Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 26 April 2017 [1]

Case C-180/16 P

Toshiba Corporation
v

European Commission

(Appeal — Article 101 TFEU — Gas Insulated Switchgear — Commission decision amending the initial decision after partial annulment by the General Court — Fines — Rights of defence — Statement of objections — Equal treatment — Participation in certain aspects of the cartel — Res judicata)

1. By this appeal, Toshiba Corp. ('Toshiba') requests the Court to set aside the judgment of the General Court [2] by which the latter dismissed its action for annulment of a decision of the Commission, adopted on 27 June 2012 [3] ('the contested decision') pursuant to Article 23(2) of Council Regulation (EC) No 1/2003. [4] The contested decision amended a previous decision of the Commission, adopted on 24 January 2007 [5] ('the 2007 decision'), which fined certain European and Japanese undertakings, including Toshiba, for taking part in a worldwide cartel on the market for gas insulated switchgear ('GIS') equipment.

2. The 2007 decision had been annulled by the General Court in so far as it imposed a fine on Toshiba, on the ground that the Commission had infringed the principle of equal treatment when setting the amount of the fine. [6] However, the Commission's finding of an infringement of Article 81 EC had remained in effect. In order to remedy that situation, the Commission adopted the contested decision, by which it imposed a new fine on Toshiba. That fine was calculated by applying the methodology suggested by the General Court.

3. This appeal raises a procedural issue, namely the question whether the Commission is required to issue a new statement of objections prior to the re-adoption of a decision that has been annulled by the General Court. It also raises issues pertaining to the calculation of the fine with regard to the principle of equal treatment.

1 — Original language: English.

2 — Judgment of 19 January 2016, *Toshiba* v *Commission*, T-404/12, EU:T:2016:18 ('the judgment under appeal').

3 — Commission Decision C(2012) 4381 final of 27 June 2012 amending Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty (now Article 101 [TFEU]) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corporation and Toshiba Corporation (COMP/39.966 – Gas Insulated Switchgear – fines).

4 — Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

5 — Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.899 – Gas Insulated Switchgear).

6 — Judgment of 12 July 2011, *Toshiba* v *Commission*, T-113/07, EU:T:2011:343 ('the 2011 judgment'). The appeal brought against the 2011 judgment was dismissed by the Court in its judgment of 19 December 2013, *Siemens* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866 ('the 2013 judgment').

I. **Legal framework**

4. Article 7(1) of Regulation No 1/2003 ('Finding and termination of infringement') provides:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101] or of Article [102] of the Treaty, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. …'

5. Article 23 of Regulation No 1/2003 ('Fines') states:

'…

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101] or Article [102] of the Treaty; …

…

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

…'

6. Article 27(1) of Regulation No 1/2003 ('Hearing of the parties, complainants and others') provides:

'Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. …'

7. Article 10 of Commission Regulation (EC) No 773/2004[7] ('Statement of objections and reply') states:

'1. The Commission shall inform the parties concerned in writing of the objections raised against them. The statement of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, set a time limit within which these parties may inform it in writing of their views. …'

8. Article 11 of Regulation No 773/2004 provides:

'1. The Commission shall give the parties to whom it has addressed a statement of objections the opportunity to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation… No 1/2003.

2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.'

7 — Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

9. The first, the second and the third paragraphs of Section 1.A of the Commission's 1998 Guidelines on the method of setting fines,[8] state:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

…

Within each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed.'

10. According to the sixth subparagraph of Section 1.A of the 1998 Guidelines:

'Where an infringement involves several undertakings (e.g. cartels), it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take 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 the sizes of the undertakings committing infringements of the same type.'

II. **Background to the proceedings**

A. **The 2007 decision and its background**

11. The case was opened on the basis of an application for immunity from fines. Following unannounced inspections at the premises of several GIS producers, the Commission adopted a statement of objections on 20 April 2006. An addendum to the statement of objections was issued on 21 June 2006 (together 'the 2006 statement of objections'). An oral hearing was held on 18 and 19 July 2006.

12. In the 2007 decision, the Commission found that the main Japanese and European providers of GIS, including Mitsubishi Electric Corporation ('Melco') and Toshiba, had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area ('EEA Agreement') by coordinating the allocation of GIS projects worldwide on the basis of quotas largely reflecting historic market shares.

13. The infringement at issue in the 2007 decision comprised three essential components.

14. First, GIS projects worldwide were allocated according to the rules laid down in an agreement signed in Vienna on 15 April 1988 ('the GQ Agreement'). The GQ Agreement, which was applicable worldwide except in the United States, Canada, Japan and the countries of the European members of the cartel, was based on the allocation of a 'joint Japanese quota' to the Japanese producers and a 'joint European quota' to the European producers.

8 — The Commission's 1998 Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the 1998 Guidelines').

15. Second, there was a 'common understanding' that GIS projects in Japan were reserved to the Japanese producers, while GIS projects in the domestic markets of the European members of the cartel were reserved respectively to those European producers. Moreover, according to the 'common understanding', GIS projects in other European countries were also reserved to the European members of the cartel, since the Japanese members had undertaken not to bid in Europe.

16. Third, another agreement, also signed in Vienna on 15 April 1988, ('the EQ-Agreement') specified how the joint European quota was to be shared amongst the European producers.

17. The Commission regarded this set of measures as a single and continuous infringement, which had as its object the restriction of competition within the meaning of Article 81 EC and Article 53 of the EEA Agreement.

18. In Article 1 of the 2007 decision, the Commission found that Toshiba had participated in the infringement from at least 15 April 1988 (when the GQ Agreement and the EQ Agreement were signed) until 11 May 2004 (when the Commission carried out unannounced inspections at the premises of the major GIS providers). [9]

19. However, from 1 October 2002 until 11 May 2004, Toshiba had participated in the infringement through its 50/50 joint venture with Melco, TM T&D Corporation ('TM T&D'). Both parent companies had exercised a decisive influence on TM T&D's behaviour. Therefore, Toshiba was held solely liable for its involvement in the infringement between 15 April 1988 and 1 October 2002, and jointly and severally liable with Melco for the infringement committed by TM T&D between 1 October 2002 and 11 May 2004. [10]

20. Consequently, in Article 2(h) and (i) of the 2007 decision, Toshiba was fined an amount of EUR 86 250 000, while a fine of EUR 4 650 000 was imposed jointly and severally on Toshiba and Melco.

B. **The appeal against the 2007 decision**

21. In the 2011 judgment, the General Court dismissed the application seeking annulment of Article 1 of the 2007 decision. However, it annulled Article 2(h) and (i) of the 2007 decision in so far as it concerned Toshiba [11] on the ground that, by using different reference years for the Japanese producers (2001) and the European producers (2003) in order to calculate the starting amounts of the fines, the Commission had infringed the principle of equal treatment. [12]

22. The Commission's objective had been to take account of the uneven competitive position between Toshiba and Melco by referring to the last year of Toshiba and Melco's participation in the cartel as individual undertakings, that is 2001. The General Court held that such objective was legitimate, but it could have been achieved without treating the Japanese producers and the European producers differently. By way of example, in order to determine the starting amounts of Toshiba's and Melco's fines, the Commission could have calculated TM T&D's starting amount from TM T&D's turnover *in 2003*, then divided TM T&D's starting amount between Toshiba and Melco in accordance with the proportion of GIS sales made by them in 2001. The Commission would thus have used 2003 as the reference year for the Japanese producers as well.

9 — See recitals 324, 326 and 332 of the 2007 decision.

10 — See recitals 61, 324, 326, 332, 405, 407, 428 and 429 of the 2007 decision.

11 — See points 18 and 20 above.

12 — Paragraphs 280 to 297 of the 2011 judgment. By another judgment, the General Court annulled Article 2(g) and (h) of the 2007 decision in so far as it concerned Melco (Article 2(g) imposed on Melco a fine of EUR 113 925 000) (judgment of 12 July 2011, *Mitsubishi Electric* v *Commission*, T-133/07, EU:T:2011:345, paragraphs 264 to 282). The ground for annulment was the same as the one in the 2011 judgment.

23. In the 2013 judgment, the Court dismissed the appeal brought against the 2011 judgment.

C. **The contested decision and its background**

24. On 15 February 2012, the Commission sent Toshiba a letter of facts, in which it stated that it intended to adopt a new decision imposing a fine on Toshiba and set out the facts which, in its view, were relevant for the calculation of that fine ('the 2012 letter of facts').

25. On 7 and 23 March 2012, Toshiba submitted its comments on the letter of facts.

26. On 12 June 2012, a meeting was held between Toshiba's representatives and the Commission team responsible for the case.

27. On 27 June 2012, the Commission adopted the contested decision. That decision amended, in particular, Article 2(h) and (i) of the 2007 decision. It found Toshiba to be solely liable for an amount of EUR 56 793 000, and Toshiba and Melco to be jointly and severally liable for an amount of EUR 4 650 000.[13] Those amounts were calculated by using 2003 as the reference year and by applying the calculation method suggested by the General Court in the 2011 judgment.[14]

III. **Proceedings before the General Court and judgment under appeal**

28. On 12 September 2012, Toshiba brought an action for the annulment of the contested decision.

29. By judgment of 19 January 2016, the General Court dismissed the action seeking the annulment of the contested decision.

30. First, the General Court found that, by failing to send Toshiba a new statement of objections, rather than a letter of facts, prior to the adoption of the contested decision, the Commission had not infringed Toshiba's rights of defence. The 2006 statement of objections gave Toshiba the information necessary to enable it to defend itself properly, since it set out the essential elements for the determination of the fine. The veracity, relevance or validity of those elements had not been called into question in the 2011 judgment. In the contested decision, the Commission had not relied on elements other than those set out in the 2006 statement of objections.

31. Second, the General Court held that the Commission had not failed to state the reasons for setting TM T&D's starting amount at EUR 31 000 000.

32. Third, the General Court found that, by calculating the fine imposed on Toshiba on the basis of a hypothetical joint venture starting amount, not on the basis of Toshiba's turnover, the Commission had not infringed the principle of equal treatment. Since Toshiba had not made any GIS sales in 2003 (it had transferred its GIS operations to TM T&D), its fine could not be calculated in the exact same manner as that of the European producers.

33. Fourth, the General Court held that the Commission had not infringed the principle of equal treatment by setting the starting amounts without taking into consideration the fact that Toshiba had not participated in the collusive measures in the EEA, whereas the European producers had taken part in those measures.

13 — The contested decision amended also Article 2(g) of the 2007 decision so that Melco was held solely liable for an amount of EUR 74 817 000.

14 — See point 22 above and points 79 and 80 below.

IV. **Proceedings before the Court and forms of order sought**

34. By appeal lodged on 29 March 2016, Toshiba requests the Court to set aside the judgment of the General Court, and either annul the contested decision, reduce the amount of the fine imposed on it pursuant to Article 261 TFEU, or refer the case back to the General Court. Toshiba also requests the Court to order the Commission to pay the costs of the appeal and of the proceedings at first instance.

35. The Commission requests the Court to dismiss the appeal and order Toshiba to pay the costs of the appeal.

V. **Assessment of the grounds of appeal**

36. Toshiba puts forward three grounds of appeal. First, it submits that the General Court erred in law in finding that its rights of defence were not breached by the Commission. Second, it contends that the General Court erred in law in finding that the method applied by the Commission for the calculation of its fine did not infringe the principle of equal treatment. Third, it complains that the General Court erred in law in concluding that, by failing to reduce its fine on account of its relative participation in the infringement, the Commission did not infringe the principle of equal treatment.

A. **First ground of appeal**

1. ***Arguments of the parties***

37. By its first ground of appeal, Toshiba submits that the General Court erred in law in finding that, by issuing a letter of facts rather than a statement of objections prior to the adoption of the contested decision, the Commission did not infringe its rights of defence. In Toshiba's view, the Commission was required to adopt a statement of objections.

38. Toshiba argues, first, that, contrary to the General Court's finding at paragraph 42 of the judgment under appeal, the procedure which led to the contested decision is not the 'extension' of the procedure which led to the 2007 decision.

39. Second, Toshiba submits that, while the General Court was right in finding, at paragraph 74 of the judgment under appeal, that the Commission was required to provide additional information as to how it intended to ensure the deterrent effect of the fine, it contradicted itself by stating in that very same paragraph that that information could be provided 'following the communication of the statement of objections', rather than in the statement of objections. At paragraph 74 of the judgment under appeal, the General Court recognised that Toshiba had a right to be heard, not only on the additional amount of the fine imposed for deterrence, but also on the method of setting the fine in general. Toshiba's rights of defence are protected only if the additional information on deterrence referred to in paragraph 74 is provided in a statement of objections, since the adoption of a statement of objections is, unlike that of a letter of facts, provided for by Regulation No 1/2003 and Regulation No 773/2004, and it triggers other procedural rights, namely the adoption of a decision by the College of Commissioners and an oral hearing.

40. The Commission contends that, if the first ground of appeal is to be understood as meaning that a fine could only be imposed in a new proceeding, it is inadmissible as it was not raised at first instance.

41. As to the merits, the Commission submits that the first ground of appeal, should it be understood as meaning that a new statement of objections had to be issued prior to the adoption of the contested decision, must be rejected.

42. First, the Commission stresses that the General Court was right in finding, at paragraph 42 of the judgment under appeal, that the procedure which led to the contested decision was the extension of the procedure which led to the 2007 decision. This is because it is settled case-law that the procedure for replacing a measure annulled by the General Court must be resumed at the very point at which the illegality occurred.

43. Second, the Commission maintains that, although it issued a letter of facts prior to the adoption of the contested decision, it was not required to do so, since all necessary information with regard to the calculation of the fine had already been provided in the 2006 statement of objections. The General Court erred in law in finding, at paragraph 74 of the judgment under appeal, that the Commission was required to provide information as to how it intended to ensure the deterrent effect of the fine, since the case-law relied upon by the General Court in that paragraph applies, not to the calculation of the fine, but to the finding of an infringement.

2. ***Assessment***

(a) ***Admissibility***

44. The Commission contends that the first ground of appeal is inadmissible since it is a new plea in law. According to the Commission, Toshiba did not raise before the General Court the argument that the Commission could not adopt the contested decision without conducting a new proceeding.

45. It is true that Toshiba did not argue before the General Court that the Commission could not adopt the contested decision without repeating the whole proceeding. However, it has not raised that plea before this Court either. By stating that the procedure which led to the contested decision is not the 'extension' of the procedure which led to the 2007 decision, Toshiba only submits that a new statement of objections is required since the 2006 statement of objections is not a valid preparatory step for the adoption of the contested decision. In its reply, Toshiba clarifies that, by the first ground of appeal, it is only criticising the General Court for having rejected its claim that a new statement of objections is necessary.

46. Therefore, I consider that the first ground of appeal is admissible.

(b) ***Substance***

47. The Commission was not, in my view, required to issue a new statement of objections before the adoption of the contested decision. First, the annulment of the 2007 decision had no effect on the validity of the 2006 statement of objections. Second, the Commission was under no obligation to provide information as to how it intended to ensure the deterrent effect of the fine in the contested decision.

(1) *Validity of the 2006 statement of objections*

48. It is settled case-law that annulment of a Union measure does not necessarily affect the preparatory acts, since the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred.[15]

15 — Judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582 ('*PVC II*'), paragraph 73; of 1 July 2009, *ThyssenKrupp Stainless* v *Commission*, T-24/07, EU:T:2009:236 ('*ThyssenKrupp Stainless*'), paragraph 232; of 25 June 2010, *Imperial Chemical Industries* v *Commission*, T-66/01, EU:T:2010:255, paragraph 125; of 27 June 2012, *Bolloré* v *Commission*, T-372/10, EU:T:2012:325 ('*Bolloré*'), paragraph 74; and of 9 December 2014, *Feralpi* v *Commission*, T-70/10, EU:T:2014:1031, paragraph 133.

49. The question whether the annulment of the 2007 decision had an effect on the validity of the 2006 statement of objections must be answered by reference to the scope of the 2011 judgment. In order to determine the scope of that judgment, it is necessary to refer to its grounds. Those grounds, first, identify the exact provision regarded as unlawful and, second, show the exact reasons for the illegality found in the operative part.[16]

50. The grounds of the 2011 judgment indicate that the 2007 decision was annulled on account of a breach of the principle of equal treatment in the calculation of the fine. In order to calculate the starting amounts of the fines, the Commission used 2001 as the reference year for the Japanese producers and 2003 for the European producers. 2003 was the last full year of the infringement. By using 2001 as the reference year for the Japanese producers, the Commission had sought to take account of the uneven market position of the two shareholders of TM T&D (Melco held a considerably larger share of the worldwide GIS market than Toshiba). 2001 was the last year of Toshiba's and Melco's direct participation in the infringement prior to the creation of TM T&D. Taking account of the uneven position of Toshiba and Melco would have been impossible if the Commission had divided TM T&D's turnover for 2003 between Toshiba and Melco in accordance with their respective shares in the joint venture (it was a 50/50 joint venture). The General Court found that, although the Commission's objective had been legitimate, it could have been achieved without treating the Japanese producers and the European producers unequally. For instance, the Commission could have used TM T&D's turnover for 2003 to calculate TM T&D's starting amount and then divided it between Toshiba and Melco in accordance with the proportion of GIS sales made by them in 2001.[17] Therefore, the illegality consisted in the choice of the reference year used to calculate the starting amounts of the fines.

51. It is not disputed that there is no indication in the 2006 statement of objections that, in order to calculate the starting amounts, different years may be used for the Japanese producers and for the European producers. Therefore, the finding, in the 2011 judgment, that the choice of 2001 as the reference year for the Japanese producers is illegal cannot affect the validity of the 2006 statement of objections.

52. Consequently, the General Court correctly held, at paragraph 42 of the judgment under appeal, that the content of the 2006 statement of objections '[had] not been called into question in the [2011] judgment'.

53. That conclusion is not affected by the judgments in *ThyssenKrupp Stainless*[18] and *Bolloré*,[19] where a new statement of objections was deemed necessary prior to the re-adoption of a decision annulled by the General Court.

16 — Judgment of 20 April 1999, *Limburgse Vinyl Maatschappij* v *Commission*, T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 184.

17 — See the 2011 judgment, paragraphs 286 to 293. Before the Court, Toshiba did not challenge the General Court's findings in those paragraphs. Only Siemens, a European producer, did, on the ground that the Commission should have used 2001 as the reference year for the European producers as well (judgment of 19 December 2013, *Siemens* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraphs 29 to 31, 271 to 276, and 285 to 296).

18 — Cited in footnote 15, paragraph 233.

19 — Cited in footnote 15, paragraph 75.

54. In those two cases, the initial decisions of the Commission were annulled on the ground that they relied on elements that had not been included in the statement of objections and on which the parties had not been offered an opportunity to make their views known. [20]

55. By contrast, in the present case, the 2007 decision was annulled on the ground that, by using different reference years for the Japanese producers and the European producers, the Commission had treated them unequally. The 2007 decision was not annulled on the ground that the Commission's intention to use 2001 as the reference year for the Japanese producers had not been mentioned in the 2006 statement of objections.

56. Nor is the conclusion at point 52 above affected by Toshiba's argument that the judgment in *PVC II* is not applicable to the present case. In *PVC II*, the Court held that a new statement of objections was not required. [21] According to Toshiba, in *PVC II*, the decision was annulled on account of a procedural defect, whereas in the present case the 2007 decision was annulled on account of the illegality of the method of setting the fine.

57. In my view, the reason why a new statement of objections was not deemed necessary in *PVC II* is not that the error affected the procedure, rather than the merits of the decision or the calculation of the fine. It is that the error consisted in the incorrect authentication of the decision by the College of Commissioners. Since only the decision finding an infringement of Article 101 or 102 TFEU (not the statement of objections) requires authentication, that error could not affect the validity of the statement of objections. [22] The same may be said of the judgment in *ICI II*. [23]

58. I should add that the situation in the present case differs from the one considered by Advocate General Wahl in his recent opinion in *Feralpi*. [24]

59. The Commission's decision had been annulled on the ground that its legal basis was Article 65(4) and (5) CS, and the Commission no longer had competence to find an infringement of Article 65(1) CS after the expiry of the ECSC Treaty. [25] The Commission then adopted a new decision on the basis of Article 7(1) and Article 23(2) of Regulation No 1/2003. In *Feralpi*, the General Court held that the Commission was not required to adopt a fresh statement of objections prior to the adoption of the new decision, since, first, the illegality had occurred at the stage of the adoption of the decision, and second, the facts and objections were the same in both decisions. [26]

20 — The Commission decision was partially annulled on the ground that the Commission's intention to attribute to ThyssenKrupp Stainless liability for the conduct of its subsidiary Thyssen had not been mentioned in the statement of objections addressed to ThyssenKrupp Stainless (judgments of 13 December 2001, *Krupp Thyssen Stainless* v *Commission*, T-45/98 and T-47/98, EU:T:2001:288, paragraphs 58 to 68; and of 14 July 2005, *ThyssenKrupp* v *Commission*, C-65/02 P and C-73/02 P, EU:C:2005:454, paragraphs 80 to 97); and on the ground that the Commission's intention to hold Bolloré liable, not only for the conduct of its subsidiary Copigraph, but also for its own direct involvement in the cartel, had not been mentioned in the statement of objections (judgments of 26 April 2007, *Bolloré* v *Commission*, T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, EU:T:2007:115, paragraph 79; and of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission*, C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraphs 44 and 45).

21 — Cited in footnote 15, paragraphs 74 to 76.

22 — Judgment of 15 June 1994, *Commission* v *BASF and Others*, C-137/92 P, paragraphs 74 to 78.

23 — Judgment of 29 June 1995, *ICI* v *Commission*, T-37/91('*ICI II*'), paragraphs 90 to 93.

24 — Opinion of Advocate General Wahl of 8 December 2016 in *Feralpi* v *Commission*, C-85/15 P, EU:C:2016:940. The case is pending before the Court.

25 — Judgment of 25 October 2007, *SP* v *Commission*, T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317, paragraph 120.

26 — Judgment of 9 December 2014, *Feralpi* v *Commission*, T-70/10, EU:T:2014:1031 ('*Feralpi*'), paragraphs 128 to 142.

60. According to Advocate General Wahl, the judgment of the General Court should be set aside, and the new decision should be annulled. First, there had been no steps carried out in conformity with the procedure set out in Regulations Nos 1/2003 or 17,[27] either after the annulment of the decision[28] or before[29]that annulment. Second, the procedural steps taken under the provisions of the ECSC Treaty could not be regarded as valid preparatory acts for the new decision. This was because the powers conferred on the Commission by Regulation No 1/2003 were different from those conferred on it by the ECSC Treaty,[30] and 'there was no procedure – carried out under the provisions of Regulations Nos 17 and 2842/98[31] corresponding to those new provided for in Regulations Nos 1/2003 and 773/2004 – that the Commission could resume so as to *immediately* proceed to the adoption of the new decision'.[32] Therefore, the Commission could not issue a new decision without, at least, holding a new oral hearing so that the parties could develop their arguments in the presence of the representatives of the Member States' competition authorities, which are invited to the oral hearing and which, as members of the Advisory Committee, must be consulted by the Commission before it adopts a decision. It was all the more important to involve, in particular, the Italian competition authority, since the alleged infringement related to the territory of only one Member State, namely Italy.[33]

61. As mentioned above, I consider that the situation in the present case differs from the situation in *Feralpi*, and the solution proposed by Advocate General Wahl cannot be applied to the present case. In *Feralpi*, the reason why the Commission could not, in Advocate General Wahl's view, immediately proceed to adopt a new decision was that the administrative procedure prior to the annulment of the decision had been (mostly) carried out under procedural rules that had ceased to be applicable, and the new procedural rules could not be regarded as equivalent.[34] By contrast, in the present case, the same procedural rules (Regulations Nos 1/2003 and 773/2004) were applicable throughout the whole procedure. They were applicable when the statement of objections was issued, on 20 April 2006, and when the contested decision was adopted.[35] Hence, there is no question that the Commission could *immediately* proceed to adopt the contested decision after the annulment of the 2007 decision.

62. For the above reasons, I consider that the validity of the 2006 statement of objections was not affected by the annulment of the 2007 decision. Therefore, the General Court was right in finding, at paragraph 42 of the judgment under appeal, that the information provided in the 2006 statement of objections had to be taken into account in order to determine whether Toshiba's rights of defence were respected in the procedure which led to the adoption of the contested decision.

27 — EEC Council Regulation [of 6 February 1962]: First Regulation implementing Articles [81 and 82 EC] (OJ, English Special Edition 1959-1962, p. 87). Regulation No 17 was repealed and replaced by Regulation No 1/2003 from 1 May 2004.

28 — With the exception of the consultation of the Advisory Committee (Opinion of Advocate General Wahl of 8 December 2016 in *Feralpi* v *Commission*, C-85/15 P, EU:C:2016:940, point 31).

29 — Prior to the annulment of the decision, the Commission took certain procedural steps pursuant to Regulation No 17 (it issued a supplementary statement of objections and held a second hearing in the presence of the representatives of the Member States). However, the substantial aspects of the case were generally not discussed either in the supplementary statement of objections or in the second hearing (Opinion of Advocate General Wahl of 8 December 2016 in *Feralpi* v *Commission*, C-85/15 P, EU:C:2016:940, points 40 and 41).

30 — Opinion of Advocate General Wahl of 8 December 2016 in *Feralpi* v *Commission*, C-85/15 P, EU:C:2016:940, point 47.

31 — Commission Regulation (EC) of 22 December 1998 on the hearing of parties in certain proceedings under Articles [101 and 102 TFEU] (OJ 1998 L 354, p. 18).

32 — Opinion of Advocate General Wahl of 8 December 2016 in *Feralpi* v *Commission*, C-85/15 P, EU:C:2016:940, point 49.

33 — Opinion of Advocate General Wahl of 8 December 2016 in *Feralpi* v *Commission*, C-85/15P, EU:C:2016:940, points 54 to 60.

34 — As stressed by the General Court, it is settled case-law that procedural rules are generally held to apply to all disputes pending at the time when they enter into force (judgment of 9 December 2014, *Feralpi* v *Commission*, T-70/10, EU:T:2014:1031, paragraph 117).

35 — Except for the initial leniency application mentioned in point 11 above, which was submitted orally on 3 March 2004 and accepted on 15 April 2004, that is, before Regulations Nos 1/2003 and 773/2004 became applicable on 1 May 2004. The inspections were then conducted when those regulations were applicable, on 11 and 12 May 2004.

(2) *No obligation to provide additional information as to how deterrence is ensured*

63. I shall now consider whether the General Court was right in finding, at paragraph 74 of the judgment under appeal, that 'following the communication of the [2006] statement of objections, the Commission was required … to provide [Toshiba] with additional information as to how it intended to ensure the deterrent effect of the fine'.

64. In that regard, Toshiba argues that the General Court contradicted itself in paragraph 74 by finding, first, that the Commission was required to provide Toshiba with information as to the additional amount of EUR 4 650 000 that it intended to impose on it for deterrence ('the additional amount') [36] and, second, that that information did not have to be set out in a statement of objections and could be provided at later stages of the administrative procedure. In its reply, Toshiba further argues that the General Court's finding at paragraph 74 that it should have been heard on the additional amount applies to the method of setting the fine in general.

65. The Commission contends that, by ruling, at paragraph 74 of the judgment under appeal, that the Commission was required to provide information as to the deterrent effect of the fine, the General Court erred in law.

66. In that regard, I recall that, as regards the calculation of the fines, it is settled case-law that the Commission satisfies its obligation to respect the right of undertakings to be heard where it expressly states, in the statement of objections, that it is going to consider whether it is appropriate to impose fines on the undertakings and also indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that the infringement was committed 'intentionally or negligently'. By contrast, where it has indicated the elements of fact and of law on which it would base its calculation of the fines, the Commission is under no obligation to explain the way in which it would use each of those elements in determining the level of the fine. To give indications as regards the level of the fines envisaged, before the undertakings have been invited to submit their observations on the allegations against them, would be to anticipate the Commission's decision and would thus be inappropriate. [37]

67. It seems to me that the Commission is under no obligation to explain in the statement of objections how it intends to ensure the deterrent effect of the fine.

68. Deterrence is one element of the assessment of gravity pursuant to Section 1.A of the 1998 Guidelines. According to case-law, in assessing the gravity of the infringement for the purpose of setting the fine, the Commission must ensure that its action has the necessary deterrent effect and it may thus adjust the amount of the fine in order to take account of the desired impact on the undertaking on which it is imposed. [38] The deterrent effect of the fine is assessed in relation to the size and the economic power of the undertakings concerned. [39] Therefore, it seems to me that the need to ensure deterrence may be regarded as a legal criterion within the meaning of the case-law cited in point 66 above. Consequently, the Commission's intention to ensure the deterrent effect of

36 — I should specify that the additional amount was calculated as follows. The fine imposed jointly and severally on Toshiba and Melco for the period of operation of TM T&D, that is, for the period between 1 October 2002 and 11 May 2004, was multiplied by Toshiba's deterrence multiplier and the amount resulting from that multiplication, minus the amount of the fine imposed jointly and severally, was imposed on Toshiba alone.

37 — Judgments of 15 June 2005, *Tokai Carbon* v *Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraphs 139 to 141; of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02P, EU:C:2005:408, paragraph 439; and of 9 July 2009, *Archer Daniels Midland* v *Commission*, C-511/06 P, EU:C:2009:433, paragraphs 68 and 69.

38 — Judgment of 13 July 2011, *Dow Chemicals and Others* v *Commission*, T-42/07, EU:T:2011:357, paragraphs 148 and 149

39 — Judgment of 12 July 2011, *Hitachi and Others* v *Commission*, T-112/07, EU:T:2011:342, paragraph 350. In that regard, see Bernardeau, L., and Christienne, J.-P., *Les amendes en droit de la concurrence. Pratique décisionnelle et contrôle juridictionnel du droit de l'Union*, Larcier, 2013, paragraph I.183.

the fine should be mentioned in the statement of objections.[40] However, in my opinion, the Commission is under no obligation to indicate in that statement *how* it intends to ensure the deterrent effect of the fine. This would amount to 'explain[ing] the way in which it will use' that criterion in setting the level of the fine. According to the case-law cited in point 66, the Commission is not required to explain how it intends to combine the main factual and legal criteria.

69. I note that the General Court did not hold, in the judgment under appeal, that the Commission was required to provide information as to how it intended to ensure deterrence *in the statement of objections*. Quite the contrary, it found, in paragraphs 43 and 73, that the information provided in the 2006 statement of objections with regard to deterrence and to the additional amount satisfied the requirements of the case-law. However, it went on to state, at paragraph 74, that the Commission was required to provide information as to how it intended to ensure deterrence '*following the communication of the [2006] statement of objections*'.

70. I see no reason why the case-law cited in point 66 above and the conclusion reached at points 67 and 68 should not apply to the procedural stages that follow the adoption of the statement of objections. If the undertakings do not have a right to be provided with certain information, the Commission has no obligation to provide them with such information, either in the statement of objections or at a later stage.

71. Obviously, this is without prejudice of the Commission's *freedom* to provide the undertakings with such information. I note that the Commission's notice on best practices[41] provides that the Commission may include in the statement of objections, alongside the main factual and legal criteria referred to in point 66 above, 'further matters' such as the sales figures and the years considered for those sales. However, the Commission's notice on best practices expressly states that the Commission is 'under no obligation in this respect'.[42]

72. This is also without prejudice to the Commission's obligation, should it discover new information after the adoption of the statement of objections, to provide the parties with such information, either by way of a supplementary statement of objections (where new objections are raised) or by way of a letter of facts (where objections already raised are corroborated by new evidence).[43] However, in that case, the information provided after the adoption of the (initial) statement of objections is that referred to in point 66 above.

73. In the present case, it is not disputed that the elements used to calculate the fine in the contested decision are the same as those used in the 2007 decision. Only the calculation method was modified in order to take account of the General Court's finding in the 2011 judgment that the Commission could not use different reference years for the Japanese producers and for the European producers. The calculation method suggested by the General Court in paragraph 291 of that judgment was applied in the contested decision.

74. Therefore, I consider that, as the Commission submits, the General Court erred in law by finding, at paragraph 74 of the judgment under appeal, that, following the adoption of the 2006 statement of objections, the Commission was required to provide Toshiba with additional information as to how it intended to ensure the deterrent effect of the fine.

40 — I note that paragraph 415 of the 2006 statement of objections provides that 'the Commission proposes to set any fines at a level sufficient to ensure deterrence' and that paragraph 414 makes reference, with regard to differentiated treatment, to each undertaking's 'importance in the GIS industry and [to] the impact of [its] offending conduct … on competition'. Besides, paragraph 32 of the 2012 letter of facts states that 'the Commission intends to take into account the total turnovers of Melco and Toshiba in order to ensure sufficient deterrence'.

41 — Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6) ('the Commission's notice on best practices').

42 — Point 85 of the Commission's notice on best practices. See also point 7 of the Commission's notice on best practices.

43 — Commission's notice on best practices, points 109 to 111.

75. However, even though in paragraph 74 the General Court erred in law, it follows from settled case-law that if the reasoning in a judgment of the General Court discloses an infringement of European Union law but its operative part is well founded on other legal grounds, the appeal must be dismissed. [44]

76. In the present case, although the General Court incorrectly found that, following the adoption of the 2006 statement of objections, the Commission was required to provide additional information as to how it intended to ensure the deterrent effect of the fine, it was right in concluding that Toshiba's rights of defence had not been infringed.

77. For the reasons set out above, the first ground of appeal should in my view be dismissed.

B. **Second ground of appeal**

78. For the sake of clarity, I will briefly explain the calculation method applied by the Commission in the contested decision before I set out the arguments of the parties, including the alternative calculation method proposed by Toshiba, followed by my assessment.

1. ***The calculation method applied in the contested decision***

79. In order to calculate Toshiba's starting amount, the Commission applied the following method in the contested decision.

80. Having classified the infringement as a 'very serious' one, the Commission divided the participating undertakings into different groups. The groups in the contested decision are the same as those in the 2007 decision. Those groups were established according to their respective worldwide sales of the GIS products. In order to comply with the 2011 judgment, the Commission used 2003 as the reference year for Toshiba and Melco, whereas in the 2007 decision it had used 2001 as the reference year for all Japanese producers. However, the Commission could not calculate Toshiba's and Melco's starting amounts by reference to their worldwide sales in 2003 since they had no sales in 2003 (from 1 October 2002 they had transferred their respective GIS businesses to their joint venture TM T&D). Therefore, in order to calculate, in particular, Toshiba's starting amount, the Commission used TM T&D's starting amount as established in the 2007 decision, that is, EUR 31 000 000 ('the hypothetical joint venture starting amount'), of which it took a share corresponding to Toshiba's share of the sales made by itself and Melco in the year preceding the creation of TM T&D, that is, 2001. The resulting figure was Toshiba's starting amount. [45]

2. ***Arguments of the parties***

81. Toshiba contends that the General Court erred in law in finding, at paragraph 115 of the judgment under appeal, that the Commission did not infringe the principle of equal treatment by calculating Toshiba's starting amount from TM T&D's starting amount, rather than TM T&D's turnover.

82. During the administrative procedure which led to the adoption of the contested decision, Toshiba proposed an alternative method for the calculation of its starting amount. First, rather than use TM T&D's *starting amount*, the Commission should have used TM T&D's *turnover* for 2003; of which it would have taken the same share as above, [46] that is, a share corresponding to Toshiba's share

44 — Judgment of 29 March 2011, *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 136; and opinion of Advocate General Sharpston of 19 January 2016 in *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:25, point 78.

45 — Recitals 57 to 63 of the contested decision.

46 — See point 80 above.

of the sales made by itself and Melco in 2001. Second, on the basis of that figure, the Commission should have calculated Toshiba's market share in 2003. Third, on the basis of that market share, the Commission should have placed Toshiba in the appropriate group as established in the 2007 decision, that is, the fourth group. Toshiba's starting amount (EUR 9 000 000, the figure corresponding to the fourth group) would thus have been lower than in the contested decision.

83. In that regard, Toshiba accepts that, as the General Court held in paragraph 114 of the judgment under appeal, its fine could not be calculated 'in the exact same manner' as that of the European producers, since it had no sales in 2003. Nevertheless, the Commission must use the most comparable figures and the most comparable methodologies. In the present case, the General Court did not explain why the calculation method proposed by Toshiba was less appropriate, or less artificial, than that applied by the Commission in the contested decision.

84. Moreover, Toshiba argues that the Commission's use of TM T&D's starting amount, rather than its turnover, reflected *TM T&D*'s weight in the infringement. However, the calculation method should have reflected *Toshiba*'s weight in the infringement in the period prior to the creation of TM T&D. By contrast, using, as Toshiba had proposed, a portion of TM T&D's turnover in order to calculate Toshiba's starting amount would have reflected Toshiba's weight in the infringement in the period prior to the creation of TM T&D.

85. Finally, in Toshiba's view, had the Commission applied Toshiba's methodology, it would have been placed in the fourth group, and thus assigned a starting amount of EUR 9 000 000. Instead, in the contested decision, Toshiba's starting amount did not correspond to any of the groups established in the 2007 decision. Consequently, Toshiba was assigned a higher starting amount than undertakings of a comparable size, which had been placed in the fourth group.

86. Therefore, Toshiba requests the Court to annul the contested decision in so far as it imposed a fine on it and reduce the amount of that fine pursuant to Article 261 TFEU.

87. The Commission submits that the General Court did not err in law in finding that the Commission did not infringe the principle of equal treatment.

88. The Commission argues that, since it had to use 2003 as the reference year in order to calculate Toshiba's fine, it could only use TM T&D's figures. It could not use Toshiba's turnover, since Toshiba had no sales in 2003.

89. The Commission further argues that Toshiba's methodology would have been more artificial than the Commission's. This was because, under Toshiba's methodology, Toshiba would have been assigned a turnover for 2003, even though it had no sales in 2003.

90. In the Commission's view, were it to calculate Toshiba's starting amount from TM T&D's turnover, it would have to allocate to Toshiba a 50% share of TM T&D's turnover for 2003 since Toshiba holds a 50% share in TM T&D. Toshiba's starting amount would thus be higher than in the contested decision.

91. Finally, the Commission stresses that, should the Court regard Toshiba's methodology as more appropriate than the Commission's, the General Court would not have erred in law in rejecting the ground alleging an infringement of the principle of equal treatment. The Court is not to determine whether the best possible method was applied by the Commission, but, rather, whether the method applied was lawful.

3. ***Assessment***

92. I recall that the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[47]

93. With regard to fines, the principle of equal treatment applies not only to the final amount, but also to intermediary steps such as the division of undertakings into categories for the purpose of differential treatment.[48]

94. Furthermore, it is settled case-law that, when the amount of the fine is determined, the application of different methods of calculation cannot result in any discrimination between the undertakings which have participated in the same infringement of Article 101 TFEU.[49] By way of example, in *Guardian*,[50] the Commission was found to have acted in breach of the principle of equal treatment by excluding internal sales from the turnover used to calculate the starting amounts of the fines. Since vertically integrated cartel members and non-vertically integrated cartel members were in a comparable situation, they had to be treated equally, that is, internal sales had to be included in the relevant turnover. This was because excluding internal sales from the relevant turnover favoured vertically integrated undertakings by reducing their weight in the infringement to the detriment of non-vertically integrated undertakings.

95. In the present case, I consider that, contrary to Toshiba's contention, the General Court did not infringe the principle of equal treatment in finding that Toshiba's starting amount could be calculated from TM T&D's starting amount.

96. In that regard, Toshiba argues that, since the starting amounts of the European producers were calculated from their *turnovers*, its starting amount had to be calculated on the basis of TM T&D's *turnover*, rather than from TM T&D's *starting amount*.

97. It is true that, in the contested decision, the Commission used different methods in order to calculate the starting amounts of the European producers and of Toshiba. The starting amounts of the European producers were set, first, by calculating their market shares on the basis of their GIS sales in 2003 and, second, by placing each undertaking in the relevant group and allocating to it the corresponding starting amount. This method is in accordance with Section 1.A of the 1998 Guidelines. By contrast, Toshiba's starting amount was calculated, first, by calculating TM T&D's starting amount in 2003 and, second, by taking a share of TM T&D's starting amount for 2003 corresponding to Toshiba's share of the sales made by itself and Melco in 2001.

98. However, I stress that the European producers and Toshiba are not in the same situation, since the former had GIS sales in 2003 and the latter did not. Consequently, the General Court correctly held, in paragraph 114 of the judgment under appeal, that Toshiba's fine could not be calculated 'in the exact same manner' as that of the European producers. This is acknowledged by Toshiba.

47 — Judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363 ('*Guardian*'), paragraph 51.

48 — Judgment of 16 June 2011, *Caffaro* v *Commission*, T-192/06, EU:T:2011:278, paragraph 83.

49 — Judgments of 9 March 2017, *Samsung SDI and Samsung SDI (Malaysia)* v *Commission*, C-615/15 P, EU:C:2017:190, paragraph 40; of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 62; and of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58; and of 16 June 2011, *Caffaro* v *Commission*, T-192/06, EU:T:2011:278, paragraph 83.

50 — Cited in footnote 47, paragraphs 62 and 63.

99. Moreover, it is clear, in my view, that the method applied in the contested decision did not lead to a grossly inaccurate representation of Toshiba's position on the GIS market.[51] In that regard, I note that the Commission took a share of TM T&D's starting amount corresponding to Toshiba's share in the sales made by Toshiba and Melco in the year preceding the creation of TM T&D, rather than taking a share of TM T&D's starting amount corresponding to Toshiba's shareholding in the joint venture (that is, 50%).

100. Finally, it seems to me that there are fewer differences between, on the one hand, the method applied in the contested decision to calculate the European producers' starting amounts and that applied to calculate Toshiba's starting amount, than between, on the other hand, the method applied in the contested decision to calculate the European producers' starting amounts and the method proposed by Toshiba to calculate its own starting amount.[52]

101. In the contested decision, the Commission calculated Toshiba's starting amount from TM T&D's starting amount as established in the 2007 decision. However, TM T&D's starting amount was itself calculated on the basis of TM T&D's turnover in 2003. Therefore, the method applied in the contested decision to calculate Toshiba's starting amount uses, albeit *indirectly*, TM T&D's turnover.

102. The alternative method proposed by Toshiba does not, in my view, provide for a more *direct* use of TM T&D's turnover. While the Commission's method consists in taking a share of TM T&D's starting amount, Toshiba's method requires the calculation of its notional turnover for 2003 and, on that basis, its notional market share for 2003. I doubt that these additional steps in Toshiba's method allow for a more direct use of TM T&D's turnover for 2003, or a more accurate picture of Toshiba's position on the market in 2003.

103. Contrary to what Toshiba argues, the General Court did explain why the alternative method it proposed was, in Toshiba's words, 'less appropriate' than the Commission's method. At paragraph 128 of the judgment under appeal, the General Court noted that, 'in the Commission's view, the method suggested by [Toshiba] would result in artificially dividing up TM T&D's turnover, notwithstanding the fact that it was a distinct entity from its shareholders, in order to determine the virtual turnover of its shareholders'. As explained above, applying the method proposed by Toshiba would have resulted in the calculation of its *notional* turnover for 2003, that is, in the 'artificia[l] dividing up' of TM T&D's actual turnover for 2003.

104. I conclude that the General Court did not infringe the principle of equal treatment in finding that Toshiba's starting amount could be calculated from TM T&D's starting amount.

105. That conclusion is not altered by Toshiba's contention that, as a result of the method of calculation applied in the contested decision, it was allocated a higher starting amount than undertakings of a comparable size.

106. According to settled case-law, in checking whether a division of the members of a cartel into categories is consistent with the principles of equal treatment and proportionality, the Court, in the course of its review of the legality of the way in which the Commission exercised its discretion in the area, must nonetheless restrict itself to reviewing whether that division is coherent and objectively justified.[53]

51 — Compare the judgment of 16 June 2011, *Caffaro* v *Commission*, T-192/06, EU:T:2011:278, paragraph 97.

52 — See point 82 above.

53 — Judgment of 16 June 2011, *Caffaro* v *Commission*, T-192/06, EU:T:2011:278, paragraph 84. See also point 93 above.

107. In the present case, it is true that the starting amount allocated to Toshiba in the contested decision (EUR 10 863 199) does not correspond to any of the starting amounts corresponding to the groups established in the 2007 decision (EUR 17 000 000 for the third group, in which Toshiba was placed in the 2007 decision, and EUR 9 000 0000 for the fourth group, in which Toshiba claims it should be placed). [54]

108. However, since in the contested decision Toshiba's starting amount was calculated by taking a share of TM T&D's starting amount, it could not correspond to any of the starting amounts in the 2007 decision. Moreover, Toshiba does not argue that, by placing TM T&D in the second group and hence allocating to it a starting amount of EUR 31 000 000, the Commission infringed the principle of equal treatment. [55]

109. For the reasons set out above, I conclude that the second ground of appeal should be dismissed.

C. **Third ground of appeal**

1. ***Arguments of the parties***

110. Toshiba submits that the General Court erred in law in finding that, by failing to reduce the amount of the fine imposed on it in order to reflect its relative participation in the infringement, the Commission did not infringe the principle of equal treatment.

111. Toshiba argues that, while the European producers participated in the common understanding as well as the collusive activities in the EEA, the Japanese producers participated only in the former. Therefore, the Japanese producers' participation in the infringement was less serious than the European's undertakings. This should have been taken into account when Toshiba's starting amount was set. Consequently, the General Court erred in law in finding, at paragraph 142 of the judgment under appeal, that Toshiba's contribution to the infringement was 'comparable to that of the European undertakings', and that, by treating equally the European and Japanese producers, the Commission had not infringed the principle of equal treatment.

112. The Commission submits that the third ground of appeal is inadmissible because it was not raised before the General Court.

113. The Commission acknowledges that the fifth plea raised by Toshiba before the General Court alleged an infringement of the principle of equal treatment as regards the determination of its level of culpability. However, the Commission stresses that Toshiba indicated in its reply that its fifth plea did not touch upon the gravity of its conduct. Therefore, Toshiba's fifth plea had become devoid of content, and Toshiba had in fact abandoned that plea. Consequently, according to the Commission, the third ground of appeal is a new plea in law and, as such, it is inadmissible.

114. Alternatively, the Commission contends that the third ground of appeal is inadmissible because it calls into question an issue that is *res judicata*.

54 — See recital 490 of the 2007 decision.

55 — Before the General Court, Toshiba challenged the starting amount allocated to TM T&D with regard to the Commission's obligation to state grounds, not with regard to the principle of equal treatment.

115. The Commission notes that, in the 2011 judgment, the General Court held, first, that the Japanese producers participated in the common understanding and there was one single and complex infringement and, second, that the gravity of the Japanese producers' conduct was comparable to that of the European producers. Therefore, the question whether Toshiba's conduct was less serious than the European producers' conduct, which is raised by the third ground of appeal, is *res judicata*.

116. In the event that the Court finds the third ground of appeal to be admissible, the Commission submits that it should be rejected.

117. The Commission argues, in that regard, that, where an undertaking that participates only in some elements of a cartel is nonetheless aware of the overall plan that includes all elements of the cartel, it is liable for the whole infringement.

118. In response, Toshiba contends that the third ground of appeal is admissible. First, that ground is not a new plea since Toshiba did not withdraw the fifth plea raised before the General Court, and the General Court ruled on that plea in the judgment under appeal. Second, the third ground of appeal does not touch upon an issue which is *res judicata*, because by that ground it challenged the amount of the fine imposed on it, not the existence of a single and complex infringement, which is *res judicata*.

2. ***Assessment***

(a) ***Admissibility***

119. In my opinion, the third ground of appeal should be declared inadmissible since it alleges that the amount of the fine imposed on Toshiba should be reduced on account of its limited participation in the infringement, and that issue is *res judicata*.

120. According to settled case-law, it is important that judicial questions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question. A judgment's status as *res judicata* is such as to bar the admissibility of an action if the proceedings disposed of by the judgment in question were between the same parties, had the same purpose and the same legal basis. The principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question.[56]

121. I note that, in the contested decision, the Commission found that the infringement comprised three elements: first, the 'common understanding' between the Japanese producers and the European producers, whereby the Japanese producers undertook to refrain from entering the home markets of the European producers, and the European producers from entering the Japanese market; second, the GQ Agreement, which established rules allowing the allocation of GIS projects between the Japanese producers and the European producers in countries other than (in particular) Japan and the home markets of the European producers; and, third, the EQ Agreement, whereby GIS projects allocated to the European producers were distributed amongst them. These arrangements were found to constitute a single and complex infringement, rather than several infringements.[57]

56 — Judgment of 25 June 2010, *Imperial Chemical Industries* v *Commission*, T-66/01, EU:T:2010:255, paragraphs 196 to 198.

57 — Recitals 265 to 299 of the contested decision.

122. In the 2011 judgment, the General Court confirmed that those arrangements formed a single and complex infringement.[58] It was irrelevant, in that regard, that the Japanese producers did not participate in the collusive measures in the EEA (they had not signed the EQ Agreement). This was because the passive role of the Japanese producers in respect of the allocation of GIS projects on the EEA market was 'a prerequisite' for ensuring that GIS projects in the EEA could be allocated between the European producers alone.[59] On appeal, the Court confirmed the General Court's findings.[60]

123. By the third ground of appeal, Toshiba argues that 'the General Court erred in law in finding that the Commission, by failing to reduce Toshiba's fine to reflect its relative participation in the infringement, did not infringe the principle of equal treatment'.

124. I consider, first, that by the third ground of appeal Toshiba does not challenge the existence of a single and complex infringement. In its reply, Toshiba expressly states that it does not challenge the General Court's finding in paragraph 141 of the judgment under appeal that the Japanese producers' undertaking not to enter the EEA market (reproduced from the 2011 judgment) was 'a prerequisite' for ensuring that GIS projects could be allocated amongst the European producers according to the rules established in the EQ Agreement. Acknowledging that the Japanese producers' undertaking not to enter the EEA market is a prerequisite for the collusive measures in the EEA amounts to acknowledging that the two sets of arrangements form a whole and are to be regarded as a single infringement.

125. Second, I note that by the third ground of appeal Toshiba submits that the amount of the fine imposed on it should be reduced since it did not participate in the collusive measures in the EEA. In other words, Toshiba argues that, although the collusive measures in the EEA do not constitute a separate infringement, they are a separate aspect of that infringement. Consequently, in Toshiba's view, its infringement is of a less serious nature than that of the European producers, and this should be reflected in the amount of its fine.

126. In the 2011 judgment, the General Court found that the participation of the Japanese producers in the arrangements in the EEA was 'not the same' as that of the European producers (since the Japanese producers' participation consisted in a failure to act on the EEA market, in contrast with the active participation of the European producers). However, there was 'no substantial difference' in respect of the gravity of those two types of conduct since, in particular, the Japanese producers' undertaking not to enter the EEA market was a prerequisite for ensuring that the arrangements in the EEA would be carried out amongst the European producers.[61] I stress that these findings of the General Court were made in response to a plea seeking the annulment or a substantial reduction of the fine imposed on Toshiba.

127. Therefore, the question whether Toshiba's conduct is less serious than that of the European producers due to its non-participation in the collusive arrangements in the EEA was examined in the 2011 judgment.[62]

58 — Paragraph 229 of the 2011 judgment

59 — Paragraph 222 of the 2011 judgment.

60 — Paragraphs 241 to 256 of the 2013 judgment.

61 — Paragraphs 260 to 262 of the 2011 judgment.

62 — The gravity of Toshiba's conduct was not addressed in the 2013 judgment.

128. With regard to the case-law cited in point 120 above, I note that the parties to the proceedings which led to the 2011 judgment were the same as those to the present proceedings (Toshiba and the Commission). The two proceedings have the same legal basis, namely Article 263 TFEU. As for purpose, I note that the decision whose annulment is sought in the present proceedings is not the one that was partially annulled by the 2011 judgment. However, save for the calculation method of the fine that was modified in order to comply with the 2011 judgment, the content of the contested decision is the same as that of the 2007 decision.[63]

129. I conclude that the question whether Toshiba's conduct is less serious than that of the European producers due to its non-participation in the collusive arrangements in the EEA is *res judicata*.

130. I should add that, contrary to the submissions of the Commission, that question was raised by Toshiba before the General Court in the present proceedings. By its fifth plea, Toshiba submitted that the Commission had infringed the principle of equal treatment by setting the fines without taking account of the fact that Toshiba did not participate in the arrangements pertaining to the EEA market and its conduct was thus less serious than that of the European producers.[64] Toshiba did not, in its reply before the General Court, abandon that plea. In its reply, it stated that it 'claim[ed] that the Commission ha[d] failed to take into account [its] alleged contribution to the cartel when setting its fine'. Therefore, the Commission's allegation that the third ground of appeal is a new plea in law is incorrect.

131. I conclude that the General Court erred in law in rejecting as unfounded the fifth plea raised before it by Toshiba. In my view, it should have rejected that plea as inadmissible. However, the operative part of the judgment under appeal remains well founded.[65]

132. However, for the sake of completeness, I will now briefly examine whether the General Court was right in finding that the Commission had not infringed the principle of equal treatment by setting the amount of Toshiba's fine without having regard to the fact that it did not take part in the collusive measures in the EEA.

(b) ***Substance***

133. It is settled case-law that the fact that an undertaking has not taken part in all aspects of an anticompetitive scheme or that it has played a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and when the fine is determined.[66]

134. However, in the present case, the Japanese producers, including Toshiba, did not participate in the allocation of GIS projects in the EEA *because they had undertaken not to enter the EEA market*. Therefore, the fact that Toshiba did not participate in that aspect of the infringement is no indication that its conduct was less serious than that of the European producers. That fact is a mere consequence of its participation in the 'common understanding' whereby the Japanese producers agreed not to enter the EEA market.

63 — Compare judgment of 25 June 2010, *Imperial Chemical Industries* v *Commission*, T-66/01, EU:T:2010:255, paragraphs 207 and 208; and see recital 37 of the contested decision.

64 — In its application before the General Court, Toshiba submitted that 'the Commission infringed the principle of equal treatment by not taking into account, when setting the starting amount of Toshiba's fine, the fact that Toshiba's conduct (alleged participation in the common understanding) was of a different magnitude of gravity and culpability compared to the conduct of the European GIS manufacturers which took part both in the common understanding and in other cartel infringements on the EEA market'.

65 — See point 75 above.

66 — Judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 90.

135. I conclude that, should the Court find that the third ground of appeal is admissible, it should reject that ground as unfounded.

VI. **Costs**

136. In accordance with Articles 138 and 184 of the Rules of Procedure, where an appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. I consider that the appeal should be dismissed and, as the Commission has applied for costs, Toshiba should be ordered to pay the Commission's costs.

VII. **Conclusion**

137. I therefore consider that the Court should:

— dismiss the appeal;

— order Toshiba Corp. to pay the European Commission's costs.