alstom raised new pleas which were not based on elements of fact or law which had arisen in the course of the proceedings. In accordance with Article 48(2) of the Rules of Procedure, such pleas must be rejected as inadmissible.

101 The parties disagree, second, on whether the evidence submitted by Alstom, in paragraphs 90 to 150 of its reply to the statement of objections, as summarised in recitals 345 to 347 of the contested decision, and the documents produced in support of that

reply to the statement of objections were such as to rebut the presumption of liability arising from the fact that the parent company held the entire capital of the subsidiaries and to show that, despite that holding, Alstom T&D SA and Alstom T&D AG determined, at the time of the infringement, their conduct on the market independently of their parent company.

102 As a preliminary point, it should be noted that the documents produced by Alstom in support of its reply to the statement of objections establish that the operative organisation had primacy over the legal structure within the Alstom Group. With regard to that evidence, the parties themselves agree that, within the Alstom Group, the organisation of divisions or operational sectors took precedence over the legal structure. The e-book provided by Alstom, which contains the instructions and general policies of the Alstom Group, defined by the Director General of Alstom, confirms, in the third subparagraph of its point 3.1,1 that '[*confidential*] [1]'. It is apparent, in particular, from point 1.4 of the 'Information Memorandum' that, before its transfer to the Areva Group, the T&D division '[*confidential*]', within the Alstom Group, with the result that '[*confidential*]'. That being so, the parties cannot validly dispute the fact that, during the periods in question, namely from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively, Alstom T&D SA and Alstom T&D AG held the rights with respect to the human and material elements which were participating in activities in the GIS sector, which correspond, in the present case, to the undertaking in question (see, paragraph 71; see, also, Opinion of Advocate General Kokott in *ETI and Others*, paragraph 65 above, paragraph 31). Therefore, the issue of determining the policy followed by the undertaking in question, during the abovementioned periods, cannot be separated from that of determining the policy followed by Alstom T&D SA and Alstom T&D AG during those same periods.

1 — confidential information omitted.

103 In addition, the documents produced by Alstom do not establish that the 'T&D division' of the Alstom Group and, within it, the activities in the GIS sector were carried on in a wholly decentralised and independent manner within the Alstom Group. Those documents prove, on the contrary, that the management of the Alstom Group, under the responsibility of Alstom, took part in defining the course of action on the market in relation to the Alstom Group's 'T&D division' and its various branches of activity, and that it permanently supervised compliance with that course of action by that division and its different branches of activity.

104 The e-book describes, in points 3.1,2.1 and 3.1,2.2, the organisation of the management of the Alstom Group. [*confidential*]

105 [confidential]

106 [confidential]

107 [confidential]

108 [confidential]

109 [confidential]

110 In the light of the organisational, economic and legal links demonstrated by the evidence submitted by Alstom during the administrative procedure between, on the one hand, the management of the Alstom Group, under the responsibility of Alstom and, on the other, that group's activities in the GIS sector carried out, at the material time, by Alstom T&D SA and Alstom T&D AG, through the 'T&D division', the Commission was entitled to find in the contested decision that that evidence did not allow the rebuttal of the presumption of liability arising from the fact that the parent company held the entire capital of the subsidiaries. The Commission was therefore also entitled, in the contested decision, to attribute, personally to Alstom, liability for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004.

111 That conclusion, in so far as it finds, first, that Alstom had never ceased, through the intermediary of wholly-owned or majority-owned subsidiaries, to manage the undertaking in question until the intergroup transfer of 8 January 2004 and, second, that Alstom remained, in that respect, personally liable until that date for the participation of the undertaking in question in the infringement which has been established, moreover answers the ground of complaint alleging an error of law arising from a failure to apply the criterion of 'economic continuity' in the light of the intragroup restructuring which took place on 7 December 1992 and 22 December 2003 (see paragraph 79), and allows that ground of complaint to be rejected as ineffective, in the light of the relationship existing between Alstom and its subsidiaries which were active in the T&D sector.

112 Lastly, on the basis of that conclusion, the Court may reject, as unfounded, the ground of complaint raised in the context of the seventh plea, alleging failure to observe the rights of the defence in relation to certain additional evidence relied on by the Commission in the contested decision to support the presumption of liability arising from the fact that the parent company held the entire capital of the subsidiaries (see paragraph 91). First, there can be a failure to observe the rights of the defence only where it is possible that the outcome of the administrative procedure conducted by the Commission might have been different as a result of an error committed by it (see, to that effect, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821,

paragraph 31, and the case-law cited). Second, Alstom has not established that it could have better conducted its defence if it had known, during the administrative procedure, that the Commission intended to rely on additional evidence to support the presumption of liability arising from the fact that the parent company held the entire capital of the subsidiaries (see, to that effect, *Thyssen Stahl* v *Commission*, paragraph 31, and the case-law cited).

The transfer of the personal liability incurred by Alstom, by reason of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004, to the companies of the Areva Group in the light of the transfer of that company to the Areva Group

— Arguments of the parties

113 Alstom, in the context of the second part of its fourth plea, alleging an error of law, complains that, in the contested decision, the Commission did not transfer the liability which it incurred, by reason of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004, to the companies of the Areva Group, in the light of the intergroup transfer of 8 January 2004.

114 According to Alstom, the Commission made an error of law when applying the rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA Agreement, in that it attributed liability to Alstom for the infringement committed by the undertaking in question from 15 April 1988 to 8 January 2004, even though, under

the transfer contract, concluded on 25 September 2003 the majority of the shares, liabilities, employees and responsibilities of the Alstom Group's 'T&D division' were regrouped within T&D Holding Etranger, which was transferred, with effect from 8 January 2004, to the Areva Group and became Areva T&D Holding, which held all of the capital of Areva T&D SA and Areva T&D AG (previously Alstom T&D SA and Alstom T&D AG respectively). The evidence contained in the letter of 4 December 2006 in relation to determining the legal persons concerned by the facts at issue (see paragraph 26), which forms part of the case-file in Case T-121/07, shows that all the shares, employees and liabilities of the Alstom Group's 'T&D division' were transferred to the Areva Group. That explains the requirement of a liability guarantee, in the contract, for liabilities incurred in the past by the 'T&D division'. Accordingly, liability for the participation of the undertaking in question in the infringement for the whole of the period from 15 April 1988 to 8 January 2004 ought to have been attributed to the companies of the Areva Group only.

115 The Commission refutes Alstom's arguments and contends that the present ground of complaint should be rejected.

— Findings of the Court

116 As is apparent from the case-law recalled in paragraph 65, it falls, in principle, to the person managing the undertaking when the infringement was committed to answer for that infringement, even if, at the date of the decision finding the infringement, that undertaking is the responsibility or under the management of a different person.

117 In the present case, the Commission has attributed liability personally to Alstom for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004, to Alstom and Areva T&D SA jointly and severally for the period from 7 December 1992 to 8 January 2004, and to Alstom and Areva T&D AG jointly and severally for the period from 22 December 2003 to 8 January 2004. In the course of those periods, it could validly be considered, as was observed in paragraphs 110 and 111, that Alstom managed that undertaking through the intermediary of Alstom T&D SA and Alstom T&D AG, its wholly-owned subsidiaries which were active in the GIS sector.

118 The parties do not dispute that, from 8 January 2004, and in accordance with the requirements of the transfer contract, Alstom lost control of Alstom T&D SA and Alstom T&D AG. From that date, the undertaking in question was therefore no longer its responsibility or under its management.

119 Therefore, the Commission was entitled to attribute liability for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004 to the legal person who, through the intermediary of its wholly-owned subsidiaries, managed that undertaking. The Commission therefore did not commit an error of law by attributing liability for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004 to Alstom personally, and by refusing to transfer that liability to the companies of the Areva Group, on the sole ground that the undertaking in question had been placed under their responsibility or management from 9 January 2004.

120 The present ground of complaint must therefore be rejected.

The personal liability incurred by Areva T&D SA and Areva T&D AG on account of the participation of the undertaking in question in the infringement for the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively

— Arguments of the parties

121 By the first part of their first plea, the companies of the Areva Group claim that, in the contested decision, the Commission failed in its duty to state reasons inasmuch as the reasons it gave were contradictory and, in any event, insufficient to attribute liability for the participation of the undertaking in question in the infringement, for the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively, to Areva T&D SA and Areva T&D AG. The Commission contradicted itself, in recitals 368 and 369 of the contested decision, in conjunction with the case-law cited in recital 337, by finding, on the one hand, that Alstom exercised a decisive influence on its wholly-owned subsidiaries in the T&D sector during the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively and, on the other, that those subsidiaries acted independently on the market during those periods. In any event, the Commission did not reason, to the requisite legal standard, the finding that those subsidiaries had acted independently on the market during those periods.

122 In addition, in the context of the first part of their second plea and the second part of their fourth plea, the companies of the Areva Group further claim that, in the contested decision, the Commission, in essence, infringed the rules on attributing liability for infringements of Article 81(1) EC and Article 53 of the EEA Agreement, inasmuch as it did not attribute sole liability for the participation of the undertaking in question in

the infringement to Alstom, which managed that undertaking at the time when the infringement was committed.

123 Lastly, in the context of the second part of their second plea, the companies of the Areva Group claim, in essence, that, in the contested decision, the Commission breached the general principle of legal certainty, inasmuch as it attributed personal liability for the participation of the undertaking in question in the infringement for the periods in question to Areva T&D SA and Areva T&D AG, which managed the undertaking in question at the time when the infringement was established. The Commission thus applied, in the contested decision, a new repressive policy to an infringement committed before the adoption of that decision.

124 The Commission disputes the arguments of the companies of the Areva Group and contends that the abovementioned pleas and grounds of complaint should be rejected.

— Findings of the Court

125 It is appropriate to examine, first, the first part of the first plea raised by the companies of the Areva Group, alleging a breach of the duty to state reasons, namely an infringement of an essential procedural requirement (see paragraph 88).

126 As has already been explained in paragraph 88, to fulfil the requirements of Article 253 EC, the individual Commission decisions must enable the persons concerned to ascertain the reasons for the measure, so that they may defend their rights, and enable the competent court to exercise its power of review. The reasons for the decision

must, therefore, not be contradictory or inadequate (see, to that effect and by analogy, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 45 and 46).

127 In recitals 333 to 339 of the contested decision, the Commission, making reference to the case-law of the Court of Justice and the General Court, set out the rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA Agreement which it applied in the contested decision. It follows from recitals 368 and 369 that, in order to find Areva T&D SA and Areva T&D AG personally liable, jointly and severally with Alstom, for the participation of the undertaking in question in the infringement for the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively, the Commission considered, first, that Areva T&D SA and Areva T&D AG, under their business names at the material time, had directly participated in the infringement. The Commission thus took account of the fact that, as was stated in recitals 20, 21, 357, 358, 366 and 367 of the contested decision, the undertaking in question was their direct responsibility at the time when it participated in the infringement. Next, the Commission stated that Areva T&D SA and Areva T&D AG, under their business names at the material time, formed a single economic unit with Alstom, by which they were wholly-owned and which determined, in essence, their course of action on the market. The Commission accordingly considered that, in accordance with the principle of personal liability (see point 65), Areva T&D SA and Areva T&D AG had to be held personally liable, jointly and severally with Alstom, for the participation of the undertaking in question for the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively.

128 While, in recitals 357 and 366 to 367 of the contested decision, the Commission refers to the personal liability incurred by the former subsidiaries which were active in the Alstom Group's T&D sector, it does not, by contrast, state that the conduct of those subsidiaries was independent of their former parent company, namely Alstom. In the present case, such a fact cannot be established, even implicitly, by reference to the case-law cited in recital 337 of the contested decision, since, in recital 369 of that

decision, the Commission expressly indicated that, during the periods in question, Areva T&D SA and Areva T&D AG, under their business names at the material time, 'were unable to take autonomous decisions'.

129 It is apparent from the foregoing that the sole liability incurred by Alstom on account of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, inasmuch as it managed that undertaking, was reasoned to the requisite legal standard and that that reasoning in the contested decision was not contradictory. Accordingly, the first part of the first plea of the companies of the Areva Group, alleging breach of the duty to state reasons, must be rejected as unfounded.

130 It is appropriate, second, to examine the two parts of the second plea and the second part of the fourth plea raised by the companies of the Areva Group, in which they criticise, in essence, the attribution of liability to Areva T&D SA and Areva T&D AG for the participation of the undertaking in question in the infringement for the periods from 7 December 1992 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively.

131 It should be borne in mind that the principle that penal provisions may not have retroactive effect is common to all the legal orders of the Member States and is enshrined in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). It takes its place among the general principles of law whose observance is ensured by the judicature of the European Union (Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 202; Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 219, and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 43).

132 Although Article 15(4) of Regulation No 17 and Article 23(5) of Regulation No 1/2003 provide that Commission decisions imposing fines for infringement of competition law are not of a criminal nature, the Commission is none the less required to observe the general principles of European Union law ('EU law'), and in particular the principle of non-retroactivity, in any administrative procedure capable of leading to fines under competition law (*Cheil Jedang* v *Commission*, paragraph 131 above, paragraph 44).

133 Such observance requires that the rules on attributing liability to legal and natural persons for infringements of competition law correspond with those laid down at the time when the infringement was committed (see, by analogy, as regards the rules on fines for infringements, *Dansk Rørindustri and Others* v *Commission*, paragraph 131 above, paragraph 202; *LR AF 1998* v *Commission*, paragraph 131 above, paragraph 221, and *Cheil Jedang* v *Commission*, paragraph 131 above, paragraph 45). While the principle of non-retroactivity does not prohibit the gradual clarification of the rules on attributing liability for offences, it does however preclude the retroactive application of a new interpretation of those rules, the result of which was not reasonably foreseeable, especially in the light of the previous case-law (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 131 above, paragraphs 217 and 218).

134 According to the case-law, where a number of entities are held personally liable for the participation of one and the same undertaking, for the purposes of competition law, in an infringement, they must be considered to be jointly and severally liable for that infringement (see, to that effect, Joined Cases 6/73 and 7/73 *Istituto Chemicoterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41; Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraphs 33 and 34; *HFB and Others* v *Commission*, paragraph 66 above, paragraphs 54, 524 and 525; judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 62, and *Akzo Nobel and Others* v *Commission*, paragraph 64 above, paragraphs 57 to 62). It is, moreover, apparent from those judgments that the person who had direct responsibility for or managed the undertaking at the time the

infringement was committed, or the person who, because it in fact exercised control over the undertaking and determined the undertaking's conduct on the market, indirectly managed that undertaking at the time when the infringement was committed, may be held personally liable and jointly and severally liable for the participation of one and the same undertaking in an infringement. It follows that the case-law cited in paragraphs 65 and 116 must be understood as covering the personal liability of both the person directly managing the undertaking at the time when the infringement was committed, and that of the person who, at the same time, indirectly managed that undertaking.

135 The case-law cited above is applicable, by analogy, to Article 53(1) of the EEA Agreement.

136 In the present case, as stated in paragraph 71, the undertaking referred to in the contested decision does not correspond, as the companies of the Areva Group claim, to the Alstom Group's 'T&D division', subsequently transferred to the Areva Group, but to all of the components which, within that division, or through it, participated in activities in the GIS sector. Moreover, the fact that Areva T&D SA and Areva T&D AG held rights with respect to those components during the periods of infringement at issue, and that those components were, therefore, their direct responsibility, has not properly been disputed (see paragraph 102). Lastly, it has been established that Alstom determined the conduct of its wholly-owned subsidiaries which were active in the T&D sector, and that it thus managed, indirectly, the undertaking in question at the time when the infringement was committed (see paragraph 110). Furthermore, it is apparent from recitals 358 to 371 of the contested decision that Areva T&D SA and Alstom were held jointly and severally liable for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 21 December 2003, and that Areva T&D SA, Areva T&D AG and Alstom were held jointly and severally liable for the participation of the undertaking in question in the infringement for the period from 22 December 2003 to 8 January 2004.

137 In addition, it does not follow from the case-law cited by the companies of the Areva Group and, in particular, from *Cascades* v *Commission*, paragraph 65 above (paragraphs 79 and 80), or from Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 71, that, in the event of a transfer of control of the subsidiary which was directly managing the undertaking which committed the infringement, only the former parent company, which indirectly managed the undertaking through its subsidiary, should be held personally liable for the participation of that undertaking in the infringement for the period before the transfer. Moreover, the abovementioned case-law concerns, in essence, whether liability may be attributed to the transferee of an undertaking, for the purposes of competition law, in respect of that undertaking's participation in the infringement for the period before its transfer.

138 As the Commission acted in accordance with the rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA Agreement when deciding that Areva T&D SA and Areva T&D AG could be held personally liable, jointly and severally with Alstom, for the participation of the undertaking in question for the periods from 7 January 1994 to 8 January 2004 and from 22 December 2003 to 8 January 2004 respectively, it cannot be criticised for having infringed either of those articles in that respect.

139 It cannot moreover be claimed that, in the contested decision, the Commission breached the principle of non-retroactivity by retroactively applying a new repressive policy. The rules on attributing liability for infringements applied in the present case by the Commission stem from the application of the principle of personal liability for infringements of Article 81 EC and Article 53 of the EEA Agreement. It is apparent from the case-law cited in paragraphs 65, 116 and 134 that such rules were already applicable at the time when the infringement was committed and that, while, at that time or afterwards, they may have been the subject of some clarifications or explanations, it cannot be held that those clarifications or explanations led to a new interpretation of those rules the result of which was not foreseeable in the light of earlier

case-law. Accordingly, the contested decision itself cannot be regarded as implementing a new repressive policy, following the adoption of new rules on attributing liability for infringements of Article 81 EC and Article 53 of the EEA Agreement.

140 Moreover, the fact, which was not contested by the companies of the Areva Group, that they required a liability guarantee clause in the transfer contract — which covers, inter alia, the risk of liability being attributed to Areva T&D SA and Areva T&D AG for the participation of the undertaking in question in an infringement of competition law in the period before its transfer and the risk of them being found personally liable in that respect — shows that the Commission's attribution of liability for the infringement in the contested decision was reasonably foreseeable, even before that decision was adopted, for the companies of the Areva Group in light of the rules on attributing liability which were applicable at that time,.

141 It follows from the foregoing that the two parts of the second plea and the second part of the fourth plea, raised by the companies of the Areva Group, must all be rejected as unfounded.

The personal liability incurred by Areva and Areva T & D Holding, as the parent companies of the wholly-owned subsidiaries Areva T&D SA and Areva T&D AG, on account of the participation of the undertaking in question in the infringement for the period from 9 January to 11 May 2004

— Arguments of the parties

142 The companies of the Areva Group, in the context of their third plea, claim that, in Article 1(e) and (f) of the contested decision, the Commission infringed the rules on attributing liability for infringements of Article 81(1) EC and Article 53 of the EEA

Agreement, inasmuch as liability for the participation of the undertaking in question in the infringement for the period from 9 January to 11 May 2004 was attributed to them, as the parent companies of the wholly-owned subsidiaries Areva T&D SA and Areva T&D AG, even though the evidence which they had submitted during the administrative procedure had had enough probative value to rebut the presumption of liability in the present case, arising from the fact that the parent companies held the entire capital of the subsidiaries.

143 The Commission disputes the arguments of the companies of the Areva Group and contends that the plea should be rejected.

— Findings of the Court

144 It follows from recital 370 and recital 371(c) of the contested decision, and from recitals 333 to 337, 354 and 364, to which recital 370 refers, that in order to attribute personal liability to Areva and Areva T&D Holding, jointly and severally with Areva T&D SA and Areva T&D AG, for the participation of the undertaking in question in the infringement for the period from 9 January to 11 May 2004, the Commission not only referred to the presumption of liability arising from the fact that the parent company held the entire capital of the subsidiary, but also to factual evidence which had been submitted by Areva and Areva T&D Holding, during the administrative procedure, in attempting to rebut that presumption (see paragraph 148 below). Thus, the Commission pointed out that Alstom's nomination of a new member for the boards of its subsidiaries which were active in the T&D sector supported the finding that the former exercised a decisive influence over the latter, given that, as is apparent from publicly-available information gathered from the Areva website, that new board member had also been appointed as director of the Areva Group's 'T&D division' on 19 January 2004, that is to say, only ten days after the intergroup transfer, and

that he had, simultaneously, been installed in the Areva Group's executive committee. Moreover, as regards the intragroup restructuring operations, the Commission took the view that the change of the business names of the subsidiaries of the Alstom Group which were active in the T&D sector, taking place immediately after the intergroup transfer, by which they had been renamed Areva T&D SA and Areva T&D AG, demonstrated their integration into the Areva Group. In any event, the Commission stated that the factual evidence submitted by Areva and Areva T&D Holding did not prove that they had abstained, during that period of the infringement at issue, from exercising decisive influence over their wholly-owned subsidiaries which were active in the T&D sector.

145 As has already been pointed out in paragraph 86, where a parent company holds the entire capital of its subsidiary, it is presumed to exercise a decisive influence over the conduct of that subsidiary on the market and can, therefore, be held personally liable for that conduct. It is for the parent company which intends to contest the Commission's decision finding it personally liable for the infringement imputed to its subsidiary to rebut that presumption of liability, arising from the fact that it holds the entire capital of its subsidiary, by adducing evidence of sufficient probative value to show that that subsidiary determined, in a genuinely independent way, its course of action on the market (*Avebe* v *Commission*, paragraph 86 above, paragraph 136, and *Akzo Nobel and Others* v *Commission*, paragraph 64 above, paragraph 60; see also, to that effect, *Stora Kopparbergs Bergslags* v *Commission*, paragraph 65 above, paragraph 29).

146 In the present case, Areva and Areva T&D Holding do not dispute the factual assessments, in the contested decision, according to which Areva T&D SA and Areva T&D AG were, directly or indirectly, their wholly-owned subsidiaries during the period from 9 January to 11 May 2004. However, those findings alone allowed the Commission to presume that Areva T&D SA and Areva T&D AG did not determine their course of action on the market independently of Areva and Areva T&D Holding, and that they constituted, together with the latter companies, one and the same

undertaking for the purposes of competition law. In accordance with the case-law cited in paragraph 86, it was thus for Areva and Areva T&D Holdings, who were claiming that their wholly-owned subsidiaries which were active in the T&D sector determined their conduct on the market independently for the period at issue, to rebut the presumption of liability arising from the fact that the parent companies held the entire capital of the subsidiaries, by adducing evidence of sufficient probative value in that regard.

147 Therefore, it is necessary to examine whether the factual evidence, submitted by Areva and Areva T&D Holding during the administrative procedure, which they rely on, again, in Case T-117/07, is of sufficient probative value to rebut the presumption of liability, as reinforced by the additional factual evidence referred to, on which the contested decision is based, by showing that Areva T&D SA and Areva T&D AG had determined their course of conduct on the market in a genuinely independent manner.

148 As is apparent from paragraphs 246 to 249 of their reply to the statement of objections, Areva and Areva T&D Holding claimed, in essence, during the administrative procedure that between 9 January and 11 May 2004 they abstained from exercising decisive influence over their wholly-owned subsidiaries which were active in the T&D sector as they had, at that time, no experience in that sector and in the various branches of activity. According to them, that is borne out by the fact that they kept the operational managers who had been recruited and trained by the Alstom Group in their posts. Only one administrator on the boards of their subsidiaries simultaneously carried out duties on their board. Moreover, to the extent that the transfer of the Alstom Group's 'T&D division' to the Areva Group implied numerous and complex restructuring operations, some of which were only completed after 8 January 2004, Areva and Areva T&D Holding were not in a position to take, at that time, actual operational control of that division and its various branches of activity. The companies of the Areva Group claim, in addition, that it is unreasonable to assume that a group

might, without delay and on the same date on which a new division of operations is transferred to it, exercise actual control over that division and become aware that it is participating in an infringement of competition law. No negligence in that regard can be attributed to them, taking account, first, of their lack of experience in the T&D sector and in activities in the GIS sector and, second, of the written assurances given by the Alstom Group, in the context of the intergroup transfer, as regards the absence of prior infringements of competition law.

149 Those factors, taken individually, or even as a whole, are however not such as to show that Areva T&D SA and Areva T&D AG determined their course of action on the market in a genuinely independent manner vis-à-vis Areva and Areva T&D Holding. Accordingly, the Commission did not vitiate the contested decision with an error of assessment by rejecting that evidence as of no probative value.

150 First, the assertions of the companies of the Areva Group — according to which, for the period from 9 January to 11 May 2004, Areva and Areva T&D Holding did not have sufficient experience of the T&D sector and of the activities in the GIS sector to allow them to exercise effectively a decisive influence over the conduct of Areva T&D SA and Areva T&D AG — are unsupported assertions. It is true that the Areva Group was not active in the T&D sector prior to the transfer, and was not active in the GIS sector, and, generally, that the integration of a new division of operations into a group is a delicate task. However, it cannot be inferred therefrom that Areva and Areva T&D Holding necessarily in fact refrained from exercising a decisive influence over Areva T&D SA and Areva T&D AG between 9 January and 11 May 2004. It is necessary, in addition, to take account of the fact that, as is apparent from the written pleadings of the companies of the Areva Group themselves in the application in Case T-117/07, from their reply to the statement of objections annexed to that application, and in the documents produced by them in reply to the Commission's request for information of 20 September 2006 (see paragraph 24) also annexed to that application, the restructuring carried out at the end of 2003 had been stipulated under, and

programmed into, the transfer contract concluded on 25 September 2003. Therefore, it cannot be ruled out that the negotiation of that contract and the aftermath of its signing, in the course of 2003, provided the opportunity for Areva and Areva T&D Holding to acquire or, at the very least, develop their knowledge of the T&D sector and activities in the GIS sector, and indeed before the actual transfer of the T&D division to the Areva Group on 8 January 2004. Furthermore, it is apparent from the Commission's written pleadings, from the written pleadings of the companies of the Areva Group themselves, from their reply to the statement of objections, and from the documents which they produced in reply to the Commission's request for information of 20 September 2006, that Mr G, the new director whom they had appointed to the boards of Areva T&D SA and Areva T&D AG, and who, from 19 January 2004, was also chief executive of Areva T&D Holding and, in that respect, president of the 'T&D division' and member of the executive committee of the Areva Group, had been 'recruited from outside the group'. It cannot be ruled out that that external recruitment allowed Areva and Areva T&D Holding to equip itself with the expertise which had been lacking in the sector in question. Far from showing the independence of Areva T&D SA and Areva T&D AG within the Areva Group, the external recruitment of that new director proves, on the contrary, that, at the beginning of the period in question, Areva and Areva T&D Holding equipped themselves with an organisation which enabled them to exercise effective control over their wholly-owned subsidiaries which were active in the T&D sector and to influence, in a decisive manner, the conduct of those subsidiaries on the market.

151 Second, the claims of the companies of the Areva Group that Areva and Areva T&D Holding became aware of the participation of the undertaking in question in the infringement only on 11 May 2004, even if they were proven, are not such as to show that Areva T&D SA and Areva T&D AG conducted themselves independently on the market during the period from 9 January to 11 May 2004.

152 In the light of the foregoing considerations, the third plea raised by the companies of the Areva Group must be rejected as unfounded.

Interruption of the infringement attributed to Alstom between September 1999 and March 2002

— Arguments of the parties

153 Alstom, by its sixth plea, complains, in essence, that the Commission infringed the rules on proving the continuity of an infringement which flow from Article 23(3) of Regulation No 1/2003, and Article 15(2) of Regulation No 17, and that it breached the principle of legal certainty, inasmuch as it stated, in Article 1(b) of the contested decision, that the infringement at issue was carried out without interruption from 15 April 1988 until 8 January 2004 and, therefore, over a period of 15 years and 8 months which justified an increase of 155 % in the basic amount of the fine which the Commission imposed on Alstom, in Article 2(b) and (c) of the contested decision.

154 Alstom claims that the Commission did not establish, to the requisite legal standard, that the cartel was uninterrupted during a first period of 13 months, from 28 October 1999 to 15 December 2000, then during a second period of 14 months, from 22 January 2001 to 26 March 2002, which corresponds to a total duration of 27.5 months. Each of those periods was sufficiently long that the Commission could not presume the uninterrupted nature of the infringement, in accordance with the case-law (Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 62). The only piece of evidence presented by the Commission in support of an uninterrupted continuation of the infringement was the list of 12 May 2000 relating to 'committee meetings' which were to take place between 18 May 2000 and 17 May 2001. That list, provided by ABB and reproduced in recital 197 of the contested decision, is not however sufficient proof of the continuation of the infringement during the two disputed periods in so far as, first, the actual holding of some of the meetings to which it refers has not been confirmed and, second, no other evidence from the case-file proves the

existence of infringing conduct during those meetings. Furthermore, the Commission has not proven the anti-competitive object of the meetings referred to in the list, as required by the case-law (Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraphs 116 et seq.). Alstom claims, in addition, that the Commission could not hold the period of the validity of some of the GIS projects against it as evidence of its participation in the cartel during the disputed periods, since it has not upheld that same evidence against Siemens, as is apparent from recital 198 of the contested decision. In any event, that evidence does not establish that the infringement was continuous during a period of 10 months, from 17 May 2001 to 26 March 2002.

155 In the context of its seventh plea, Alstom claims, moreover, that in the contested decision the Commission failed to observe the rights of the defence and infringed Article 27(1) of Regulation No 1/2003 by taking account, in that regard, of documents relating to an agreement reached on a GIS project bearing reference number [*confidential*], concluded on 24 September 1999, as applying until 28 September 2001, in relation to which Alstom did not have the opportunity to state its point of view.

156 In the light of the foregoing, Alstom claims that the duration of the participation of the undertaking in question in the infringement which has been attributed to Alstom, should be reduced to 13 years and 3 months and that the increase in the basic amount of the fine which was imposed on it must, consequently, be reduced to 130 %.

157 The Commission disputes Alstom's arguments and contends that the abovementioned pleas and grounds of complaint should be rejected.

— Findings of the Court

158 It is apparent from recitals 2, 3, 248, 270 and 299 of the contested decision that the Commission found that the companies to which the decision was addressed had participated in a complex, but single and continuous, infringement of Article 81 EC from 15 April 1988 to 11 May 2004, and of Article 53 of the EEA Agreement from 1 January 1994 to 11 May 2004, in the context of which they agreed, at a worldwide level, in relation to the sale of GIS projects, on the sharing of markets, the allocation of quotas and maintenance of the respective market shares, the allocation of individual GIS projects to designated producers and manipulation of the bidding procedure for those projects (bid-rigging) in order to ensure that the assigned producers were awarded the contract in question, the fixing of prices by means of complex price arrangements for GIS projects which were not allocated, the termination of licence agreements with non-cartel members and the exchange of sensitive market information.

159 In recital 323 of the contested decision, the Commission stated that the agreements and/or concerted practices between the producers of GIS lasted at least from 15 April 1998 until 11 May 2004. It is apparent from recitals 324 and 326 of the contested decision, in conjunction with recital 358 and Article 1(b) of the operative part of that decision, that Alstom participated in the infringement from 15 April 1988, the date on which the GQ Agreement and EQ Agreement were adopted and entered into force (see paragraphs 29 and 31), to 8 January 2004, the date on which the Alstom Group transferred its 'T&D division' to the Areva Group.

160 In recitals 177 to 216 of the contested decision, the Commission presented a '[c]hronological overview of the evolution of the cartel'. As regards the evolution of the cartel during the two disputed periods, namely from 28 October 1999 to 15 December 2000 and from 22 January 2001 to 26 March 2002, the Commission, in recitals 178 and 179 of the contested decision, stated as follows:

'(178) Siemens discontinued its participation in the cartel meetings in September 1999, followed by Hitachi and Schneider/VA TECH in 2000. Siemens's absence was particularly destabilising from the European perspective, since it had been the E-Secretary since 1988 and it was a major market player both outside and inside Europe. However, the cartel activities continued and [Alstom] took over as E-Secretary. With fewer members as compared with 1988, the logistics were simplified and a complex structure was no longer justified.

(179) In 2002, Siemens, Hitachi and VA TECH returned to the cartel …'

161 In recitals 191 to 198 of the contested decision, the Commission set out the evidence, provided by ABB or the companies of the Fuji Group, which demonstrated, according to it, that the cartel continued after the departure of Siemens, in September 1999, followed by Hitachi and 'Schneider/VA Tech', in 2000, and before their gradual return from March 2002. First, the Commission referred, in recitals 191 to 196 of the contested decision, to documents provided by ABB in its application for immunity (see paragraph 10), namely a series of facsimiles exchanged — between 18 December 2000 and 22 January 2001 — between ABB, Melco and Alstom relating to meetings and the allocation of GIS projects. Then, in recital 197 of the contested decision, the Commission refers to a document provided by ABB in its application for immunity which contains a list of 'committee meetings' covering part of the period 2000-2001 and bearing the date 12 May 2000. It stated that it was apparent from that list that the participants

in those meetings were Reyrolle, Alstom, Schneider, ABB, Melco and Toshiba, but not Siemens and 'JAEPS (Hitachi)', which tallied with ABB's statement in its reply of 4 October 2004 to the Commission's request for information (see paragraph 15), 'that the latter two undertakings did not take part in the cartel at that stage'. Lastly, in recital 198 of the contested decision, it referred to a set of documents, submitted by the companies of the Fuji Group in their application pursuant to the Leniency Notice (see paragraph 20), and by ABB in a supplement to its application for immunity dated 7 May 2004 (see paragraph 12), describing agreements concluded between the members of the cartel as regards eight GIS projects bearing, within the cartel, the reference numbers [*confidential*], which showed that the cartel was active during that period.

162 In recital 286 of the contested decision, the Commission indicated that that evidence from the case-file showed that 'the cartel itself [had] continued in the absence [of Siemens and Hitachi] (e.g. see recitals (191) to (198) above), once Siemens and Hitachi temporarily interrupted their participation in it'.

163 It follows from Article 23(3) of Regulation No 1/2003, and Article 15(2) of Regulation No 17, that, in fixing the amount of the fine to be imposed by reason of the participation of an undertaking in an infringement of competition law, regard is to be had both to the gravity and to the duration of the infringement.

164 When there is a dispute concerning the existence of an infringement, the requirement of legal certainty, on which economic operators are entitled to rely, means that the Commission, which bears the burden of proving infringements which it finds, must adduce evidence which will sufficiently establish the existence of the facts constituting the infringement. With specific regard to the alleged duration of an infringement,

the same principle of legal certainty requires that, if there is no evidence directly establishing the duration of the infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79; Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 188, and *Degussa* v *Commission*, paragraph 154 above, paragraphs 114 and 153).

165 As regards the means of proof which may be used by the Commission in that respect, it should be recalled that, since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place clandestinely, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of competition law (*Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraphs 55 to 57). Such indicia and coincidences serve to reveal not just the existence of anti-competitive practices or agreements, but also the duration of a continuous anti-competitive practice or the period of application of an agreement concluded in breach of competition law (Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 166).

166 Furthermore, the fact that evidence of a continuous infringement was not produced for certain specific periods does not preclude the infringement from being regarded as established over a longer overall period than those periods, provided that such

a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement (*Technische Unie* v *Commission*, paragraph 165 above, paragraph 169).

167 In the present case, Alstom does not dispute that the activities in which the undertaking in question participated in the context of the cartel were carried out throughout the period from 15 April 1988 to 28 October 1999, then from 15 December 2000 to 22 January 2001 and, lastly, from 26 March 2002 to 11 May 2004. It further does not dispute that the various actions which form part of the infringement pursued a single purpose and fell within the framework of a single and continuous infringement. It disputes only the duration of that infringement, on the ground that the Commission did not adduce evidence, to the requisite legal standard and in accordance with the requirements of Article 23(3) of Regulation No 1/2003, Article 15(2) of Regulation No 17 and the principle of legal certainty, of the cartel's activities for the periods from 28 October 1999 to 15 December 2000 and from 22 January 2001 to 26 March 2002. In other words, by the present plea, Alstom does not dispute, in substance, the Commission's findings concerning the single and continuous nature of the infringement, but merely relies, in the context of the assessment of the duration of that infringement, on an infringement of Article 23(3) of Regulation No 1/2003 and Article 15(2) of Regulation No 17 and of the principle of legal certainty in relation to the burden of proof.

168 The sixth plea in the action thus raises the question whether the Commission has shown, to the requisite legal standard and in a manner consistent with Article 23(3) of Regulation No 1/2003, Article 15(2) of Regulation No 17 and the principle of legal certainty, that the cartel continued during the periods from 28 October 1999 to 15 December 2000 and from 22 January 2001 to 26 March 2002.

169 As a preliminary remark, it should be pointed out that Alstom has not disputed the Commission's findings in relation to the organisation and functioning of the cartel, appearing in recital 170 of the contested decision, according to which '[a]t both the worldwide level and the European level, the participants took elaborate precautions in order to disguise or conceal their contacts and meetings' and '[t]hese concealment measures existed since the start of the cartel and multiplied from 2002 onwards'. In the light of the case-law cited in paragraph 165, the Commission was therefore right, in the present case, to base its assessment regarding the duration of the infringement on an overall evaluation of the evidence and indicia which it considered relevant in that regard.

170 Alstom alleges, in essence, that the evidence and indicia admitted by the Commission do not establish that, after having evolved for 11 years and 6 months, the activities in which the undertaking in question participated in the context of the cartel continued between 28 October 1999 and 15 December 2000, that is to say, a period of 13 months. In addition, that evidence and those indicia do not show that, after having recommenced for a period of a little more than one month, those activities continued between 22 January 2001 and 26 March 2002, that is to say, a further period of 14 months, before recommencing again for a period of 1 year 8 months. It is therefore appropriate to assess the probative value of each piece of evidence and each of the indicia relied on by the Commission in the contested decision.

171 Alstom argues, wrongly, that each of the pieces of evidence or each indication at issue proves the cartel activities only on the date on which that piece of evidence was established. It fails to recognise that those documents can also demonstrate the continuous nature of the infringement.

172 In the present case, the Commission was correct to consider, in the contested decision, that the series of facsimiles produced by ABB proved the activities of cartel for the period 'around 2000'. Apart from the fact that it proves the existence of a specific agreement between ABB, Melco and Alstom regarding a list of GIS projects, it also

provides an indication as regards the continuation of the cartel's activities between those same undertakings at the start of 2001, in conjunction with another list of GIS projects, attached to the first facsimile of the series dated 18 December 2000.

173 Next, the Commission was right to consider that the list of 12 May 2000, relating to thirteen 'committee meetings' scheduled between 18 May 2000 and 17 May 2001, was an indication that the cartel's activities continued among Reyrolle, Alstom, Schneider, ABB, Melco and Toshiba until 17 May 2001. The anti-competitive objective of those 'committee meetings' can be inferred from the fact that the list describes each of the undertakings in question by reference to its own code in the context of the cartel, as reproduced in recitals 142 and 197 of the contested decision, and that, as is confirmed by a number of members of the cartel, some specific meetings of bodies — the joint Europe/Japan committee and the European committee — which participated in the operational functioning of the cartel were planned, as is also apparent from recitals 150 and 151 of the contested decision. Furthermore, as the actual holding of six of those committee meetings was either confirmed by some participants in the cartel or corroborated by other evidence from the case-file, such as travel expenses and notes from personal diaries, the cartel's activities for the period from 18 May 2000 to 18 January 2001 can be regarded as proved.

174 Lastly, without even considering the agreement reached on the GIS project bearing reference number [*confidential*], in relation to which Alstom claims, in the context of its seventh plea, a failure to observe the rights of the defence, or the agreement reached on the GIS project bearing reference number [*confidential*], in which Alstom did not participate, the Commission was right to consider that the agreements in which Alstom took part concerning six other GIS projects bearing reference numbers [*confidential*] proves that the cartel had been active or, at the very least, had had effects between 27 August 1998, the date on which the agreement on the GIS project bearing reference number [*confidential*] was concluded, and 28 October 2001, the date on which the agreement on the GIS project bearing reference number [*confidential*] ceased to have effects.

175 In that regard, it should be recalled that, for there to be an agreement within the meaning of Article 81(1) EC and, by analogy, of Article 53 of the EEA Agreement, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case T-2/89 *Petrofina* v *Commission* [1991] ECR II-1087, paragraph 211, and Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 253; see also, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 87 above, paragraph 112, and *van Landewyck and Others* v *Commission*, paragraph 87 above, paragraph 86). Furthermore, Article 81 EC is applicable where the effects of the agreement lasted, without the agreement having been formally brought to an end (see, to that effect, *ICI* v *Commission*, paragraph 254, and Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 63). The case-law cited above is applicable, by analogy, to Article 53(1) of the EEA Agreement.

176 It follows that, in so far as Alstom has not disputed that it concluded, pursuant to the rules of the cartel, agreements for the allocation, within the cartel, of six GIS projects bearing reference numbers [*confidential*] and in so far as, taken as a whole, those agreements, with regard to their date of entry into force and their period of validity, were intended to produce effects between 27 August 1998, the date of the entry into force of the agreement on the project bearing reference number [*confidential*], and 28 October 2001, the date on which the validity of the agreement on the GIS project bearing reference number [*confidential*] came to an end, the Commission was entitled to find that those agreements constituted indicia that the infringement continued, uninterrupted, during the period in question.

177 Alstom fails to take account of the fact that, while each of those pieces of evidence, taken in isolation, proves only manifestations of the cartel between September 1999 and March 2002, they can, considered together and in the absence of any other coherent explanation, provide sufficient evidence of the continuous nature of the infringement. In the context of the present proceedings, Alstom has not submitted any other coherent explanation which would explain its assertions that there were interruptions to the activities in which the undertaking in question participated in the context of the cartel between 28 October 1999 and 15 December 2000, and between 22 January

2001 and 26 March 2002 (see paragraph 170), and, in particular, the reasons for which those activities recommenced for such a limited period only, of a little more than one month, from 15 December 2000 to 22 January 2001, in between the two interrupting periods, from 28 October 1999 to 15 December 2000 and from 22 January 2001 to 26 March 2002. In that context, the proof of repeated manifestations of the cartel between September 1999 and March 2002, despite the interruption in Siemens's participation, followed by the interruption in the participation of Hitachi and of 'Schneider/VA Tech', and the set of indicia, gathered by the Commission, that the activities in which the undertaking in question participated in the context of the cartel continued throughout the period in question must be regarded as sufficient evidence that the cartel continued, uninterrupted, between 28 October 1999 and 15 December 2000 and between 22 January 2001 and 26 March 2002.

178 Moreover, Alstom's situation cannot be compared to that of Siemens, since, in the case of the latter, the Commission was able to rely on mutually reinforcing statements from other members of the cartel in the case-file to conclude that Siemens had ceased to participate in the cartel in September 1999 and, therefore, to find that Siemens had ceased, on that date, to comply with the agreements concluded concerning GIS projects bearing reference numbers [*confidential*], which continued to produce effects between 27 August 1998 and 28 October 2001. Indeed, recital 169 of the contested decision, which is not disputed by Alstom, indicates that the case-file contains evidence that, when Siemens temporarily interrupted its participation in the cartel, the other members of the cartel attempted for a certain time to punish Siemens for its departure by fighting it worldwide for particular GIS projects, which establishes that Siemens was no longer complying with the cartel rules.

179 Accordingly, it must be held that the Commission did not infringe the rules on evidence which flow from Article 23(3) of Regulation No 1/2003 and from Article 15(2) of Regulation No 17, nor did it breach the principle of legal certainty, by finding, in Article 1(b) of the contested decision, that the infringement attributed to Alstom continued without interruption from 15 April 1988 to 8 January 2004, that is to say,

for a period of 15 years and 8 months which justifies an increase of 155 % in the basic amount of the fine which was imposed on Alstom in Article 2(b) and (c) of the contested decision.

180 The sixth plea raised by Alstom must therefore be rejected as unfounded.

181 Moreover, it follows from the foregoing that the agreement reached on the GIS project bearing reference number [*confidential*] is not an indispensable piece of evidence for establishing the accuracy of the Commission's finding, in the contested decision, that the infringement at issue continued without interruption throughout the period from 28 October 1999 to 26 March 2002, and that that could be justified, to the requisite legal standard, on the basis of other evidence supporting that same finding.

182 It follows that the ground of complaint alleging failure to observe the rights of the defence, raised in the context of the seventh plea, must also be rejected as ineffective, inasmuch as it relates to a piece of evidence which, in the contested decision, could be regarded as provided for the sake of completeness.

Heads of the forms of order seeking annulment or amendment of Article 2(b) and (c) of the contested decision

183 In the context of its fourth and seventh pleas, Alstom seeks the annulment of or, in the alternative, a reduction in the amount of the individual fine which was imposed

on it in Article 2(b) of the contested decision. By its first and second pleas, which it is appropriate to consider together, it seeks the annulment of or, in the alternative, a reduction in the amount of the fine, for which it is jointly and severally liable with Areva T&D SA, and which was imposed on it in Article 2(c) of the contested decision.

184 In the context of their first and fourth pleas, the companies of the Areva Group seek the annulment of the fine which was imposed on them in Article 2(c) of the contested decision or, in the alternative, a reduction in the amount of that fine.

Infringement of the rules on the limitation of actions concerning the individual fine imposed on Alstom in Article 2(b) of the contested decision

— Arguments of the parties

185 Alstom, in the third part of its fourth plea, alleges, in the alternative, in the event that the first part of that plea is upheld but the second part of that plea is not, infringement of Article 25 of Regulation No 1/2003 resulting, in essence, from the fact that, on the date of adopting the contested decision, the Commission's power to impose an individual fine on it by reason of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992 was time-barred.

186 The Commission disputes Alstom's arguments and contends that the plea should be rejected.

— Findings of the Court

187 The present ground of complaint has been raised by Alstom in the event that it is held that it cannot be liable for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, as it did not exercise a decisive influence over its wholly-owned subsidiaries which were active in the T&D sector, but where the personal liability which it incurred on account of the participation of the undertaking in question in the infringement for the preceding period from 15 April 1988 to 6 December 1992 was not transferred to those subsidiaries.

188 Pursuant to Article 25 of Regulation No 1/2003, the Commission's power to impose a fine for infringement of Article 81 EC and Article 53 of the EEA Agreement is limited to five years. Time is to begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time is to begin to run on the day on which the infringement ceases. In the event that the infringement attributable to Alstom ended on 6 December 1992, the Commission's power to impose a fine on it on account of that infringement was time-barred by the date on which the contested decision was adopted, namely 24 January 2007.

189 However, given that the first part of the fourth plea has been rejected, on the ground that Alstom exercised a decisive influence over its subsidiaries which were active in the T&D sector, from 7 December 1992 to 8 January 2004 (see paragraphs 80 to 110), the foundation on which the present ground of complaint is based has not been upheld. Therefore, this ground of complaint cannot succeed.

Infringement of the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement, infringement of Article 7 EC, breach of the principles of legal certainty, non-retroactivity, equal treatment, proportionality, the right to an effective remedy, the principle that the penalty must be specific to the offender and to the offence and breach of the duty to state reasons as regards the fines imposed on Alstom and on the companies of the Areva Group, in Article 2(c) of the contested decision

— Arguments of the parties

190 By its first plea, Alstom complains that the Commission, by imposing a fine on it — for which it is jointly and severally liable with Areva T&D SA — in the amount of EUR 53 550 000 in Article 2(c) of the contested decision, breached the principle of the right to an effective remedy. On that basis, Alstom's procedural situation was linked to that of Areva T&D SA.

191 By its second plea, Alstom claims, first, that by imposing a fine on it — for which it was jointly and severally liable with Areva T&D SA — in the amount of EUR 53 550 000 in Article 2(c) of the contested decision, the Commission infringed the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement. They allow a fine to be imposed jointly and severally only on companies which, on the date of adoption of the decision imposing the fine, belong to the same group and which can each be held to be directly and formally liable for the infringement, inasmuch as they derived a direct benefit from it. Moreover, Alstom claims that the Commission breached its duty to state reasons for the individual decisions which it adopts, by not indicating, in the contested decision, the reasons for which it considered that Alstom formed a single economic unit with Areva T&D SA on the date when it adopted the contested decision and the direct benefit which Alstom derived from the infringement. Indeed, the contested decision is, in that regard, based on contradictory grounds, since recital 358(b) and (c) and recital

371(a) indicate that the fine, liable to be paid jointly and severally, corresponds to a period during which Alstom formed an economic unit with Areva T&D SA, whereas recital 371(c) indicates that that fine also covers, in practice, a period during which that was not the case. In addition, Alstom claims that the Commission breached the general principle that the penalty must be specific to the offender and to the offence in so far as the Commission imposed on Alstom a fine, for which it was jointly and severally liable, on account of an infringement for which it was not personally liable. Lastly, Alstom claims that the Commission breached the principle of legal certainty, inasmuch as it created legal uncertainty as regards the enforcement of the contested decision, as the debtor of the fine is determined only when the Commission proceeds against one of the jointly and severally liable debtors, and in so far as it bound the legal position of each debtor to the other.

192 By the first part of their fourth plea and the second part of their first plea, the companies of the Areva Group criticise the Commission for having infringed the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement by having imposed a fine on Areva T&D SA, for which it was jointly and severally liable with Alstom, in the amount of EUR 53 550 000 in Article 2(c) of the contested decision. Those rules do not allow companies to be made jointly and severally liable for a fine where, on the date the decision imposing the fine was adopted, those companies did not belong or no longer belonged to the same group. Further, the companies of the Areva Group claim that the Commission breached its duty to state reasons for the individual decisions which it adopts by not providing, in the contested decision, the reasons for which it considered that Areva T&D SA formed a single economic unit with Alstom on the date the contested decision was adopted.

193 By the fifth part of their fourth plea, the companies of the Areva Group also criticise the Commission for having, in essence, breached the principle of legal certainty, inasmuch as, by making Areva T&D SA and Alstom jointly and severally liable for the fine

imposed, it applied a new repressive policy or new rules on joint and several liability for the payment of fines to events occurring before the adoption of those new rules.

194 By the third and fourth parts of their fourth plea, the companies of the Areva Group claim that the Commission infringed Article 7 EC and breached the principles of equal treatment and proportionality, in so far as it delegated to a national court or arbitration panel the task of determining the liability of each of the companies penalised and, therefore, their respective contributions in the context of the payment of the fine imposed on them, and by making Areva T&D SA pay to the Commission sums which, in the final analysis, should be paid by Alstom. Furthermore, by the sixth part of that plea, the companies of the Areva Group claim that the Commission breached the principle of the right to an effective remedy, inasmuch as, by making Areva T&D SA and Alstom jointly and severally liable for payment of the fine imposed, it bound their legal positions together.

195 In addition, by their fifth plea, the companies of the Areva Group criticise the Commission for having infringed the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement, inasmuch as it imposed on them a fine of EUR 25 500 000, for which they were jointly and severally liable, in Article 2(c) of the contested decision, without having first established, as is clear from their third plea (paragraph 142), that they formed a single economic unit at the time the infringement was committed and that each of them could be held personally liable for that infringement.

196 The Commission disputes the line of argument developed by Alstom and the companies of the Areva Group and contends that all of the pleas and grounds of complaint should be rejected.

— Findings of the Court

197 It is necessary to examine, in the first place, the lawfulness of the fine of EUR 53 550 000 imposed jointly and severally on Alstom and Areva T&D SA in Article 2(c) of the contested decision.

198 In that regard, it is appropriate, at the outset, to examine the pleas and grounds of complaint alleging, in essence, infringement of Article 81 EC and Article 53 of the EEA Agreement, infringement of the rules on joint and several liability for the payment of fines, and breach of the duty to state reasons, by beginning with the alleged breach of the duty to state reasons.

199 As has been explained in paragraphs 96 to 99 and 125 to 129, in the contested decision the Commission reasoned, to the requisite legal standard, the personal liability incurred by Alstom and by Areva T&D SA on account of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, by finding that those companies managed — directly or indirectly — that undertaking during that period. Furthermore, it is clear from recitals 348 to 356, recital 358(b) and (c), recital 369 and recital 371(a) and (b) of the contested decision that it was on the basis that Alstom and Alstom T&D SA formed an economic unit within the Alstom Group that the Commission decided to hold Alstom and Areva T&D SA (formerly Alstom T&D SA) personally liable for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004 and, in that respect, to impose a fine of EUR 53 550 000 on them, for which they are jointly and severally liable, in Article 2(c) of the contested decision.

200 The Commission cannot be criticised for not having given specific reasons for the fine imposed jointly and severally on Alstom and Areva T&D SA in the light of the fact that those companies no longer formed a single economic unit on the date when

the contested decision was adopted, since it is apparent from the contested decision that the Commission does not regard that fact as prohibiting the imposition of a fine jointly and severally on them. It is apparent from the case-law that the Commission is not required to include, in its decision, specific reasons concerning the assessment of aspects which seem to it manifestly irrelevant or insignificant or plainly of secondary importance for its assessment (see, to that effect and by analogy, Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraph 186, and Case T-282/06 *Sun Chemical Group and Others* v *Commission* [2007] ECR II-2149, paragraph 58). As regards the issue whether the Commission was entitled to exclude the matters in question from its assessment, that aspect forms part of the examination of the substantive lawfulness of the contested decision and not infringement of an essential procedural requirement. Thus, it cannot constitute an infringement of Article 253 EC (see paragraph 88).

201 The ground of complaint, submitted by Alstom, according to which the Commission contradicted itself in recital 371(c) of the contested decision by finding Alstom personally liable, jointly and severally with Areva T&D SA and Areva T&D AG, for the participation of the undertaking in question in the infringement for the period after the transfer of Alstom's T&D division on 8 January 2004, is also unfounded. It is apparent from that recital that only Areva, Areva T&D Holding, Areva T&D SA and Areva T&D AG, and not Alstom, incur liability on account of the participation of the undertaking in question in the infringement for the period from 9 January to 11 May 2004.

202 The pleas and grounds of complaint alleging breach of the duty to state reasons must therefore all be rejected as unfounded.

203 It is necessary, therefore, to examine the pleas and grounds of complaint raised by Alstom and the companies of the Areva Group and, first, those in which they claim, in essence, that Article 81 EC, Article 53 of the EEA Agreement and the rules on joint

and several liability for the payment of fines prohibit the imposition of a fine jointly and severally on companies which cannot be held personally liable for the infringement and which no longer form a single economic unit on the date when the decision imposing the fine is adopted.

204 In that regard, it should be pointed out that joint and several liability for the payment of fines on account of an infringement of Article 81 EC or Article 53 of the EEA Agreement is a legal effect which follows as a matter of law from the substantive provisions of those articles.

205 As is apparent from the case-law cited in paragraph 134, joint and several liability of a number of persons for payment of a fine on account of an undertaking's participation in an infringement of Article 81 EC and Article 53 of the EEA Agreement follows from the fact that each of them can be held personally liable for the participation of that undertaking in the infringement. The unitary conduct of the undertaking on the market justifies the fact that, for the purposes of competition law, the companies or, more generally, the persons which can be held personally liable, may be held jointly and severally liable (see, to that effect, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, paragraph 134 above, paragraph 41; *HFB and Others* v *Commission*, paragraph 66 above, paragraphs 54, 524 and 525, and *Tokai Carbon and Others* v *Commission*, paragraph 134 above, paragraph 62). Joint and several liability for the payment of fines for an infringement of Article 81 EC and Article 53 of the EEA Agreement, inasmuch as it contributes to the effective recovery of those fines, is part of the objective of deterrence pursued generally by competition rules (see, to that effect, *ACF Chemiefarma* v *Commission*, paragraph 87 above, paragraph 172 and 173, and Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 61) and respects the principle of *non bis in idem* which is a fundamental principle of EU law, also enshrined in Article 4 of Protocol No 7 to the ECHR, which precludes penalising more than once, for the same infringement of competition law, the same conduct of an undertaking on the market through the persons which may be held personally liable for that conduct (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraph 338; *PVC II*, paragraph 64 above, paragraphs 95 to 99,

and Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 340).

206 The fact that the personal liabilities incurred by a number of companies on account of the participation of the same undertaking in an infringement are not the same does not preclude those companies from being jointly and severally liable for a fine, where the joint and several liability for the payment of the fine covers only the period of the infringement during which they formed an economic unit and thus constituted an undertaking for the purposes of competition law. In any event, it does not follow from the case-law cited by the applicants that only those companies which formed an economic unit on the date when the decision imposing the fine was adopted can have a fine imposed on them for which they are jointly and severally liable. Therefore, the Commission was entitled to ignore the fact that the two companies no longer formed an economic unit on 24 January 2007, when it imposed a fine of EUR 53 550 000 jointly and severally on Alstom and Areva T&D SA, in Article 2(c) of the contested decision.

207 In the light of the foregoing, the Commission was entitled to impose a fine of EUR 53 550 000 jointly and severally on Alstom and Areva T&D SA in Article 2(c) of the contested decision, on account of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, since, as is apparent from paragraphs 80 to 141, it correctly held that each of those two companies could have been held personally liable for that participation.

208 Accordingly, those pleas and grounds of complaint alleging, in essence, infringement of Article 81 EC, Article 53 of the EEA Agreement and the rules on joint and several liability for the payment of fines must be rejected as unfounded.

209 It is next necessary to examine the pleas and grounds of complaint alleging breach of the principles of non-retroactivity and legal certainty.

210 The principle of legal certainty, a general principle of EU law, requires that, where a rule of EU law imposes or permits the imposition of penalties, even where they are not criminal in nature, that rule must be clear and precise, so that the persons concerned may be able to ascertain unequivocally what their rights and obligations are and take steps accordingly (see, to that effect, Case 117/83 *Könecke* [1984] ECR 3291, p. 11; *Jungbunzlauer* v *Commission*, paragraph 61 above, paragraph 71, and the case-law cited). This principle must be observed in relation to provisions of a criminal nature as well as specific administrative instruments imposing or permitting the imposition of administrative penalties. It applies not only to the rules which establish the elements of an offence, but also to those which define the consequences of contravening them (see *Jungbunzlauer* v *Commission*, paragraph 61 above, paragraph 72, and the case-law cited).

211 Further, the principle of non-retroactivity, as has been mentioned in paragraphs 131 to 133, is one of the general principles of law whose observance is ensured by the judicature of the European Union and requires that the rules on attributing liability and on penalties for infringements of competition law which are applied in a decision pursuant to Article 81 EC and Article 53 of the EEA Agreement correspond to those applicable at the time when the infringement was committed. That principle precludes the retroactive application, for an infringement, of new rules on attributing liability and on penalties, the result of which was not reasonably foreseeable at the time when the offence was committed.

212 It is apparent from the case-law cited in paragraphs 134 and 205 above that the rules on attributing liability and on penalties for infringements of competition law applied in the present case by the Commission had already been established at the time when the infringement was committed, that is to say, in this case, during the period from 7 December 1992 to 8 January 2004 and that, in any event, they cannot be regarded

as having been established for the first time in the contested decision. Those rules were, or at the very least should have been, known to Alstom and the companies of the Areva Group at the material time. Moreover, those rules were sufficiently clear and precise that Alstom and the companies of the Areva Group could reasonably have foreseen the result of their application in the circumstances of the present case. As has been noted in paragraph 140, that may also explain the requirement for a liability guarantee clause in the transfer contract in case Areva T&D SA and Areva T&D AG should be found liable for infringements committed previously. Accordingly, Alstom and the companies of the Areva Group cannot rely, in the present case, on breach of the principles of non-retroactivity or legal certainty resulting from the imposition of the fine of EUR 53 550 000 jointly and severally on Alstom and Areva T&D SA, in Article 2(c) of the contested decision.

213 In so far as the plea alleging breach of the principle of legal certainty can be interpreted as a plea that the rules on joint and several liability for the payment of fines are illegal, on the ground that they are the source of uncertainty as regards the payment of a fine, the determination of which debtor is obliged to pay and the legal position of other debtors who are jointly and severally liable, that plea seeks a ruling on the very legality of the system of 'joint and several liability for the payment of fines' in competition law and a determination whether the resultant rights and obligations can be known with sufficient precision by companies which are fined. Like the concept of 'undertaking' for the purposes of competition law, of which it is merely an ipso jure effect, the concept of 'joint and several liability for the payment of fines' is an autonomous concept which must be interpreted by reference to the objectives of the competition law system of which it forms a part and, where necessary, by reference to the general principles which deriving from the national legal systems as a whole.

214 In the letter registered at the Registry of the Court on 18 June 2009 (see paragraph 42), and contrary to what it stated at the hearing (see paragraph 39), the Commission contended that, where it imposes a fine for which a number of companies are jointly and

severally liable, without giving further detail or indication in the operative part of the decision, it is not seeking to determine the issue of the respective contributions to payment of that fine by the various debtors. However, it must be noted that a decision by which the Commission imposes a fine for which a number of companies are jointly and severally liable necessarily produces all the effects which, as a matter of law, apply to the legal rules for the payment of fines in competition law, and does so both in the relationship between the creditor and the debtors who are jointly and severally liable and in the relationships between the jointly and severally liable debtors themselves. Therefore, neither the Commission nor the applicants can properly argue that joint and several liability for the payment of fines governs the relationships between the creditor and the jointly and severally liable debtors, but not the relationships between the jointly and severally liable debtors themselves. Likewise, the Commission and the applicants cannot validly assert that the companies may freely arrange how they divide, among themselves, the amount of the fine for which they are jointly and severally liable and which was imposed on them pursuant to Article 15(2) of Regulation No 17 or Article 23(2) of Regulation No 1/2003 for infringement of Article 81 EC and Article 53 of the EEA Agreement, the Commission having sole competence to rule in that regard.

215 It must be held that, in the absence of a contrary indication in the decision by which the Commission has imposed a fine jointly and severally on a number of companies for an infringement by an undertaking, that decision attributes that infringement to them in equal measure (see, to that effect, Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraphs 100 and 101). It has, furthermore, already been held that companies which are jointly and severally liable to pay a fine are required to pay a single fine, the level of which is calculated by reference to the turnover of the relevant undertaking (see, to that effect, *Aristrain* v *Commission*, paragraph 101). It follows that each company is liable to pay the whole of the fine with regard to the Commission and that payment by one of them releases all of them from their obligation vis-à-vis the Commission. Companies on which a fine has been imposed jointly and severally and which, incur, unless otherwise specified in the decision imposing the fine, incur liability in equal measure for the infringement must, in principle, contribute in equal amounts to the payment of the fine imposed on account of that infringement. Accordingly, where a company, against which the Commission proceeds, pays the whole of the fine, it may, on the basis of that Commission decision, make a claim for recovery against each of the other jointly and severally liable debtors in respect of its

share. While the decision by which a number of companies are held jointly and severally liable for the payment of a fine thus does not enable it to be determined, from the outset, which of those companies will actually be required to pay the fine to the Commission, it does not prevent each of those companies from knowing, unambiguously, the share of the fine which will be its own share, or from bringing an action against the other jointly and severally liable debtors for recovery from them of the amounts which it has paid in excess of its share.

216 It follows from the foregoing that joint and several liability for the payment of fines in competition law does not prevent each of the penalised companies from knowing, unambiguously, the financial consequences which are likely to result for it from the penalty. The fact that, in that context, the contested decision does not enable it to be determined which of the companies will be required to pay the fine to the Commission does not, in itself, constitute a breach of the principle of legal certainty.

217 Moreover, joint and several liability for the payment of fines in competition law does not hinder the right of each of the penalised companies to bring an action for annulment of the decision by which the Commission imposed the fine on them for which they are jointly and severally liable. In the present case, both Alstom and Areva T&D SA have exercised their right to bring proceedings by each lodging an action for annulment on the basis of Article 230 EC.

218 The pleas and grounds of complaint alleging breach of the principles of non-retroactivity and legal certainty must, therefore, be rejected in their entirety.

219 As regards the pleas and grounds of complaints alleging breach of the principle that the penalty must be specific to the offender and to the offence, it should be borne in mind that under that principle, which is applicable in any administrative procedure that may lead to the imposition of sanctions under competition law, an undertaking may be penalised only for acts imputed to it individually (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 278, and Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 66).

220 In the present case, Alstom and Areva T&D SA have been penalised, on account of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, for acts which have been attributed to them personally by the Commission. As has already been observed in paragraph 127, it is on account of their responsibility in, directly or indirectly, managing the undertaking in question that those companies have been held personally liable for that undertaking's participation in the infringement for the period from 7 December 1992 to 8 January 2004. It is therefore on account of an infringement of Article 81 EC and Article 53 of the EEA Agreement, which they themselves are deemed to have committed by reason of their management of the undertaking in question (see, to that effect, *Metsä-Serla and Others* v *Commission*, paragraph 134 above, paragraph 28), that Alstom and Areva T&D SA have been fined in the amount of EUR 53 550 000, in respect of which they are jointly and severally liable, in Article 2(c) of the contested decision.

221 Therefore, the pleas and the grounds of complaint alleging breach of the principle that the penalty must be specific to the offender and to the offence must also be rejected.

222 Inasmuch as, in the context of the pleas and grounds of complaint alleging breach of the principle that the penalty must be specific to the offender and to the offence, Alstom has claimed, in its reply in Case T-121/07, that the failure to individualise the penalties resulting from the joint and several liability for payment of the fine undermines the objective of ensuring that that fine has a deterrent effect, an objective

which is pursued, in particular, by Article 23(2) of Regulation No 1/2003, it must be stated that such a complaint, which is not based on any matter of law or fact which came to light in the course of the procedure, constitutes a new ground of complaint which is inadmissible within the meaning of Article 48(2) of the Rules of Procedure. In any event, the ground of complaint is unfounded, since, as has already been observed in paragraph 215, each of the jointly and severally liable debtors is required, with respect to the other debtors, to pay its share of the fine and in principle bear, in that way, the burden of the fine imposed by the Commission.

223 It is appropriate to examine, next, the pleas and grounds of complaint alleging breach of the right to an effective remedy in that, by virtue of their having been found jointly and severally liable, Alstom's legal position is bound, at a procedural level, to that of Areva T&D SA and vice versa.

224 The requirement of judicial review constitutes one of the general principles of EU law stemming from the constitutional traditions common to the Member States and has also been enshrined in Articles 6 and 13 of the ECHR (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39, and Joined Cases T-116/01 and T-118/01 *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2003] ECR II-2957, paragraph 209). The right to an effective remedy is, moreover, reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

225 The requirement for effective judicial review applies to any Commission decision that finds and punishes an infringement of competition law (Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 60, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 42).

226 Pursuant to Article 17 of Regulation No 17, and Article 31 of Regulation No 1/2003, the Court has unlimited jurisdiction in relation to actions brought against decisions whereby the Commission fixes or has fixed a fine and it may cancel, reduce or increase the fine imposed.

227 In the context of actions based on Article 230 EC, the review of the legality of a Commission decision finding an infringement of competition law and imposing a fine in that respect on the natural or legal person concerned must be regarded as effective judicial review of that decision. The pleas capable of being raised by the natural or legal persons concerned in support of their application for annulment of the act are such as to allow the General Court to assess the merits, both in law and fact, of any infringement found and of any fine imposed by the Commission in the area of competition law (see, to that effect, *Lafarge* v *Commission*, paragraph 225 above, paragraph 45). The scope of the review carried out by the judicature of the European Union and, therefore, the effectiveness of actions brought against decisions in which the Commission finds an infringement of the competition rules and imposes a fine are strengthened by the unlimited jurisdiction granted to the General Court in that area. More than a simple review of legality, which merely permits dismissal of the action for annulment or annulment of the contested measure, the unlimited jurisdiction conferred on the judicature of the European Union authorises it to vary the contested measure, even without annulling it, by taking into account all of the factual circumstances, so as to amend, for example, the amount of the fine (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatchappij and Others* v *Commission* [2002] ECR I-8375, paragraph 692).

228 In the present case, the fact that the Commission attributed liability to Alstom and Areva T&D SA for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004 and, for that reason, imposed a fine on them jointly and severally in the amount of EUR 53 550 000, in Article 2(c) of the contested decision, has not undermined the right of each of those companies, as an addressee of the Commission's decision, to submit that decision to

judicial review by actual use of the remedies guaranteed by EU law and by the EEA Agreement. Both Alstom and Areva T&D SA have been able to bring actions before this Court on the basis of Article 230 EC, including not only an application for partial annulment of the contested decision — in order to satisfy themselves as to that decision's lawfulness, in particular, as regards the fact that they were held jointly and severally liable for payment of the fine — but also an application for amendment of the contested decision as regards the amount of the fine which was imposed jointly and severally on them. It follows that each of those companies has been able to submit, for review by the judicature of the European Union, the issue of the lawfulness, in the light of EU law, of the fact that they were found jointly and severally liable for the payment of the fine in the amount of EUR 53 550 000 which was imposed on them in Article 2(c) of the contested decision. On the basis of the retroactive effect (Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 30) and the principle of *res judicata* (Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 54; Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 26, and Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 36) which apply to judgments annulling decisions, Alstom and Areva T&D SA, if successful in their actions, would be exonerated of all liability for the infringement found, freed from all obligations in relation to payment of the fine which has been imposed on them by the Commission for that infringement and freed from all obligations to contribute their share to the payment of that fine in the event that it is paid by the other jointly and severally liable debtor.

229 The fact that, as Alstom claims, the liability guarantee stipulated in the transfer contract might undermine the benefit which that company might derive from its action in Case T-121/07 must be regarded as a legal effect of the agreement concluded between the parties and not as an effect of the contested decision itself. Accordingly, as is clear from recital 368, *in fine*, of the contested decision, the fact that such a liability guarantee was stipulated in the transfer contract has no effect on the legality of the contested decision. It must be recalled that Article 81 EC and, by analogy, Article 53 of the EEA Agreement, are public policy provisions, essential for the accomplishment of the tasks entrusted to the Community and to the EEA (see, to that effect, Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 49, and the

case-law cited), with the result that the nature of the liability and the penalty incurred by companies, where there has been an infringement of those provisions, cannot be left freely to those companies.

230 It cannot therefore be held that the contested decision, by imposing a fine of EUR 53 550 000 jointly and severally on Alstom and Areva T&D SA, in its Article 2(c), breaches the principle of the right to an effective remedy.

231 Therefore, the pleas and grounds of complaint alleging breach of the right to an effective remedy must be rejected as unfounded.

232 Lastly, it is appropriate to examine the pleas and grounds of complaint alleging infringement of Article 7 EC and breach of the principles of equal treatment and proportionality, in so far as the Commission, by making Alstom and Areva T&D SA jointly and severally liable for the payment of the fine, delegated to a national court or arbitration panel the power to determine the liability of each of them for the commission of the infringement established and, therefore, their respective contribution to the payment of the fine, and exposed Areva T&D SA to the risk of payment of sums to the Commission, which, in the final analysis, should be borne by Alstom.

233 Under Article 5 EC, the European Community can act only within the limits of the competences conferred upon it by the EC Treaty and of the objectives assigned to it therein. It has therefore only those powers which have been conferred upon it (see, to that effect, Opinion 2/94 [1996] ECR I-1759, paragraph 23). Pursuant to Article 7(1) EC, the institutions which, like the Commission, contribute to ensuring the realisation of the tasks conferred on the Community themselves act within the limits of the powers conferred on them by the Treaty. An institution cannot renounce its

powers without failing in the role which it has, in accordance with Article 7(1) EC, in the realisation of the tasks conferred on the Community.

234 Where the Commission, as in the present case, opens a proceeding in order to adopt a decision finding an infringement of Article 81 EC and Article 53 of the EEA Agreement, it alone is competent, pursuant to Article 15(2) of Regulation No 17, or Article 7(1) and Article 23(2) of Regulation No 1/2003, to find that infringement and impose fines on the undertakings which, either intentionally or negligently, participated in that infringement. The Commission cannot delegate to third parties powers which have thus been conferred on it by the provisions cited without thereby breaching the principle of conferred powers (see, to that effect, as regards the Commission's powers of investigation deriving from Article 3 of Regulation No 17, Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 1264).

235 It should, in addition, be recalled that, each time that it decides to impose a fine pursuant to competition law, the Commission is bound to respect the general principles of law, which include the principles of equal treatment and proportionality, as interpreted by the judicature of the European Union (Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 315). According to settled case-law, the principle of equal treatment or non-discrimination is breached only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28; Case C-174/89 *Hoche* [1990] ECR I-2681, paragraph 25, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 309). As for the principle of proportionality, it requires measures of the institutions not to go beyond what is appropriate and necessary for achieving the objectives legitimately pursued by the measure in question, it being understood that, where there is a choice between several appropriate measures, recourse must be had to the least restrictive and that the disadvantages caused must not be disproportionate to the

aims pursued (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96).

236 In the present case, contrary to what the companies of the Areva Group claim, the Commission determined, in the contested decision, the respective share of liability which Areva T&D SA and Alstom bore for the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004 and therefore, their respective shares of the amount of the fine for which they are jointly and severally liable to the Commission. As has been stated in paragraph 215, it must be held that, in the absence of a contrary indication in the contested decision, Areva T&D SA and Alstom incur equal liability by reason of the participation of the undertaking in question in the infringement for the period from 7 December 1992 to 8 January 2004, from which it follows that their respective share in the amount of the fine for which they are jointly and severally liable is, in principle, 50 %. As those aspects can be inferred from the contested decision itself, it cannot be considered that, in the present case, the Commission delegated to a national court or an arbitration panel some of the powers conferred on it to find and penalise infringements of Article 81 EC and Article 53 of the EEA Agreement.

237 Since the pleas and grounds of complaints being examined are based on a false premiss, they must be rejected as unfounded.

238 Accordingly, the Court must reject all of the pleas and grounds of complaint raised by Alstom and the companies of the Areva Group regarding the fine in the amount of EUR 53 550 000, for which they are jointly and severally liable, imposed on Alstom and Areva T&D SA in Article 2(c) of the contested decision, alleging infringement of the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement, infringement of Article 7 EC, breach

of the principles of legal certainty, equal treatment, proportionality, the right to an effective remedy and the principle that the penalty must be specific to the offender and to the offence, and a breach of the duty to state reasons.

239 In the second place, the plea alleging infringement of the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement must still be examined in relation to the amount of EUR 25 500 000 for which the companies of the Areva Group are jointly and severally liable under Article 2(c) of the contested decision.

240 In recital 370 and recital 371(c) of the contested decision, the Commission stated that the companies of the Areva Group could be held personally liable for the participation of the undertaking in question in the infringement for the period from 9 January to 11 May 2004, in so far as they managed, directly or indirectly, that undertaking during the period in question and that they therefore formed one and the same undertaking, for the purposes of competition law.

241 It follows from the case-law set out in paragraphs 134 and 205 above that the Commission did not commit an error by finding that the companies which managed, directly or indirectly, an undertaking at the time when it participated in an infringement could be held personally liable for the infringing conduct of that undertaking. The companies of the Areva Group, in the context of the present plea, have not disputed the fact that Areva T&D SA and Areva T&D AG directly controlled the undertaking in question between 9 January and 11 May 2004, but merely disputed that Areva and Areva T&D Holding indirectly controlled that undertaking through their wholly-owned subsidiaries which were active in the T&D sector. However, it is apparent from the explanations set out in paragraphs 144 to 152 above, that the Commission did not err in finding that, from 9 January to 11 May 2004, Areva and Areva T&D Holding exercised effective control over Areva T&D SA and Areva T&D AG and determined their conduct on the market.

242 Therefore, it cannot be claimed that the Commission infringed the rules on joint and several liability for the payment of fines resulting from Article 81 EC and Article 53 of the EEA Agreement as regards the amount of EUR 25 500 000, for which the Commission found the companies of the Areva Group jointly and severally liable in Article 2(c) of the contested decision.

243 Consequently, the pleas and grounds of complaint by which the applicants call into question the fine which was imposed on them jointly and severally in Article 2(c) of the contested decision must be rejected as unfounded.

Failure to observe the rights of the defence and infringement of Article 27(1) of Regulation No 1/2003

— Arguments of the parties

244 Alstom, in the context of its seventh plea, criticises the Commission for failing to observe the rights of the defence and for infringing Article 27(1) of Regulation No 1/2003 in the contested decision on the basis that the criticisms of Alstom in the contested decision do not correspond to those formulated in the statement of objections. It takes the view that it was not able to express its view on the 'sole liability' attributed to it, in the contested decision, on account of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992, in so far as, in paragraph 337 of the statement of objections, the Commission had indicated that Alstom had incurred that liability jointly and severally with Areva T&D SA and Areva T&D AG.

245 The Commission disputes Alstom's arguments and contends that the ground of complaint should be rejected.

— Findings of the Court

246 In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9; Case C-176/99 P *ARBED* v *Commission* [2003] ECR I-10687, paragraph 19, and *BASF* v *Commission*, paragraph 87 above, paragraph 44).

247 The proper observance of the rights of the defence requires that the undertaking concerned be afforded the opportunity, from the stage of the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents relied on by the Commission in support of its allegations of an infringement of competition law (Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 10, and *Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraph 66).

248 To that effect, Regulation No 1/2003 - in the same way as Regulation No 17 before it - provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the proceedings. However, that may be done summarily and the decision is not necessarily required to be a replica of the Commission's statement of objections (*Musique Diffusion française and Others* v *Commission*, paragraph 247 above, paragraph 14, and *Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraph 67), since the statement of objections is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see *Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraph 67, and the case-law cited; see

also, to that effect, Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 63, and the case-law cited). For that reason, the Commission may, and even must, take into account the factors emerging from the administrative procedure in order, inter alia, to abandon such objections as have been shown to be unfounded (*Musique Diffusion française and Others* v *Commission*, paragraph 247 above, paragraph 14, and *Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraph 67).

249 In the context of the present ground of complaint, Alstom claims that the Commission failed to observe the rights of the defence, inasmuch as, in the contested decision, it abandoned an objection which it previously made against Areva T&D SA and Areva T&D AG in paragraph 337 of the statement of objections, which held those companies personally liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992.

250 The Commission, which disputes Alstom's assertion that it did not inform Alstom that it held Alstom solely liable for the infringement for the period from 15 April 1988 to 6 December 1992, asserts that it is apparent from paragraph 337 of the statement of objections, in conjunction with paragraph 331 thereof, that it intended to find Alstom solely liable for the participation of the undertaking in question for the period from 15 April 1988 to 6 December 1992. In the light of the objection, it is necessary first to rule on the merits of that contention.

251 In paragraph 331 of the statement of objections, the Commission recalled the case-law of the Court of Justice and the General Court relating to the presumption of liability of parent companies on account of anti-competitive conduct attributable to their subsidiary, which arises on the basis that the former hold all, or practically all, of the capital of the latter.

252 In paragraph 336 of the statement of objections, the Commission observed that Alstom and its legal and economic predecessors were the owners of all, or practically all, of the capital of the legal entities which participated in the collusive conduct described in the statement of objections, namely, on the one hand, Alsthom SA (France), GEC Alsthom SA, Kléber Eylau, GEC Alsthom T&D SA and Alstom T&D SA, of which Areva T&D SA is the legal and economic successor, and, on the other hand, Sprecher Energie, GEC Alsthom T&D, Alstom T&D AG, Alstom Power (Schweiz) and Alstom AG (Suisse), of which Areva T&D AG is the legal and economic successor.

253 In paragraph 337 of the statement of objections, the Commission explained that, for the reasons set out in paragraph 331 of the statement of objections, it intended to find Alstom, Areva T&D SA and Areva T&D AG jointly and severally liable for the participation of the undertaking in question in the infringement for the period between 15 April 1988, the date on which that undertaking joined the GQ Agreement and the EQ Agreement, and 8 January 2004, the date on which the Alstom Group transferred its 'T&D division' to the Areva Group.

254 In the light of the clear wording of paragraph 337 of the statement of objections, it must be held that Alstom is correct to claim that the statement of objections conveyed the Commission's intention to find Areva T&D SA and Areva T&D AG personally liable for the participation of the undertaking in question in the infringement, inter alia, for the period from 15 April 1988 to 6 December 1992. Inasmuch as, in the contested decision, the Commission finds only Alstom liable for the infringement during that period, the Commission thus abandons, in essence, an objection initially made against Areva T&D SA and Areva T&D AG in the statement of objections and, to that extent, the contested decision is not consistent with the statement of objections.

255 It is apparent from the case-file that, in their reply to the statement of objections, the companies of the Areva Group provided the Commission with additional information

establishing the unfounded nature of the objection made against Areva T&D SA and Areva T&D AG. It is apparent from recital 344 of the contested decision, relied on by the Commission, that the Commission took account of the fact that, in their reply to the statement of objections, the companies of the Areva Group stated that only Alstom should be found liable for the infringement at least until 1993, since what is now the Alstom Group directly controlled activities in the T&D sector throughout the period from 1988 to 1993, until Alstom T&D SA's predecessor, namely GEC Alsthom T&D SA, was set up. In recitals 20, 357 and 366 of the contested decision, the Commission stated that Areva T&D SA and Areva T&D AG, under their business names at the time, did not exist before 7 December 1992, the date on which the Alstom Group's activities in the GIS sector in France were allocated to Kléber Eylau, and 22 December 2003, the date on which the Alstom Group's activities in the GIS sector in Switzerland were allocated to Alstom (Schweiz) Services, in order to infer, in recitals 358 and 371 of the contested decision, that those companies could not be found personally liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992.

256 It must therefore be examined whether the liability incurred by Alstom has been increased on account of the fact that the Commission, in the contested decision, declined to find Areva T&D SA and Areva T&D AG personally liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992.

257 In the light of the effects of joint and several liability for the payment of fines, as set out in paragraphs 205 and 215, it must be noted that, in the contested decision, the fact that only Alstom was considered to be liable for the participation of the undertaking in question for the period from 15 April 1988 to 6 December 1992 altered the legal situation of Alstom and that, in that way, the inconsistency between the statement of objections and the contested decision, referred to in paragraph 254, adversely affected it. By declining to find Areva T&D SA and Areva T&D AG liable on account of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992 and, therefore, by not imposing a fine on

them for which they would have been jointly and severally liable with Alstom for that period, the Commission, in the final analysis, attributed all the liability and, therefore, all the burden of the fine on Alstom, when, under the notion of joint and several liability for the payment of fines, each of the jointly and severally liable debtors would ultimately be liable to the other debtors only to the value of their share of the amount of the fine for which they were jointly and severally liable.

258 The provisional nature of the statement of objections did allow the Commission, in the present case, to abandon an objection formulated in that statement of objections against Areva T&D SA and Areva T&D AG, in view of additional information submitted by Areva during the administrative procedure which justified that action. However, inasmuch as that abandoning of the objection adversely affects Alstom, it cannot occur unless the latter was allowed to properly express its view on it.

259 In recital 344 of the contested decision, the Commission stated — in light of the observations submitted by the companies of the Areva Group in their reply to the statement of objections to the effect that only Alstom should be found liable for the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992 (see paragraph 255) — that Alstom accepted explicitly, in its reply to the statement of objections, that it had had access to the reply of the companies of the Areva Group to the statement of objections, in accordance with the terms agreed between the Alstom Group and the Areva Group in the transfer contract, and had addressed in detail the contentions of the Areva Group as regards liability. The Commission added that the hearing on 18 and 19 July 2006 had been the occasion, both for Alstom and for the companies of the Areva Group, to restate their respective arguments and to reply to those of the other party. In recitals 345 to 347 of the contested decision, the Commission referred to the arguments put forward by Alstom in its reply to the statement of objections. In recital 347, it observed, in particular, that Alstom denied having been directly active in GIS activities or in the related cartel before 1993 because the 'T&D division', later the 'T&D sector' (to which Alstom T&D

SA and Alstom T&D AG belonged) had always behaved as an autonomous undertaking on the market, both before and after legal personality was conferred on it, and that it claimed that only the 'T&D sector' and, thus, Areva T&D SA and Areva T&D AG should be held liable for the infringement.

260 The content of recitals 344, 345 and 347 of the contested decision has not been disputed by Alstom. That content shows, to the requisite legal standard, that Alstom was able to take a view, even before the contested decision was adopted, on the principle of its sole liability on account of the participation of the undertaking in question in the infringement for the period from 15 April 1998 to 6 December 1992, and shows its awareness of the arguments submitted by the companies of the Areva Group in their reply to the statement of objections. It is also apparent from the content of those recitals that Alstom was in a position to set out the reasons for which it considered that it was not appropriate to abandon the objection initially made against Areva T&D SA and Areva T&D AG in the statement of objections.

261 That is confirmed by the final report of the Hearing Officer of 15 January 2007, which states that, in the light of the written replies to the statement of objections and subsequent correspondence, and the results of the hearing, the duration of the infringement, as described in the statement of objections, had been reduced, in particular, for Areva T&D SA and Areva T&D AG, and that the parties right to be heard had been respected in the present case for all participants to the proceedings.

262 Since it has been established that Alstom was in a position to properly make known its point of view on the issue prior to the adoption of the contested decision, it must be concluded that Alstom's rights of the defence have not been infringed by reason of the inconsistency between the statement of objections and the contested decision arising from the absence, in the latter, of a finding that Areva T&D SA and Areva T&D AG were personally liable on account of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 6 December 1992.

263 Accordingly, the ground of complaint, raised by Alstom in the context of its seventh plea, alleging failure to observe the rights of the defence and infringement of Article 27(1) of Regulation No 1/2003, must be rejected.

The 50 % increase in the basic amount of the fine imposed on Alstom and the companies of the Areva Group in Article 2(b) and (c) of the contested decision

— Arguments of the parties

264 Alstom, by its fifth plea, which is divided into three parts, objects to the fact that the Commission increased by 50 % the basic amount of the fines which were imposed on it in Article 2(b) and (c) of the contested decision, for the aggravating circumstance of the role of leader played by the undertaking in question as 'European secretary' to the cartel.

265 The first part of the fifth plea raised by Alstom alleges an error, vitiating the Commission's assessment, according to which the undertaking in question played a leading role as 'European secretary' to the cartel.

266 Alstom accepts that the undertaking in question adopted the role of 'European secretary' to the cartel 'for the period beginning "around 2000" until 2004'. It also accepts

that 'the role of ["European secretary" to the cartel adopted by the undertaking in question] could have conferred on it a central role or a role as a "point of contact"' within the cartel and that 'it is clear that the fact of bundling information and/or sharing it had the effect of making the functioning of the cartel more efficient'. It does not dispute that the role of 'European secretary' implied 'being in charge of the bundling, compiling and exchanging communications between the European participants, and between them and the Japanese [participants], the sharing of [GIS] projects on the basis of the notification forms received from the participants and pursuant to functional principles (quotas), or even the actual management of some, and not all of the meetings.' Lastly, it admits that, as 'European secretary' to the cartel, it '… took note of the evolution of the quotas of each participant, following the sharing of [GIS] projects, on the one hand, and obtaining the orders from customers, on the other'.

267 Nevertheless, Alstom takes the view that no lead role can be attributed to it in respect of its tasks as 'European secretary' since, as is apparent from the contested decision and the evidence in the Commission's case-file, those tasks were imposed on it by the other members of the cartel, first on a temporary basis between 2000 and March 2002, then on a permanent basis. Moreover, it is apparent from the statement of objections, the contested decision and the Commission's case-file that the duties of 'European secretary' were of a purely administrative nature and did not confer on the undertaking in question a role which was more important than that of the other members of the cartel as leader in or instigator of the cartel.

268 The second part of the fifth plea raised by Alstom alleges, in essence, infringement of the third indent of Section 2 of the Guidelines and breach of the duty to state reasons. Evidence usually taken into account when establishing a role of leader, within the meaning of the third indent of Section 2 of the Guidelines, was, in the present case, either lacking, or common to all the members of the cartel. First, certain decisive factors for the purposes of classifying an undertaking as leader of an infringement

were missing in the present case. Alstom neither made threats against competitors which were not participating in the cartel, nor took decisions regarding the expansion of the cartel or its relationships with third parties. It was also not in charge of monitoring compliance with the cartel by its members. Its position on the relevant market did not surpass that of the other companies, such as Siemens and ABB, which had larger market shares than Alstom, and Alstom's position on the market did not allow it to exert pressure on competitors. It could, furthermore, not be regarded, in the light of the case-law, as the undertaking which inspired or conceived of the cartel or its working rules, since the first agreement, concluded in 1988, was signed by nine European companies and since the cartel was organised in common by those nine companies. Second, certain factors which are characteristic of the role of leader were not peculiar to Alstom, but were shared by all or some of the other members of the cartel. Thus, the preparation for and participation in the strategic meetings of the cartel, and the frequency of that participation, were aspects which were common to Alstom, Siemens and ABB in relation to the so-called 'managerial' meetings, concerning the management of the cartel and the joint Europe/Japan committee meetings. As regards the working groups and the preparatory meetings of each group for the joint Europe/Japan committee meetings, they brought all the cartel participants together. It has not been established that Alstom took the initiative more often than the others in the context of the cartel, or that it acted independently with regard to, for example, regular changes to codes within the cartel. Lastly, compliance with instructions, supervision and discipline within the cartel were assured by each member of the cartel, pursuing the defence of its own interest within the cartel or, with regard to compliance of the Japanese members of the cartel with their obligations, by the European committee. In that context, the Commission could not infer, merely from Alstom's title of 'European secretary', an aggravating circumstance linked to the fact that it played a more important role than the others in the running of the cartel, or even a decisive role for the survival of the cartel. In addition, the Commission did not provide appropriate and sufficient reasons for its findings that the 'European secretary' to the cartel had played a very important role, which was, in actual fact, essential to the functioning of the cartel, by devoting considerable resources and taking the initiative within it.

269 The third part of the fifth plea raised by Alstom alleges breach of the principles of equal treatment and proportionality. The Commission breached the principle of equal

treatment in that, with regard to the aggravating circumstance of the role of leader, it treated the undertaking in question in the same way as Siemens, although they were not in a comparable situation, and treated it differently than ABB and the Japanese undertakings which participated in the infringement established, although they were in a comparable situation to the undertaking in question. Alstom also claims breach of the principle of proportionality arising from the identical treatment of the undertaking in question and Siemens.

270 The companies of the Areva Group, by their sixth plea, which is set out in four parts, dispute the increase in the amount of the fine imposed on them in Article 2(c) of the contested decision on account of the leading role played by the undertaking in question as 'European secretary' to the cartel.

271 The first part of the sixth plea raised by the companies of the Areva Group is based on an infringement of Article 23(2)(a) of Regulation No 1/2003 and of Section 2 of the Guidelines resulting from the fact that the Commission classified them as leaders without showing that they had carried out management duties or a stimulating role in implementing the cartel. While the undertaking in question assumed enforcement duties, of an administrative nature, as the 'European secretary' between the end of 1999 and May 2004, it never carried out management duties or played a stimulating role in the context of the cartel. Thus, as is apparent from the Commission's case-file, the secretariat of the working groups conferred no decisive influence on the undertaking in question over strategic issues for the cartel. Those issues were dealt with in the course of meetings concerning the management of the cartel, which were chaired by ABB. Furthermore, the role of European secretary to the cartel became less important over time, up to a point where it was no longer remunerated. In any event, unlike Siemens and ABB, the undertaking in question did not have the market power necessary to play a leading role in the infringement.

272 The second part of the sixth plea raised by the companies of the Areva Group alleges error vitiating the Commission's assessment of the nature of the duties assumed by the undertaking in question as 'European secretary' to the cartel.

273 The companies of the Areva Group acknowledge that the undertaking in question 'was actually the European secretary to the cartel from the end of 1999 until May 2004' and that, in that regard, it played 'an administrative role', or an 'instrumental function', which 'undoubtedly facilitated the functioning of the cartel'. As regards the content of that role, they admit that the 'European secretary' to the cartel 'facilitated … information exchange' within the cartel, in that it bundled, compiled and exchanged certain information regarding the functioning of the cartel. In addition, they acknowledge that the 'European secretary' to the cartel 'organis[ed]' and 'acted as secretariat for the working groups' of the cartel and that, in that context, it had to draft the agenda, in accordance with 'what arose from the discussions and proposals of all the members of the cartel' and to 'summarise … the requests and proposals of the members of the cartel and … the outcome of the discussions', in particular concerning the allocation of GIS projects. Lastly, it is apparent from their written pleadings that, until '2002', the 'European secretary' to the cartel played a role in the 'sharing of [GIS] projects'.

274 Nevertheless, the companies of the Areva Group consider that a leading role cannot be attributed to them on account of their role as 'European secretary'. The Commission was wrong to consider, in recital 512 of the contested decision, that the 'European secretary' acted as a pivot for communication between the members of the cartel and that it convened and chaired meetings aimed at implementing the cartel. In relation to circulating information within the cartel, it cannot be considered that the 'European secretary' acted as an intermediary for the European members of the cartel, since almost half the information was exchanged by those members of the cartel on a bilateral basis, and the exchange of information by the European secretary significantly declined after September 1999. Next, the 'European secretary' no longer carried out the task of convening meetings after the end of the GQ Agreement

system. Moreover, that secretary was not alone in bearing the material (monitoring, drafting of minutes, etc) and financial cost of the meetings, as that cost was shared according to the rotation method. Lastly, it is incorrect to consider that the 'European secretary' chaired the meetings, in the sense that it carried out management duties or played a stimulating role within the cartel, since it restricted itself, in that context, to bundling requests and proposals from all and summarising those together with the outcome of the discussions. The companies of the Areva Group claim that, in any event, the Commission made an error in finding, in recital 513 of the contested decision, that the role of secretary had been substantial and, in fact, necessary for the functioning of the cartel. In 2002, after the departure of Siemens from the cartel, the GQ and EQ Agreements ceased to be applied and the role of European secretary to the cartel was greatly simplified. In particular, the secretary was no longer exclusively responsible for the organisation of the meetings and was no longer responsible for the allocating of markets. Therefore, the 'European secretary' was restricted to the role of simply enforcing the decisions of the cartel members, facilitating the functioning of the cartel without, however, being indispensable to it.

275 The third part of the sixth plea raised by the companies of the Areva Group is based on breach of the principle of equal treatment, inasmuch as the Commission treated the undertaking in question in the same way as Siemens, although they were not in a comparable situation, and treated the undertaking in question differently than ABB and the Japanese undertakings which participated in the cartel, although they were in a comparable situation. The fourth part of that plea is based on breach of the principle of proportionality in that the difference between the gravity of the infringement committed by the undertaking in question and that of the infringements committed by other members of the cartel is not great enough to justify an increase of 50 % in the basic amount of the fines which were imposed on it.

276 The Commission disputes Alstom's arguments and those of the companies of the Areva Group and contends that their pleas and grounds of complaints should be rejected.

— Findings of the Court

277 In recital 514 of the contested decision, the Commission found, inter alia, that the undertaking in question had played a role of leader in the infringement, within the meaning of the third indent of Section 2 of the Guidelines on the basis of its duties as 'European secretary' to the cartel. It took the view, in recitals 514 and 522 of the contested decision, that the basic amount of the fines imposed on Alstom had to be increased by 50 %, which gave the figure EUR 65 020 000, and that the basic amount of the fines imposed on Areva T&D SA and on the other companies of the Areva Group should be increased by 50 %, which gave the figures of EUR 53 550 000 and EUR 25 500 000 respectively.

278 Where certain companies are held liable on account of the participation of a number of undertakings in an infringement of Article 81 EC and/or Article 53 of the EEA Agreement, the Commission, when determining the basic amount of the fines to impose on those companies pursuant to Article 15(2) of Regulation No 17, or Article 23(2) of Regulation No 1/2003, must examine the relative gravity of the participation of the undertaking which they managed (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 87 above, paragraph 623; *Aalborg Portland and Others* v *Commission*, paragraph 61 above, paragraph 92, and judgment of 25 October 2005 in *Groupe Danone* v *Commission*, paragraph 219 above, paragraph 277). That means, in particular, that it is necessary to establish the role played by each undertaking in the infringement for the duration of its participation (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 65 above, paragraph 150; *Enichem Anic* v *Commission*, paragraph 63 above, paragraph 264, and judgment of 25 October 2005 in *Groupe Danone* v *Commission*, paragraph 219 above, paragraph 277) under the management of one or other of the companies in question. That conclusion follows logically from the principle that penalties should be specific to the offender and the offence, as set out in paragraph 219 (see judgment of 25 October 2005 in *Groupe Danone* v *Commission*, paragraph 219 above, paragraph 278, and the case-law cited).

279 In accordance with the principle that the penalties should be specific to the offender and to the offence, Sections 2 and 3 of the Guidelines provide for variation in the amount of the fine depending upon certain aggravating or mitigating circumstances, which are specific to each of the undertakings which participated in the infringement and to the companies to which that participation can be attributed. Section 2 sets out, in particular, a non-exhaustive list of aggravating circumstances which may be taken into account.

280 The role of 'ringleader' played by one or more undertakings in a cartel must be taken into account for the purposes of calculating the fine, since the undertakings which have played such a role must bear particular responsibility by comparison with the other undertakings (*Tokai Carbon and Others* v *Commission*, paragraph 134 above, paragraph 316, and *BASF* v *Commission*, paragraph 87 above, paragraph 281; see also, to that effect, Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 291). The non-exhaustive list of circumstances which may justify an increase in the basic amount of the fine, laid down in Section 2 of the Guidelines, includes, inter alia, under the third indent, the 'role of leader in, or instigator of the infringement' which was played by the undertaking.

281 As is clear from the very wording of the third indent of Section 2 of the Guidelines, it is necessary to distinguish between the concept of 'leader in' and that of 'instigator of' an infringement. Whereas instigation is concerned with the establishment or enlargement of a cartel, leadership is concerned with its operation (*BASF* v *Commission*, paragraph 87 above, paragraph 316). Since the contested decision found only that the undertaking in question played the role of leader, Alstom's arguments based on the concept of 'instigator' must be rejected as unfounded.

282 The grounds of complaint alleging an error of assessment and an infringement of the third indent of Section 2 of the Guidelines thus require it to be ascertained whether

the Commission was entitled to consider, in the light of the context of the present case, that the fact that the undertaking in question had held the role of European secretary to the cartel could be equated to it playing a role of leader in the infringement, within the meaning of the third indent of Section 2 of the Guidelines. The Court, in the context of reviewing the lawfulness of the assessment of the leading role in the infringement played by the undertaking in question and the particular liability incurred, for that reason, by Alstom and the companies of the Areva Group, must limit its analysis to the factual circumstances set out in the contested decision as proof of that role.

283 In order to be characterised as a leader, the undertaking in question must have represented a significant driving force in the cartel (*BASF* v *Commission*, paragraph 87 above, paragraph 374, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 423) and have borne individual and specific liability for the operation of the cartel (see, to that effect, *BASF* v *Commission*, paragraph 87 above, paragraph 300). That circumstance must be assessed from the overall perspective in the particular context of the case (see, to that effect, *BASF* v *Commission*, paragraph 87 above, paragraphs 299 and 373). It may, inter alia, be inferred from the fact that the undertaking, through specific initiatives, voluntarily gave a fundamental boost to the cartel (see, to that effect, *BASF* v *Commission*, paragraph 87 above, paragraphs 348, 370 to 375 and 427, and *Hoechst* v *Commission*, paragraph 426). It may also be inferred from a combination of indicia which reveal the determination of the undertaking to ensure the stability and success of the cartel (see, to that effect, *BASF* v *Commission*, paragraph 87 above, paragraph 351). This is the case where it is established that the undertaking carried out coordinating functions and has, inter alia, organised and staffed the secretariat responsible for the actual implementation of the cartel (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 246 and 247). The same applies where it is shown that that undertaking played a central role in the actual operation of the cartel, for example by organising various meetings, collecting and distributing information within the cartel, by taking it upon itself to represent some of the members in the context of the cartel or by most often suggesting proposals relating to the operation of the cartel (see, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369,

paragraphs 57 and 58, and *BASF* v *Commission*, paragraph 87 above, paragraphs 404, 439 and 461).

284 The fact that an undertaking exerted pressure, or even dictated the conduct of other members of the cartel is not, by contrast, a necessary precondition for that undertaking to be described as a leader in the cartel (*BASF* v *Commission*, paragraph 87 above, paragraph 374). The market position enjoyed by the undertaking and the resources at its disposal also cannot constitute evidence of a role of leader in the cartel, even though they form part of the context in which such evidence must be assessed (see, to that effect, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 283 above, paragraph 241, and *BASF* v *Commission*, paragraph 87 above, paragraph 299).

285 In the present case, as is apparent from recitals 511 to 513 of the contested decision, the Commission took account of the fact that the 'European secretariat' to the cartel existed throughout the duration of the cartel and that it remained stable in that time, despite the many organisational features of the cartel which changed. The secretariat had many tasks. With reference to recitals 121 to 123, 131, 132, 142, 147 to 149, 157 to 161, 173, 185 and 191 to 198 of the contested decision, the Commission points out that the 'European secretariat' to the cartel was the pivot for communication between the European undertakings, and between them and the Japanese undertakings, that it convened and chaired meetings and that it was responsible for accounting for the quotas. According to the Commission, it is apparent from that secretariat's messages, from the text of the GQ-Agreement and the EQ-Agreement, as well as from the practical operation of the cartel, that the role of the 'European secretary' was essential for the cartel. By taking the initiative, and dedicating significant resources to the cartel, the 'European secretary' rendered a considerable service to the cartel and contributed, in a special way, to the proper functioning of the cartel.

286 It is necessary, first, to ascertain whether, in the light of just the factual elements set out in the contested decision which are not disputed by Alstom or the companies of the Areva Group (see, inter alia, paragraphs 266 and 273), the Commission could, without infringing Article 23(2)(a) of Regulation No 1/2003, the third indent of Section 2 of the Guidelines and without committing an error of assessment, conclude that the undertaking in question played the role of leader in the infringement by assuming, from the end of 1999 until 11 May 2004, the duties of the 'European secretary' to the cartel, as is apparent from recital 147 of the contested decision.

287 In that regard, it must be stated that the tasks carried out by the 'European secretary' to the cartel conferred on that secretary the role of ringleader in the coordination of the cartel and, on any view, in the actual functioning of that cartel. As the Commission correctly stated in the contested decision, that 'European secretary' was the pivot for members of the cartel and played an essential role in the actual functioning of that cartel, inasmuch as it facilitated the exchange of information within the cartel, it bundled, compiled and exchanged essential information on the functioning of the cartel with other members of it and, in particular, information about the GIS projects, inasmuch as it organised and took charge of the secretariat for working meetings and inasmuch as, from time to time, it amended the codes intended to conceal those meetings and contacts. Furthermore, the Commission was entitled to find, in recitals 147 and 513 of the contested decision, that the 'European secretariat' to the cartel was a significant responsibility entailing considerable resources, whether in terms of time or staff made available. Without the coordination and central organisation ensured by that secretariat, the cartel would undoubtedly not have been able, in the light of its complexity, to function as efficiently. In addition, in the light of the fact that it is not disputed that the undertaking in question carried out those tasks on a permanent basis, from the end of 1999 to 8 January 2004, the Commission was entitled to conclude that that undertaking had, in the present case, represented a significant driving force in the cartel and, in that way, had a role of leader in the infringement, within the meaning of the third indent of Section 2 of the Guidelines.

288 That conclusion is not called into question by Alstom's other arguments or by those of the companies of the Areva Group.

289 At the outset, it should be observed that Alstom is unfounded in criticising the contested decision for relying on some factual and legal assessments which appear in the statement of objections (see paragraph 264). It is sufficient, in that respect, to recall that the statement of objections constitutes a preparatory document containing assessments of fact and of law which are purely provisional in nature (see paragraph 248).

290 As regards, next, those criteria for classification as leader in the infringement which are allegedly lacking in the present case, namely threats against undertakings which are not participating in the cartel, taking decisions regarding the expansion of the cartel or its relationships with third parties or even the role of inspiring or conceiving the cartel, it should be pointed out that they relate to the moment when a cartel is established or expanded and, therefore, relate to the role of 'instigator of the infringement' as was recalled in paragraph 281. Therefore, while such factors may be decisive for showing that the undertakings pushed or encouraged other undertakings to establish the cartel or to join it and, therefore, for classifying a party as 'instigator of the infringement' within the meaning of the third indent of Section 2 of the Guidelines (see, to that effect, *BASF* v *Commission*, paragraph 87 above, paragraphs 316 and 321), they are not decisive when determining whether an undertaking was a leader in the infringement, in which case it is sufficient, as in the present case, to establish that the relevant undertaking, in one way or another, represented a significant driving force in the cartel (see paragraph 283).

291 Moreover, even assuming that the undertaking in question did not have the economic power or a sufficiently important position to supervise and ensure compliance with the cartel, that does not suffice to preclude it from having been able to play a role of leader in the infringement, within the meaning of the third indent of Section 2 of the Guidelines. As is apparent from the case-law cited in paragraphs 283 and 284, the fact that the undertaking in question may not have been in a position to impose a course of conduct on other members of the cartel does not prevent it from having,

in one way or another — in the circumstances of this case, by carrying out the duties of the 'European secretary' to the cartel over a long period, even if those duties were administrative — represented a significant driving force in the cartel by enabling it to function in a stable and efficient manner.

292 As regards Alstom's allegations that the role of 'European secretary' to the cartel had been imposed on the undertaking in question 'around 2000', they are not supported by any evidence from the case-file in the present proceedings, or corroborated by the statement of Mr S of 15 September 2006 (see paragraph 23) or by recitals 147 and 191 of the contested decision, which Alstom relies on in that regard. In addition, Alstom's arguments that the undertaking in question did not voluntarily take up the duties of 'European secretary' to the cartel or that, in carrying out those duties, it had to follow certain predefined rules within the cartel, do not preclude it from having played a role of leader in the infringement. What matters in that regard is that the undertaking in question actually carried out the duties of 'European secretary' to the cartel on a permanent basis, from the end of 1999 until 8 January 2004, that is to say for a period of four years and two months, and that, in that way, played the role of ringleader in the coordination and the actual functioning of the cartel.

293 Likewise, the arguments claiming that the duties of the 'European secretary' to the cartel were not all carried out exclusively by the undertaking in question, but that, pursuant to the cartel rules, other undertakings were able to exchange information directly with one another, organise cartel meetings, in particular meetings regarding the management of the cartel, or implement the cartel, in particular with regard to the allocation of GIS projects, without referring to the 'European secretary' to the cartel are not such as to call into question the Commission's finding that the undertaking in question played a role of leader in the infringement within the cartel by assuming, over a long period, the duties ascribed to the 'European secretary' to the cartel. Neither recitals 120, 122, 149, 152, 157, 162, 180, 182, 185, 194, 197, 205 and 207 of the contested decision cited by Alstom, nor the evidence in the case-file in the present

proceedings allows for the conclusion that ABB or the other undertakings which participated in the cartel, who did not officially adopt the role of 'European secretary', acted, in practice, in the same way as the undertaking in question in the functioning of the cartel, with regard to both the frequency and duration and to the significance and intensity. In addition, even assuming that other undertakings which participated in the cartel, particularly ABB, had also played a significant role in determining the cartel's general strategy or by holding a position of authority within it, that could, at the very most, also justify an examination of their responsibility for the functioning of the cartel on the ground that they played a role of leader in the infringement, but cannot, on any reading, call into question the Commission's finding that the undertaking in question played a role of 'leader in the infringement' within the cartel by assuming all of the duties ascribed to the 'European secretary' to the cartel over a long period (see, to that effect, *BASF* v *Commission*, paragraph 87 above, paragraph 376).

294 It must therefore be held that the Commission was entitled to find, without infringing Article 23(2)(a) of Regulation No 1/2003 and the third indent of Section 2 of the guidelines, and without committing an error of assessment, that, by carrying out the duties of 'European secretary' to the cartel on a permanent basis from the end of 1999 to 8 January 2004 the undertaking in question played a role of leader in the infringement.

295 In addition, in so far as recitals 512 and 513 of the contested decision make clear the reasoning which the Commission followed in classifying the undertaking in question as a leader in the infringement, based on its coordinating duties and on its central role in the actual functioning of the cartel, the contested decision has been reasoned to the requisite legal standard, within the meaning of the case-law cited in paragraph 283. Accordingly, Alstom's ground of complaint alleging a breach of the duty to state reasons on that point must be rejected as unfounded. As the Commission correctly states, it is apparent from Alstom's own pleadings that it was in a position to

understand the reasoning followed by the Commission, in the contested decision, in classifying the undertaking in question as a leader in the infringement.

296 The ground of complaint alleging breach of the principles of equal treatment and proportionality amounts, in essence, to contesting whether the increase of 50 % in the basic amount of the fines imposed on Alstom and the companies of the Areva Group was fair.

297 It is clear from the case-law that respect for the principle of equal treatment or non-discrimination, as set out in paragraph 235, must be reconciled with the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, to that effect, Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14, and the case-law cited; Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 259, and *LR AF 1998* v *Commission*, paragraph 131 above, paragraph 367).

298 In addition, respect for the principle of proportionality, as set out in paragraph 235, requires that the fines must not be disproportionate to the aims pursued, that is to say compliance with competition law, and that the amount of the fine imposed on an undertaking in respect of an infringement of competition law must be proportional to the infringement, seen as a whole, having regard, in particular, to its gravity (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 240; Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 532, and judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 224).

299 In assessing the gravity of an infringement, it is necessary to take account of numerous elements whose nature and importance varies according to the type of infringement concerned and the special circumstances surrounding it (*Musique Diffusion française and Others* v *Commission*, paragraph 247 above, paragraph 120, and *JFE Engineering and Others* v *Commission*, paragraph 298 above, paragraph 532).

300 It should also be borne in mind that undertakings which participate in a long-term infringement may, at various times, take turns in exercising leadership — so that it cannot be ruled out that each of them, and the companies to which their behaviour is attributable, may have the aggravating circumstance of leader applied to them (*BASF* v *Commission*, paragraph 87 above, paragraph 460).

301 In order to ascertain whether there has been a breach of the principle of equal treatment, the treatment of Alstom and the companies of the Areva Group, on the one hand, must be compared with that of Siemens, ABB and the companies which managed the Japanese undertakings which participated in the infringement, on the other, with regard to the aggravated circumstance relating to role of 'leader in the infringement'.

302 First, it must be stated that, taking that aggravating circumstance into account, Alstom and the companies of the Areva Group were given a 50 % increase in the basic amount of their fine, which was identical to that applied to Siemens on the ground that the undertaking in question had, like the undertaking managed by Siemens, assumed the duties of 'European secretary' to the cartel over a long period. Alstom specifically criticises the fact that that treatment is identical, claiming that the situation of the undertaking in question was different than that of the undertaking managed by Siemens, in so far as it assumed the duties of 'European secretary' to the cartel for a period which was two times shorter than the period for which the undertaking managed by Siemens was 'European secretary'.

303 As has already been pointed out, it follows from recitals 147 and 178 of the contested decision that the undertaking managed by Siemens assumed the duties of 'European secretary' to the cartel from the beginning of the cartel, on 15 April 1988, until September 1999, that is to say, a period of approximately 11 years 5 months and that, after it had left the cartel, the undertaking in question assumed those duties from the end of 1999 until the cartel ended its activities, on 11 May 2004. Furthermore, as the theory of economic continuity has not been applied to them (paragraph 111) in the present case, Alstom and the companies of the Areva Group can be held personally liable for the driving role played by the undertaking in question in the functioning of the cartel only for the period during which they managed, directly or indirectly, the latter's activities. It follows from Article 1(b) and (f) of the contested decision, read in the light of recitals 358 and 371 thereof, that the role of leader in the infringement played by the undertaking in question can be attributed:

— to Alstom only from the end of 1999 until 8 January 2004, that is to say, a period of approximately four years and two months;

— to Areva T&D SA only from the end of 1999 until 11 May 2004, that is to say, a period of approximately four years and seven months;

— to Areva T&D AG only from 22 December 2003 until 11 May 2004, that is to say, a period of approximately five months;

— and to Areva and Areva T&D Holding only from 9 January to 11 May 2004, that is to say, a period of approximately four months.

304 There is therefore, in all those cases, a substantial difference between how long the undertaking under the management of Siemens carried out the duties of 'European secretary' to the cartel, and how long those duties were carried out by the undertaking in question, when managed by Alstom and the companies of the Areva Group.

305 In the contested decision, the Commission focused on the fact that both the undertaking managed by Siemens and the undertaking in question adopted the role of 'European secretariat' to the cartel alone, in a stable manner and over a long period. In that regard, it should be pointed out that, even if Alstom is correct that, in recitals 147 and 191 of the contested decision, the undertaking in question was identified merely as the 'temporary European secretary' to the cartel at the end of 1999 or the beginning of 2000, it does not dispute that, in March 2002, it was agreed that it would take over the role for an indefinite duration and therefore, in a stable manner and over a long period. Moreover, the consideration that the undertaking in question adopted the role of 'European secretariat' to the cartel alone, in a stable manner and over a long period, is not undermined by the fact, relied on by Alstom, that the undertaking in question only assumed the duties of 'European secretary' during a limited period of four years and two months, since that was independent of Alstom's intention and is merely a result of the fact that, following ABB's application for immunity (see paragraph 10), the Commission intervened to bring an end to the infringement.

306 The question is whether the substantial difference between the lengths of time for which the duties of 'European secretary' to the cartel were carried out, which are attributable to the various undertakings at issue, is relevant in respect of the aggravating circumstance of the role of leader in the infringement, or whether such a difference might, in the present case, be disregarded in the light of the fact that the role of European secretariat had been adopted by those undertakings on their own, in a stable manner and over a long period.

307 In the circumstances of the present case — an infringement over a long period during which different undertakings, managed by various companies, have successively played, for well-established periods, the role of leader in the infringement — the principles of equal treatment and proportionality require that the companies which managed one or more undertakings which, under their management, played the role of 'leader in the infringement' should have a different increase in the basic amount of their fine where the period during which the undertakings under their management played that role is substantially different. It must be noted that the role of leader relates to the functioning of the cartel (paragraph 281) and that, unlike the role of instigator of the cartel, it is bound to occur over a certain period. Therefore, account must be taken of the fact that a company which managed one of the undertakings which participated in the cartel can be found liable for being the driving force for that undertaking in the functioning of the cartel for, at most, a little over one quarter of the period of the infringement, as was the case with Alstom and the companies of the Areva Group, while another company which managed a different undertaking participating in the cartel can be found liable for being the driving force in the functioning of the cartel during almost three quarters of the period of the infringement, as was the case with Siemens. Moreover, the Commission itself admitted, at the hearing, that the period during which an undertaking played the role of 'leader in the infringement' was a criterion to be taken into account for the purposes of assessing the increase in liability arising from such a role (see paragraph 39).

308 It follows that, by imposing, in the contested decision, an identical increase in the basic amount of the fine on Alstom and the companies of the Areva Group, on the one hand, and on Siemens, on the other, although the periods during which the relevant undertaking carried out, under their management, the duties of 'European secretary' to the cartel were substantially different, the Commission breached the principles of equal treatment and proportionality.

309 Next, it must be noted that, as regards the aggravating circumstance of being a leader in the infringement, ABB was treated differently from Alstom and the companies of the Areva Group, since, unlike the latter, ABB was not classified as playing the 'role

of leader' in the infringement and, therefore, an increase in the basic amount of the fine was not imposed on it in respect of that aggravating circumstance. Alstom and the companies of the Areva Group criticise that difference in treatment, claiming that ABB's situation was comparable to theirs as regards the aggravating circumstance of being a leader in the infringement.

310 However, it has not been established, or even claimed, that ABB assumed the duties of 'European secretary' to the cartel or even that it carried out, alone, in a stable manner and over a long period, all of the duties normally conferred on that secretary. Furthermore, while it is generally admitted, even by the Commission, that ABB played a 'significant role' within the cartel, it has not been demonstrated that that role was comparable, with regard to the functioning of the cartel, to that played by the undertaking in question and by the undertaking managed by Siemens as 'European secretary' to the cartel. Therefore, it has not been established that ABB was in a comparable situation to that of Alstom or the companies of the Areva Group, or even to that of Siemens.

311 Even if the Commission had unlawfully applied criteria concerning the classification of an undertaking as leader in the infringement, as set out in paragraph 283, by not classifying ABB as such, despite the significant role which that undertaking played within the cartel, such an unlawful application, in favour of a third party, would not justify upholding the present grounds for annulment raised by Alstom and the companies of the Areva Group, pursuant to the case-law cited in paragraph 297.

312 It follows that the Court must reject the grounds of complaints alleging breach of the principle of non-discrimination in that Alstom and the companies of the Areva Group were not treated in the same way as ABB although they were in a comparable situation.

313 Lastly, it must be noted that Alstom and the companies of the Areva Group were also treated differently than the companies which controlled the Japanese undertakings, while they were participating in the infringement established in Article 1 of the contested decision, as regards the aggravating circumstance of being a leader in the infringement. In recital 511 of the contested decision, the Commission noted, in that regard, that 'the Japanese secretary … mainly concerned the exchanges amongst the Japanese counterparts and exchanges with the European secretary for [GIS] projects outside the EEA' and that that role was 'rotated for shorter periods between Hitachi, Toshiba and Melco', from which it inferred, in essence, that it was not possible to equate that role to that of 'leader in the infringement', within the meaning of the third indent of Section 2 of the Guidelines. Alstom and the companies of the Areva Group criticise that difference in treatment, claiming that, to the extent that the undertaking which they had managed successively had carried out the duties of 'European secretary' to the cartel for a period of approximately four years, they were in a situation that was substantively comparable to that of the companies which had each controlled a Japanese undertaking which had carried out the duties of 'Japanese secretary' during an equivalent period.

314 In the contested decision, the Commission considered, in the context of its assessment of the aggravating circumstance of being a leader in the infringement, that the carrying out of the duties of 'European secretary' to the cartel and the carrying out of the duties of 'Japanese secretary' to the cartel were not comparable. It took account of the fact that '[the role of] Japanese secretary … mainly concerned the exchanges amongst the Japanese counterparts and exchanges with the European secretary for projects outside the EEA'. In that regard, it stated in recitals 127, 128 and 246 of the contested decision that the participation of the Japanese undertakings in the infringement established in Article 1 of the contested decision was mainly linked to the existence of the 'common understanding' (see paragraph 29), under which the Japanese undertakings abstained from bidding for GIS projects in the EEA. It is apparent from that 'common understanding' that, unlike the 'European secretariat', the 'Japanese secretariat' was not a driving force behind the functioning of the cartel within the EEA and that the companies which managed the Japanese undertakings responsible for that secretariat did not incur specific liability in that regard. The grounds of

complaint submitted by Alstom and the companies of the Areva Group, according to which they were treated differently than the Japanese companies to the extent that the Commission did not apply the increase in the fine to the Japanese companies for the aggravating circumstance relating to the role of leader in the infringement played by the undertakings which were managed by those Japanese companies, must therefore be rejected, as their situation was not comparable to that of those Japanese companies.

315 Even if the Commission had unlawfully applied criteria concerning the classification of an undertaking as a leader in the infringement, as set out in paragraph 283 by not so classifying those Japanese companies which managed the undertakings which, in succession, carried out the duties of 'Japanese secretary' to the cartel for periods of two years, such an unlawful application in favour of a third party would not justify upholding the grounds of complaint referred to in paragraph 314, pursuant to the case-law cited in paragraph 297.

316 It follows that the Court must reject Alstom's grounds of complaint and those of the Areva Group alleging breach of the principle of non-discrimination in that Alstom and the companies of the Areva Group were treated differently from the Japanese undertakings although they were in a comparable situation.

317 It follows from all of the foregoing that Article 2(b) and (c) of the contested decision breaches the principle of proportionality and the principle of equal treatment or non-discrimination, inasmuch as it increases the basic amount of the fine imposed on Alstom and the companies of the Areva Group by 50%, identical to the increase imposed on Siemens, in respect of the aggravating circumstance of playing the role of leader in the infringement. Accordingly, Article 2(b) and (c) of the contested decision is annulled.

318 Therefore, it is necessary for the Court, in accordance with the claims of Alstom and the companies of the Areva Group that the decision be varied, to exercise its powers of unlimited jurisdiction under Article 229 EC, Article 17 of Regulation No 17 and Article 31 of Regulation No 1/2003 and, in that context, itself assess the relevant circumstances in the present case to determine the increase in the basic amount of the fine which should be applied to the companies concerned in respect of the aggravating circumstance that the undertaking in question played the role of leader in the infringement (see, to that effect, Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 111; *Volkswagen* v *Commission*, paragraph 88 above, paragraphs 149 and 151, and *BASF* v *Commission*, paragraph 87 above, paragraphs 303, 394 and 455). In that regard, it is important to bear in mind that, by virtue of the unlimited jurisdiction conferred on it by Article 17 of Regulation No 17 and Article 31 of Regulation No 1/2003, the judicature of the European Union is empowered, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine imposed where the question of the amount of the fine is before it (paragraphs 226 and 227; judgment of 8 February 2007 in *Groupe Danone* v *Commission*, paragraph 126 above, paragraphs 61 and 62, and Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 213).

319 The increase related to the role of leader in the infringement played by the undertaking in question must be set at a level which guarantees its deterrent effect (see, to that effect and by analogy, *ACF Chemiefarma* v *Commission*, paragraph 87 above, paragraph 173, and *Archer Daniels Midland* v *Commission*, paragraph 235 above, paragraph 141), that is to say, at a level which deters undertakings from assuming duties which are essential for the smooth functioning of a cartel.

320 In the present case, it is important to take into account the fact that, under the management of Alstom and the companies of the Areva Group, the undertaking in question adopted the role of 'European secretariat' to the cartel alone, in a stable manner and over a long period. Furthermore, it is necessary to bear in mind that, while it was managed, directly or indirectly, by Alstom and Areva T&D SA (formerly Alstom T&D SA), it took over the role of 'European secretariat' at a time when the cartel was

especially destabilised, from a European perspective, by the departure of the undertaking managed by Siemens, which had been the 'European secretary' to the cartel since 1988 and was a key player on the market, both outside and inside Europe, as is apparent from recital 178 of the contested decision. Moreover, it must be pointed out that Alstom itself accepted, in its written pleadings, that 'between 2000 and 2004, [it] was the only undertaking which was able to assume the role [of "European secretary" to the cartel] on account of interests at stake at a European level.'

321 It follows from all of those factors that the undertaking in question played a decisive role in the continuation and functioning of the cartel between the end of 1999 and 8 January 2004.

322 In addition, it must be taken into account that, as is apparent from paragraph 303, the period during which the undertaking managed by Siemens carried out, under Siemen's control, the duties of 'European secretary' to the cartel was substantially longer than the periods during which the undertaking in question, under the management of Alstom and Areva T&D SA, carried out the duties of 'European secretary' to the cartel and very much longer than the periods during which the undertaking in question, under the management of Areva T&D AG, Areva or Areva T&D Holding, carried out the duties of 'European secretary' to the cartel.

323 In the light of all of those circumstances, a fair assessment of the role of leader in the infringement played by the undertaking in question and attributable to Alstom and the companies of the Areva Group leads to the application of:

— a 35 % increase in the basic amount of the fine to be paid by Alstom. The amount due from Alstom must thus be fixed at EUR 58 522 500, for which it is jointly and severally liable with Areva T&D SA in respect of EUR 48 195 000;

— a 35 % increase in the basic amount of the fine to be paid by Areva T&D SA. The amount due from that company — for which it is jointly and severally liable with Alstom — must thus be fixed at EUR 48 195 000, for which it is jointly and severally liable with Areva T&D AG, Areva and Areva T&D Holding in respect of EUR 20 400 000;

— and a 20 % increase in the basic amount of the fine to be paid by Areva T&D AG, Areva and Areva T&D Holding. The amount due from those companies, for which they are jointly and severally liable with Areva T&D SA, must thus be fixed at EUR 20 400 000.

The seventh plea raised by the companies of the Areva Group, alleging a manifest error of assessment and infringement of Article 81 EC and Article 53 of the EEA Agreement and of the Leniency Notice, inasmuch as the Commission refused to grant them a reduction in the amount of their fine in respect of their cooperation during the administrative procedure

— Arguments of the parties

324 By their seventh plea, which is set out in two parts, the companies of the Areva Group challenge the Commission's refusal to grant them a reduction in the amount of their fine pursuant to the Leniency Notice, on the ground that the information which they submitted did not provide any significant added value. The first part alleges a manifest error of assessment as regards the extent of their cooperation. They allege that the Commission was wrong to take the view that the statements of the companies of the Areva Group, as they appear in their declaration pursuant to the Leniency Notice and in their reply to the statement of objections, were contradictory and ambiguous and that, therefore, they were not reliable. The second part of that plea is based on infringement of Article 81 EC and Article 53 of the EEA Agreement and of the

Leniency Notice, inasmuch as the Commission refused to grant them a reduction in the amount of their fine. The companies of the Areva Group claim that, by confirming, during the administrative procedure, that the undertaking controlled by Siemens had participated in the meeting of September 1999, they provided the Commission with evidence of significant added value with respect to the evidence already in the Commission's possession. Their testimony played a decisive role, in that it allowed the Commission to rule out the possibility that the participation of the undertaking controlled by Siemens in the infringement from 15 April 1988 to 24 April 1999 was time-barred, and even allowed it to extend the duration of that participation in the infringement until 1 September 1999.

325 The Commission disputes the arguments of the companies of the Areva Group and contends that the plea should be rejected.

— Findings of the Court

326 According to case-law, the reduction in the amount of fines which must be imposed on account of an infringement of competition law, in the event that undertakings which participated in the infringement cooperate, is based on the consideration that such cooperation facilitates the Commission's task of establishing an infringement and, where relevant, bringing it to an end (*Dansk Rørindustri and Others* v *Commission*, paragraph 131 above, paragraph 399; *BPB de Eendracht* v *Commission*, paragraph 235 above, paragraph 325, and Case T-388/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363).

327 Points 20 to 23 of the Leniency Notice state as follows:

'20. Undertakings that do not meet the conditions under section A [Immunity from fines] above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.

23. The Commission will determine in any final decision adopted at the end of the administrative procedure:

(a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

(b) the level of reduction an undertaking will benefit from …

In order to determine the level of reduction …, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

328 As is stated in point 29 of the Leniency Notice, the notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission, or when cooperating with it. In view of the legitimate expectation which undertakings are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on an undertaking, it assesses the latter's cooperation (see, by analogy, Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 147, and the case-law cited).

329 Within the limits set by the Leniency Notice, however, the Commission enjoys a broad discretion in assessing whether the evidence supplied to it by an undertaking brought added value, within the meaning of point 22 of the Leniency Notice, and whether it is appropriate to grant a reduction to an undertaking pursuant to that notice (see, by

analogy, *Dansk Rørindustri and Others* v *Commission,* paragraph 131 above, paragraphs 393 and 394). That assessment is the subject of limited review by the Court.

330 In recitals 530 to 532 of the contested decision, as regards Areva's cooperation, the Commission stated the following:

'(530) [Areva] was the second undertaking to approach the Commission under the Leniency Notice. On 14 May 2004 it announced its willingness to cooperate. On 18 and 25 May 2004, it lodged a statement which admitted the existence of a cartel and provided an overall description of anti-competitive activities.

(531) Whereas the overall picture of [Areva's] statement was on the whole consistent with the submissions of ABB, it contained little that could be qualified as providing "added value". The only information that was of added value was the declaration that 26 March 2002 was the day on which Siemens resumed its participation in cartel meetings. However, since such information concerned an addition of the duration of Siemens's participation of 3 months, this did not significantly strengthen the Commission's ability to prove the relevant facts and is hence not considered to qualify as significant added value. Moreover, some of [Areva's] statements have been dismissed as insufficiently reliable in this Decision [see for example recitals 290 and 291 of the contested decision], which has not facilitated the Commission's findings in this case.

(532) In conclusion, the information provided by [Areva] does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.'

331 It must be ascertained, first, whether the Commission committed a manifest error of assessment by taking the view that the statements of the companies of the Areva Group, referred to in recital 531 of the contested decision, were contradictory and ambiguous and therefore unreliable.

332 In paragraphs 290 to 291 of the contested decision, the Commission stated as follows:

> '(290) The Commission cannot rely on the submissions by [Areva], Melco, Hitachi/JAEPS and Toshiba as regards their respective claims that the cartel would have ended for the first time sometime in 1997 ([Areva]), or in September 1999 (Melco … and Toshiba …), or sometime in 1999 after Siemens's departure (Hitachi/JAEPS …), or in or around September 2000 (Fuji …). They are not reliable on that point because they contradict each other and … they are at odds with the evidence in the file. Melco, Toshiba, Fuji, ABB, Alstom, Reyrolle/VA TECH, and Magrini/Schneider (both became later VAS and hence VA TECH), continued to take part in multilateral meetings and contacts in 2000 and/or 2001 [see recitals 191 to 198 of the contested decision]. Furthermore, they are ambiguous and inconclusive.
>
> (291) [Areva] submits contradictory and ambiguous statements. It stated [in its declaration pursuant to the Leniency Notice] that … it would consider the first cartel had ended in 1997, while it stated instead in its Reply to the Statement of Objections … that the period between September 1999 and March 2002 was a transitional time where meetings would have been less frequent and, although maintaining their anticompetitive character, deployed no significant anticompetitive effects.'

333 As regards the statements from the companies of the Areva Group, pursuant to the Leniency Notice, of 18 and 25 May 2004, placed in the case-file of the present proceedings, it is not in dispute between the parties that the Commission, in recital 291 of the contested decision, referred to the following statement:

'A first cartel existed between the end of 1980 and 1997 when it was interrupted. From 1997 the participants continued to meet, but they did not agree on market sharing or price fixing and the meetings of that cartel ended in September 1999, as Siemens had definitively withdrawn.'

334 As regards the companies of the Areva Group's reply to the statement of objections of 30 June 2006, it is apparent from footnote No 353, relating to recital 291 of the contested decision, that the Commission was referring to the following statement:

"While it is true that the members of the cartel other than Siemens and Hitachi continued to meet, those meetings were half as frequent as during the preceding period and did not have meaningful anticompetitive effects … In relation to the methods applied, the period between September 1999 and March 2002 was a period of transition and "hesitation" for the cartel, between the collapse of the system under the GQ Agreement and the creation of a new system applied after March 2002 … While retaining the anticompetitive nature in certain respects, those meetings had, however, significantly reduced anti-competitive effects during the period from September 1999 to March 2002, by reason of the small number of [GIS] projects allocated (rendering the application of the [GQ Agreement] mechanisms redundant) and of the theoretical nature of the discussions about organising an alternative cartel (from that of the GQ Agreement) …'

335 In the light of the content of those statements, it must be held that the Commission has not committed a manifest error of assessment in finding that they were contradictory and ambiguous in nature. Whereas in their declaration pursuant to the Leniency Notice, the companies of the Areva Group seemed to refer to a succession of different infringements, a first cartel having ceased to exist in 1997, or, in any event, in September 1999, they seemed to admit, in their reply to the statement of objections, to the existence of a single continuous infringement, the period from September 1999 to March 2002 being simply presented as a period of transition and 'hesitation' in the functioning of the cartel. Account must also be taken of the fact that, as the Commission stated in recital 290 of the contested decision, the statements of the companies of the Areva Group — according to which the cartel, or a first cartel, ended, for the first time, during the course of 1997 — were contradicted by statements from other members of the cartel and by other specific evidence in the case-file. In that respect, it cannot be held that the evidence submitted by the companies of the Areva Group facilitated the Commission's task of establishing the existence of an infringement and that therefore they fulfilled the requirements laid down in point 21 of the Leniency Notice.

336 Therefore, it must be concluded that the contested decision is not vitiated by a manifest error of assessment, inasmuch as its refusal to grant a reduction in the amount of the fine imposed on the companies of the Areva Group is based on the Leniency Notice, and there is no need to consider the reasons capable of justifying the unreliability of the evidence at issue.

337 Second, it is necessary to ascertain whether the Commission infringed Article 81 EC, Article 53 of the EEA Agreement and point 21 of the Leniency Notice, by not taking the view that the declaration of the companies of the Areva Group pursuant to the Leniency Notice contained evidence which had significant added value, since it confirmed that the undertaking managed by Siemens only withdrew from the cartel in September 1999.

338 In recital 186 of the contested decision, the Commission stated as follows:

'Siemens claims that it interrupted its participation in cartel meetings as from the Sydney summit meeting on 24 April 1999. ABB indicated that Siemens interrupted its participation in cartel meetings as from late 1999 … The Commission established that Siemens's departure took place no earlier than September 1999. A document found at VA TECH's premises, and quoted in full length in footnote 94 above, confirms that Siemens's suspension of its participation in the meetings dated from September 1999 when it reads: "Stop 3 == > 09/99" ("3" being Siemens), followed by market shares from 1988 until 1998. This is confirmed by [Areva], Melco … Fuji … and Hitachi/JAEPS...'

339 It is, moreover, apparent from footnote No 94 to the contested decision, which is not disputed by the companies of the Areva Group, that 'No "3" was Siemens' code when creating the document of 10 June 2003'.

340 In recital 142 of the contested decision, the Commission stated, in that regard, that:

'At least from July 2002 onwards (see table II below), a different set of codes was used by the members of the cartel, as ABB explained …, corroborated by contemporaneous evidence … and by other parties' submissions after inspections ([Areva], VA Tech …, Hitachi/JAEPS … and Siemens …'

341 Table II, inserted in recital 142 of the contested decision, repeated the 'codes applied at least from July 2002'. It follows therefrom that the code for all the European parties together was '0'; ABB's code was '1'; Alstom's code was '2'; Siemen's code was '3'; VA

Tech's code was '4'; the code for all the Japanese parties together was '5'; JAEP's code was '6', and the code for TM T&D was '7'.

342 In footnote No 128 to the contested decision, it is stated as follows:

'[The fact that the various codes were used at least from July 2002 is confirmed by] a document … found with Mr Z. (VA Tech), dating from around August 2002 [which] confirmed that the cartel members would aim to communicate via a "pivot", avoiding meetings and communication on paper and using the codes 1, 2, 3, 4, 6 and 7 for respectively ABB, [Alstom], Siemens, VA Tech, Hitachi/JAEPS and TM T&D when indicating at which level they would like the approximate price to be.'

343 It is apparent from the foregoing that, even before the declaration from the companies of the Areva Group, the Commission had ABB's statement pursuant to the Leniency Notice, according to which Siemens had ceased to participate in the cartel meetings from the end of 1999 and was described, from July 2002, by the number '3'. It also had written evidence, dating back to the time of the infringement, from which it was apparent, or could be inferred, that Siemens' code was '3' in summer 2002 and that Siemens had ended its participation in the cartel in September 1999. The probative value of those documents, which the Commission relies on in the contested decision, has not been disputed by the companies of the Areva Group and, accordingly, that probative value cannot be called into question in the context of Case T-117/07. In that respect, it cannot be held, in the context of Case T-117/07, that the declaration of the companies of the Areva Group pursuant to the Leniency Notice was decisive in allowing the Commission to find that Siemens had participated in the infringement until September 1999. It further cannot be held, in Case T-117/07, that the declaration of the companies of the Areva Group facilitated the Commission's task and, in that respect, that it met the conditions laid down in point 21 of the Leniency Notice

which would allow Areva T&D SA, Areva T&D AG, Areva and Areva T&D Holding to benefit from a reduction in the amount of their fines.

344 Accordingly, in the contested decision, the Commission did not infringe Article 81 EC, Article 53 of the EEA Agreement or indeed point 21 of the Leniency Notice by refusing to grant a reduction in the amount of the fines imposed on the companies of the Areva Group in respect of their declaration pursuant to the Leniency Notice.

The eighth plea raised by Alstom, based on infringement of the Guidelines or, in the alternative, on breach of the principle of proportionality

— Arguments of the parties

345 By its eighth plea, Alstom claims, principally, that Article 2(b) and (c) of the contested decision is vitiated by an error of law, inasmuch as, for determining the amount of the fine imposed on account of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 1 January 2004, it relies on that undertaking's turnover throughout the territory of the EEA, even though the EEA Agreement entered into force only on 1 January 1994. In the alternative, Alstom claims that the principle of proportionality precludes the amount of the fine from being artificially increased by consideration of turnover obtained within an

area which did not exist at the material time, namely between 15 April 1988 and 1 January 1994.

346 The Commission disputes Alstom's arguments and contends that the present plea should be rejected as manifestly unfounded.

— Findings of the Court

347 The present plea raises, in essence, the question whether, in the contested decision, the Commission fixed the amount of the fine imposed on Alstom on account of the participation of the undertaking in question in the infringement for the period from 15 April 1988 to 8 January 2004 on the basis of turnover obtained by that undertaking within the EEA and, if so, whether the Commission thus committed an error of law.

348 As has already been pointed out in paragraph 298, under the principle of proportionality the amount of the fine imposed on an undertaking in respect of an infringement of competition law must be proportional to the infringement, seen as a whole.

349 Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 constitute the relevant legal basis pursuant to which the Commission may impose fines on undertakings and associations of undertakings for infringements of Article 81 EC (see, by analogy, judgment of 8 February 2007 in *Groupe Danone* v *Commission*, paragraph 126 above, paragraph 24) and, where appropriate, pursuant to Article 53 of the EEA Agreement. They provide that the fine imposed on each undertaking which participated in the infringement cannot exceed 10% of its total turnover in

the preceding business year. That ceiling seeks specifically to prevent fines imposed by the Commission from being disproportionate in relation to the size of the relevant undertaking (Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 24). In addition, it is apparent from Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 that, in fixing the amount of the fine within that limit, regard is to be had both to the gravity and to the duration of the infringement.

350 Whereas the starting amount of the fine is set according to the infringement, the gravity of the infringement is determined by reference to numerous other factors, in respect of which the Commission has a broad discretion (judgment of 8 February 2007 in *Groupe Danone* v *Commission*, paragraph 126 above, paragraph 25). The criteria for assessing the gravity of the infringement may include the volume and value of the goods in respect of which the infringement was committed, the size and economic power of the undertaking and, consequently, the influence which it was able to exert on the market. It follows that it is permissible for the Commission, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which gives an indication of the scale of the infringement (*Musique Diffusion française and Others* v *Commission*, paragraph 247 above, paragraphs 120 and 121; Case T-28/99 *Sigma Tecnologie* v *Commission* [2002] ECR II-1845, paragraph 86, and the case-law cited).

351 It is, moreover, clear from the case-law that, for the purposes of assessing the size and economic strength of an undertaking at the time of the infringement, it is necessary to refer to the turnover achieved by that undertaking at that time (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 86). The mere fact that the Commission refers, generally, to the last full year of the period of infringement to assess

the economic reality, as it was during that period, does not contravene the principle of proportionality (see, to that effect, *Aristrain* v *Commission*, paragraph 215 above, paragraphs 128 and 129).

352 While the Guidelines do not constitute the legal basis of decisions adopted by the Commission in the area in question, they nevertheless ensure legal certainty on the part of the undertakings since they determine the method which the Commission has bound itself to use for the purposes of setting fines (see judgment of 8 February 2007 in *Groupe Danone* v *Commission*, paragraph 126 above, paragraph 23, and the case-law cited).

353 Pursuant to the Guidelines, the gravity of infringements is established on the basis of a number of factors, some of which must be taken into account by the Commission.

354 In that regard, the Guidelines provide that, in addition to the nature of the infringement, its actual impact on the market and the size of the relevant geographic market, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect (Section 1 A, fourth paragraph).

355 In addition, account may also be taken of the fact that large undertakings are in a better position to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from it under competition law (Section 1 A, fifth paragraph).

356 Where an infringement involves several undertakings, such as cartels, a weighting may be applied to the general starting amount in order to establish a specific starting amount which takes account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between undertakings committing infringements of the same type (Section 1 A, sixth paragraph).

357 It should be noted that the Guidelines do not state that fines should be calculated according to the overall turnover of the undertakings concerned or their turnover on the relevant market. Nor, however, do they preclude either figure being taken into account in determining the amount of the fine, in order to ensure compliance with the fundamental principles of EU law and where circumstances so require. In particular, turnover may be relevant when considering the various factors mentioned in paragraphs 354 to 356 (*LR AF 1998* v *Commission*, paragraph 131 above, paragraphs 283 and 284, and *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 283 above, paragraph 187).

358 In the present case, after having, in recitals 474 to 479 of the contested decision, determined the gravity of the infringement in and of itself — it being classified as 'very serious' — the Commission took into account factors likely to differentiate the treatment of individuals undertakings, in accordance with the methodology set out in Section 1 A of the Guidelines.

359 In that regard, it is apparent from recitals 480 to 491 of the contested decision that the Commission took account of the effective economic capacity of each of the parties involved in the infringement to cause significant damage to other operators and of the specific size, and therefore the actual impact, of each undertaking's infringing conduct on competition, to ensure that the fines imposed have sufficient deterrent effect.

360 In recitals 481 and 482 of the contested decision, the Commission considered that, given the global character of the cartel, it was appropriate to take the share of worldwide turnover in relation to GIS projects held by each undertaking in the last full year of the infringement as the basis for comparison of the relative significance of each undertaking. According to the Commission, that basis of comparison was such as to give the most appropriate picture of the capacity of each undertaking to cause significant damage to other operators in the EEA and to give an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated.

361 In order to calculate the basic amount of the fine imposed on Alstom, the Commission thus relied on the worldwide turnover in relation to GIS projects achieved by the undertaking in question during the last full year of the infringement and not, as Alstom alleges, on the turnover in relation to GIS projects achieved throughout the duration of the infringement in the EEA. It follows that Alstom's plea is factually inaccurate.

362 In any event, it follows from the foregoing that, in the contested decision, the Commission did not deviate from the calculation method laid down in the Guidelines, did not exceed the legal framework for penalties established by Article 15 of Regulation No 17 and Article 23 of Regulation No 1/2003 and did not breach the principle of proportionality, by deciding to refer, in principle, to the worldwide turnover in relation to GIS projects achieved by each undertaking in the last full year of the infringement, in order to assess the relative size and economic power of each undertaking at the time of the infringement.

363 It follows that the plea alleging infringement of the Guidelines and, in the alternative, breach of the principle of proportionality must be rejected.

Costs

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

365 In Case T-117/07, as the action has been upheld in part, on a fair assessment of the circumstances of the case, the Court will order the Commission to pay one-tenth of the costs incurred by Areva, Areva T&D Holding, Areva T&D SA and Areva T&D AG and one-tenth of its own costs. Areva, Areva T&D Holding, Areva T&D SA and Areva T&D AG will be ordered to pay nine-tenths of their own costs and nine-tenths of the Commission's costs.

366 In case T-121/07, as the action was upheld in part, on a fair assessment of the circumstances of the case, the Court will order the Commission to pay one-tenth of the costs incurred by Alstom and one-tenth of its own costs. Alstom will be ordered to pay nine-tenths of its own costs and nine-tenths of the Commission's costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Joins Cases T-117/07 and T-121/07 for the purposes of the judgment;

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

3. For the infringements found in Article 1(b) to (f) of Decision C (2006) 6762 final, imposes the following fines:

— Alstom, société anonyme: EUR 10 327 500;

— Alstom: EUR 48 195 000, for which it is jointly and severally liable with Areva T&D SA. In respect of EUR 20 400 000 of the amount owed by Areva T&D SA, it is jointly and severally liable together with Areva T&D AG, Areva, société anonyme, and Areva T&D Holding SA;

4. Dismisses the actions as to the remainder;

5. In Case T-117/07, orders the European Commission to pay one-tenth of the costs incurred by Areva, Areva T&D Holding, Areva T&D SA and Areva T&D AG and one-tenth of its own costs. Areva, Areva T&D SA and Areva T&D AG are ordered to pay nine-tenths of their own costs and nine-tenths of the Commission's costs;

6. In Case T-121/07, orders the Commission to pay one-tenth of the costs incurred by Alstom and one-tenth of its own costs. Alstom is ordered to pay nine-tenths of its own costs and nine-tenths of the Commission's costs.

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 3 March 2011.

[Signatures]

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