



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 15 November 2012¹

Case C-103/11 P

European Commission

v

Systran SA and Systran Luxembourg SA

(Appeals — Public contracts of the European Union — Invitation to tender relating to the maintenance and linguistic enhancement of software — Commission's machine translation software — Source code communicated without authorisation of author — Infringement of copyright —
Unauthorised disclosure of know-how — Non-contractual liability — Contractual liability —
Jurisdiction of the European Union judicature — Nature of the dispute — Unlawful act —
Sufficiently serious breach — Actual and certain damage — Causal link — Break in the chain of causation — Lump-sum assessment of the amount of the damages)

1. The present case raises a preliminary problem of delimiting contractual and non-contractual disputes and therefore, in this case, the substantive jurisdiction of the European Union judicature, thereby raising a novel question of the vertical allocation of jurisdiction between the European Union judicature and national courts. It principally involves, in my view, defining the detailed rules according to which the European Union judicature must, in accordance with the principle of conferred powers, rule on its jurisdiction to hear and determine an action based on non-contractual liability in the context of which an objection of lack of jurisdiction is raised based on the contractual nature of the dispute.

2. In this case, the European Commission has brought before the Court an appeal against the judgment of the General Court of the European Union of 16 December 2010 in Case T-19/07 *Systran and Systran Luxembourg v Commission* [2010] ECR II-6083 ('the judgment under appeal'), by which it ordered the European Union to pay Systran SA² lump-sum damages of EUR 12 001 000 as compensation for the damage resulting from the Commission's infringement of Systran's copyright and know-how in the Unix version of the Systran software.

3. The General Court ruled, inter alia, that, by granting itself the right to initiate, without the prior authorisation of the companies in the Systran group, an invitation to tender to carry out works relating to the maintenance and linguistic enhancement of its automatic translation system, in this case the EC-Systran Unix version of the Systran software, the Commission had committed an unlawful act by reference to the general principles common to the laws of the Member States (paragraph 261 of the judgment under appeal), since that invitation to tender entailed the disclosure to third parties and the modification of elements of the Systran Unix version of that software, in infringement of the copyright and know-how of those companies.

¹ — Original language: French.

² — 'Systran'.

4. It must be stated from the outset that, if the Court were to hold, as I invite it to do, that the dispute between the Commission and Systran SA and Systran Luxembourg SA ('Systran Luxembourg') should primarily be examined and possibly determined by the competent national courts and that the General Court therefore lacked jurisdiction to resolve that dispute, there would be no need to examine all the pleas raised by the Commission. Nevertheless, and in the event that the Court does not concur with me on that first fundamental point, I shall examine the other pleas in order to shed light on all aspects of this case.

5. It should be noted, from that point of view, that the Commission in particular calls into question, in the context of its other pleas, the General Court's assessment of the three conditions for the non-contractual liability of the European Union, always required by the settled case-law, that is to say, the finding that its conduct is unlawful, the existence of resulting material and non-pecuniary damage and the existence of a direct causal link between that unlawful act and the damage at issue. Although those three invariant conditions must be satisfied cumulatively for a right to compensation to be recognised, it none the less seems to me appropriate to examine them in turn, within the limit of the pleas raised by the Commission, in order to ensure that the General Court has actually ensured they were clearly and unambiguously satisfied.

6. It also seems to me appropriate to clarify at this point that, having regard to the pleas put forward in the appeal, it will not be necessary to address the other issues indirectly raised by the present dispute, relating, in particular, to the respective jurisdiction of the European Union judiciary and of the national courts to examine actions for infringement brought against the institutions, bodies, offices and agencies of the European Union³ or the practices of the institutions, bodies, offices and agencies of the European Union in awarding of public IT development and maintenance contracts.⁴

I – Background to the dispute

7. In 1968, Dr Toma, president of the US company World Translation Center Inc. ('WTC'), established in La Jolla, California (United States of America), created machine translation software called 'Systran' (SYStem TRANslation).

8. On 22 December 1975, the Commission concluded with WTC an initial contract for the installation and development of the Systran software for the English-French language pair and the initial development of that software for the French-English language pair.

3 — The Court has already been indirectly seized of an allegation of infringement by the Commission of several trade marks, in that case within the framework of the Galileo European satellite navigation services project, albeit without being in a position to address the issues that the bringing of an infringement action may raise. See the order of 20 March 2007 in Case C-325/06 P *Galileo International Technology and Others v Commission* dismissing as, in part, manifestly inadmissible and, in part, manifestly unfounded the appeal against the judgment in Case T-279/03 *Galileo International Technology and Others v Commission* [2006] ECR II-1291. The General Court has, however, already had the opportunity to consider, quite apart from in the judgment under appeal, such infringement actions. See, in the field of trade mark law, in addition to *Galileo International Technology and Others v Commission*, Case T-195/00 *Travellex Global and Financial Services and Interpayment Services v Commission* [2003] ECR II-1677, and, in the field of patents, the order in Case T-295/05 *Document Security Systems v ECB* [2007] ECR II-2835.

4 — Here, it will simply be pointed out that, in accordance with Article 89 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), '[a]ll procurement contracts shall be put out to tender on the broadest possible base', and that the European Union institutions are to be deemed to be contracting authorities in the case of contracts awarded on their own account under Article 104 of that regulation. It may also be recalled that, under Article 93(1)(f) of that regulation, candidates or tenderers may be excluded from participation in a European Union procurement procedure if, following another procurement procedure, they have been declared to be in serious breach of contract for failure to comply with their contractual obligations. Although, notwithstanding the termination of the contractual relationship which occurred in the present case, this case does not seem to be covered by that situation, it nevertheless indirectly raises the question of reconciling the rules on copyright in software with the rules on public procurement. Indeed, the question which may arise in the context of public IT services contracts awarded by the institutions is that of reconciling, on the one hand, compliance with copyright in software and, on the other hand, compliance with the fundamental rules of the Treaty applicable to those public contracts and imposing on the contracting authority, to reproduce the wording of Case C-324/98 *Telaustria and Telefonadress* [2000] ECR I-10745, paragraph 62, an obligation of transparency which 'consists in ensuring, for the benefit of any potential tenderer, a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of procurement procedures to be reviewed'.

9. The contractual relationship between the Commission and WTC then continued, between 1976 and 1987, leading to the creation of a machine translation system operating in the Mainframe environment, called ‘EC-Systran Mainframe’, consisting of a kernel of linguistic routines and dictionaries for nine pairs of languages of the European Union.

10. As of 1985, the French company Gachot acquired the companies of the WTC group, the owners of the Systran technology and the Mainframe version of the Systran software. Gachot then changed its business name to become Systran SA.

11. On 4 August 1987, Systran and the Commission concluded a ‘collaboration agreement’ concerning the joint organisation of the development and improvement of the Systran translation system for the present and future official languages of the European Community and also for its implementation.

12. On 11 December 1991, the Commission terminated the collaboration agreement concluded with Systran.

13. On 22 December 1997, Systran and the Commission concluded the first of four successive migration agreements, designed to allow the EC-Systran Mainframe software to operate in the Unix and Windows environments.

14. On 4 October 2003, the Commission launched an invitation to tender for the maintenance and linguistic enhancement of its machine translation system.

15. By letter of 31 October 2003, Systran informed the Commission, in essence, that the work proposed in the invitation to tender was likely to infringe its intellectual property rights and invited the Commission to give its views in that regard. Systran stated that it was unable, under those circumstances, to respond to that invitation to tender.

16. By letter of 17 November 2003, the Commission replied that the proposed work did not, in its view, seem likely to infringe Systran’s intellectual property rights.

17. Following that invitation to tender, only two of the eight lots comprising the tender were awarded, in the circumstances of this case to Gosselies SA.⁵

II – Procedure before the General Court and the judgment under appeal

18. It is under those circumstances that Systran and Systran Luxembourg,⁶ by application lodged at the Registry of the General Court on 25 January 2007, brought an action requesting that the General Court, first, order the immediate cessation of the acts of infringement and of disclosure committed by the Commission, secondly, order the confiscation of all the support material held by the Commission and by Gosselies, on which are reproduced the information technology developments carried out by the latter from the EC-Systran Unix and Systran Unix versions in infringement of their rights and its delivery up to Systran, or, at the very least, its destruction under control, thirdly, order the Commission to pay a minimum amount of EUR 1 170 328 to Systran Luxembourg and EUR 48 804 000, subject to addition, to Systran, fourthly, order the General Court’s decision to be published, at the Commission’s expense, in specialist journals, reviews and internet sites of the applicants’ choice and, finally and fifthly, order the Commission to pay the costs.

⁵ — ‘Gosselies’.

⁶ — For the sake of convenience, and although Systran and Systran Luxembourg are respondents in the appeal, they will be referred to in this Opinion as ‘the applicants’ in the proceedings before the General Court.

19. The General Court, first of all, rejected the various objections of inadmissibility of the action for damages raised by the Commission (paragraphs 52 to 125 of the judgment under appeal). It held, first, after examining the applicants' application and the various pieces of evidence submitted by the parties, that the dispute could not be regarded as being contractual in nature and therefore that the General Court could not be regarded as lacking jurisdiction to hear and determine the dispute (paragraphs 57 to 104 of the judgment under appeal). Secondly, it rejected as unfounded the objection based on the lack of clarity in the application (paragraphs 107 to 111 of the judgment under appeal). Thirdly and finally, it rejected the objection of inadmissibility based on its lack of jurisdiction to make a finding of infringement in an action based on non-contractual liability, after having found that the infringement relied on had been relied on for the sole purpose of characterising the Commission's conduct as unlawful in the context of an action alleging non-contractual liability, which falls within its jurisdiction, and that no national remedy could lead to the making of reparation for the alleged damage (paragraphs 113 to 117 of the judgment under appeal).

20. The General Court then rejected the objections of inadmissibility raised against the submissions seeking that it order the immediate cessation by the Commission of the acts of infringement and disclosure, the confiscation from the Commission or Gosselies of certain IT data or their destruction and the publication of the decision at the Commission's expense, in specialist journals and reviews and also on specialist internet sites (paragraphs 118 to 125 of the judgment under appeal).

21. Finally, the General Court, as to the substance of the action, successively examined the rights invoked by the applicants and the unlawfulness of the Commission's impugned conduct (paragraphs 127 to 261 of the judgment under appeal), the damage suffered by the applicants and the causal link between the alleged damage and the unlawfulness relied on (paragraphs 262 to 326 of that judgment), and then the various measures other than damages sought by the applicants in their submissions (paragraphs 327 to 332 of that judgment).

22. The General Court rejected the claim for compensation submitted by Systran Luxembourg, in the absence of a causal link between the Commission's impugned conduct and the damage alleged by that company (paragraphs 264 to 267 of the judgment under appeal). It also rejected, on the same grounds, the claim submitted by Systran for compensation in connection with the depreciation of Systran Luxembourg's shares (paragraphs 283 and 284 of the judgment under appeal). However, it recognised that the Commission's conduct had caused Systran material damage for the loss in value of its intangible assets, assessed as a lump-sum amount of EUR 12 million, and non-pecuniary damage, assessed at EUR 1 000 (paragraphs 285 to 326 of the judgment under appeal).

III – Procedure before the Court and forms of order sought

23. By application lodged at the Court Registry on 4 March 2011, the Commission brought the present appeal.

24. The parties presented oral argument at the hearing which took place on 19 April 2012.

25. The Commission claims that the Court should:

- declare the appeal admissible and well founded;
- set aside the judgment under appeal, to the extent that it allows in part the action for damages brought against the Commission, and, consequently, by finally ruling on the case, dismiss the action on the basis that it is inadmissible or unfounded; and
- order Systran and Systran Luxembourg to bear all their own costs and to pay those of the Commission.

26. Systran and Systran Luxembourg contend that the Court should:

- dismiss the Commission's appeal;
- uphold the judgment under appeal; and
- order the Commission to pay all the costs of the proceedings.

IV – Grounds of appeal

27. The Commission puts forward eight grounds of appeal. The first ground of appeal alleges that the General Court lacks jurisdiction, since it was manifestly incorrect and contradictory for the General Court to find that the dispute was not of a contractual nature. The second ground of appeal alleges an infringement of the rights of the defence and a disregard of the rules on the taking of evidence. By its third ground of appeal, the Commission claims that the General Court incorrectly applied the rules on copyright with regard to the ownership of the rights relied on by Systran. By its fourth and fifth grounds, the Commission claims that the General Court committed a manifest error of assessment of the unlawful or wrongful nature of its conduct and of the sufficiently serious nature of its supposed fault. By its sixth ground of appeal, the Commission claims that the General Court, first, erred in its interpretation of the exception laid down in Article 5 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs⁷ and, secondly, failed in its judgment to provide adequate reasoning with respect to the exception laid down in Article 6 of that directive. The seventh plea alleges an error of law in assessing the existence of a 'sufficiently direct' causal link between the wrongful act complained of and the alleged damage. The eighth plea, finally, alleges an error of law in determining damages in the amount of EUR 12 001 000.

V – The first ground of appeal

A – Summary of the Commission's line of argument

28. In the context of the first ground of appeal, the Commission claims, as its principal line of argument, that its dispute with Systran and Systran Luxembourg is not a dispute based on non-contractual liability but, in view of the various agreements which it has concluded with those companies between 1975 and 2002 as well as other contractual documents, such as some exchanges of mail and letters of commitment, a dispute based on contractual liability. The General Court thus committed a manifest error in its assessment of the legal nature of the dispute and, therefore, disregarded its own rules of jurisdiction.⁸

29. It claims, first of all, that the General Court erred in its interpretation of *Guigard v Commission*.⁹ While acknowledging that an infringement of copyright may pave the way for an action based on non-contractual liability, it considers that that situation does not apply to the present dispute, in so far as the parties have agreed detailed rules for the assignment or concession of the copyright at issue in this case.

7 — OJ 1991 L 122, p. 42. That directive, as amended by Council Directive 93/98/EEC of 29 October 1993 (OJ 1993 L 290, p. 9; 'Directive 91/250'), was codified by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16). In the light of the date of the facts of the present case, however, the latter directive is not applicable *ratione temporis*.

8 — The Commission, it should be noted, does not, however, call into question the General Court's assessment of the second objection of inadmissibility which the Commission had raised, alleging that the General Court lacks jurisdiction to make a finding of infringement in the context of an action based on non-contractual liability.

9 — Judgment of 20 May 2009 in Case C-214/08 P.

30. The Commission then seeks to substantiate its argument by engaging in an analysis of the agreements at issue, their legal nature and their provisions, and the rights which they confer on it. It concludes from this that, by incorrectly determining its user rights in the EC-Systran Unix software, the General Court distorted the clear meaning of those agreements, leading it to make an error of assessment of the nature of the dispute.

31. The Commission relies, finally, on an infringement of the rules on the interpretation of contracts, since the General Court cannot interpret the migration agreements, and in particular Article 13 thereof, as conferring no rights on the Commission. It also argues that the General Court erred in concluding that, since Systran was not a signatory to the migration agreements, they were not enforceable as such against it, by application of the principle of the relative effect of the agreements.

32. The response to be given to this first plea of the Commission calls for some preliminary considerations on my part.

B – The implications of an objection of lack of jurisdiction based on the contractual nature of the dispute

1. An issue of the vertical distribution of jurisdiction between the European Union and the Member States

33. I must begin by recalling that, in accordance with Article 274 TFEU, disputes to which the European Union is a party are not on that ground to be excluded from the jurisdiction of the courts or tribunals of the Member States, '[s]ave where jurisdiction is conferred on the Court of Justice', that is to say, in accordance with the case-law of the Court, except in cases in respect of which exclusive jurisdiction is conferred on the European Union judicature.¹⁰

34. Article 274 TFEU thus determines the vertical allocation of jurisdiction between the Courts of the European Union and the national courts to hear and determine disputes to which the European Union is a party, governed by the principle of conferred powers, or more precisely, determined by the various provisions of the Treaty on the Functioning of the European Union conferring exclusive substantive jurisdiction on the Courts of the European Union.

35. Moreover, and in accordance with the settled case-law, the Courts of the European Union have, in particular, exclusive jurisdiction in disputes relating to compensation for damage caused by the European Union's institutions or by their servants in the performance of their duties, provided for in Article 268 TFEU and the second and third paragraphs of Article 340 TFEU,¹¹ and Article 41(3) of the Charter of Fundamental Rights of the European Union.

10 — See Joined Cases 133/85 to 136/85 *Rau Lebensmittelwerke and Others* [1987] ECR 2289, paragraph 10; Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 39; and *Guigard v Commission*, paragraph 39.

11 — See Case 281/84 *Zuckerfabrik Bedburg and Others v Council and Commission* [1987] ECR 49, paragraph 12; Joined Cases 106/87 to 120/87 *Asteris and Others* [1988] ECR 5515, paragraph 15; Case C-282/90 *Vreugdenhil v Commission* [1992] ECR I-1937, paragraph 14; Case C-55/90 *Cato v Commission* [1992] ECR I-2533, paragraph 17; Case C-275/00 *First and Franex* [2002] ECR I-10943, paragraph 43; and Case C-377/09 *Hanssens-Ensch* [2010] ECR I-7751, paragraph 17.

36. Finally, the Courts of the European Union have jurisdiction,¹² under Article 272 TFEU, to give judgment pursuant to any arbitration clause contained in a contract concluded by the European Union, whether that contract be governed by public or private law.¹³

37. It therefore follows from a combined reading of Articles 272 TFEU, 274 TFEU, 268 TFEU and the first and second paragraphs of Article 340 TFEU that, where an action based on the European Union's liability is brought against it by a natural or legal person, it is the contractual or non-contractual nature of the dispute, except where there exists a clause conferring jurisdiction, which immediately determines which courts have jurisdiction. In other words, the national courts have jurisdiction in principle to hear and determine contractual disputes, except in the case of an arbitration clause conferring jurisdiction on the European Union judicature. For its part, the European Union judicature has exclusive jurisdiction to hear and determine non-contractual disputes.

38. As is clear from the foregoing reminder, the issue of whether a particular dispute is contractual or non-contractual in nature therefore raises the question of the vertical allocation of jurisdiction between national courts and the Courts of the European Union,¹⁴ which accordingly, and by its very nature, goes far beyond the issue of the delimitation of contractual and non-contractual disputes within the legal systems of the Member States.

2. An issue of determining the applicable law: Article 340 TFEU

39. Nevertheless, determining whether a dispute in which the European Union is a party is contractual or non-contractual in nature is fundamental not only in that it determines whether the Courts of the European Union or those of the Member States have jurisdiction. It is also fundamental with regard to the law applicable to the dispute, with immediate consequences for the response to be given to an objection based on the contractual nature of that dispute.

40. It follows from the first paragraph of Article 340 TFEU that, in the case of a dispute of a contractual nature, the liability of the European Union is to be 'governed by the law applicable to the contract in question'. However, in the case of non-contractual liability, the European Union must, under the second paragraph of Article 340 TFEU, 'make good any damage caused ... in accordance with the general principles common to the laws of the Member States'.

41. If the dispute is contractual in nature, the substantive law applicable is determined under the actual terms of the contract. It is, in particular, the law of the contract which will govern the respective rights and obligations of the parties to that contract and which will determine the law applicable to the contract and, ultimately, the court or tribunal with jurisdiction to hear and determine disputes relating to that contract, in accordance with both the law applicable to the contract and the law of the contract.¹⁵

42. However, if the dispute is non-contractual in nature, the law under which it is possible to dispose of the application for compensation is, as provided for in the second paragraph of Article 340 TFEU, constituted solely by the general principles common to the laws of the Member States. This implies that the European Union judicature can rule only on the basis of those principles, that it will, in other

12 — Concerning the allocation of the respective jurisdiction of the Court of Justice and the General Court, see the orders of 27 May 2004 in Case C-517/03 *IAMA Consulting v Commission* and 8 October 2004 in Case C-248/03 *Commission v Trends and Others*; Case C-294/02 *Commission v AMI Semiconductor Belgium and Others* [2005] ECR I-2175, paragraphs 43 to 49; and the judgment of 12 May 2005 in Case C-315/03 *Commission v Huhtamaki Dourdan*, paragraphs 18 to 22.

13 — On contractual disputes of the European Union, see, for example, Heukels, T., 'The contractual liability of the European Community revisited', in Heukels, T. and McDonnell, E. (eds), *The Action for Damages in Community Law*, Kluwer Law International, 1997, p. 89, and Rittling, D., 'Les contrats de l'administration communautaire', *Droit administratif européen*, 2007, p. 147.

14 — See, in particular, Case 43/84 *Maag v Commission* [1985] ECR 2581, paragraph 26.

15 — See, in particular, Case 426/85 *Commission v Zoubek* [1986] ECR 4057, paragraph 4; Case C-299/93 *Bauer v Commission* [1995] ECR I-839, paragraphs 20 to 22; and Case C-69/97 *Commission v SNUA* [1999] ECR I-2363, paragraphs 18 and 19.

words, have no other law available to it and, therefore, that it has no jurisdiction to apply the legal provisions relating to any contracts, whether the provisions of those contracts or the laws applicable to those contracts. That situation is not in itself surprising in an action alleging non-contractual liability based, by definition, on the absence of any relevant contractual provision, that is to say, one which has a sufficient connection with the dispute.

C – How to proceed faced with an objection of lack of jurisdiction based on the contractual nature of the dispute?

43. A non-contractual dispute appears, a priori, to be a dispute between parties who are not bound by any relevant contractual relationship, that is to say, one which has a connection with the subject-matter of the dispute.

44. However, although it appears that a dispute of that type cannot be resolved without examining the content and scope of the contractual relationship between the parties and that, accordingly, the ‘law of the contract’ must be taken into consideration in order to resolve the dispute, it seems clear that that dispute becomes, first of all and in principle, a dispute which is ‘contractual in nature’. It must therefore be examined as such, at least at the outset, and it should be noted that nothing precludes, subsequent to and at the end of the examination by the court with jurisdiction in matters of contractual liability, the possibility of referring the dispute to the court with jurisdiction to hear and determine an action based on non-contractual liability. It must not be forgotten that, for the purposes of upholding an objection of lack of jurisdiction based on the contractual nature of a dispute, the court cannot be required to make a finding that there was no act such as to incur tortious liability but simply to find that there was a contractual context having the characteristics set out above.

45. All the above is tantamount to saying that an objection of inadmissibility formally raised by a defendant against an action based on non-contractual liability, relying on the existence of a contractual relationship between the parties in connection with the subject-matter of the dispute, cannot be regarded in the same way as any other objection, but should rather be regarded as a ‘special’ matter, to be resolved as a preliminary issue and as a matter of priority.

46. By contrast, it is not reasonable to accept the opposite of that logic, according to which, in this case, the examination of non-contractual liability in accordance with the general principles common to the laws of the Member States should take precedence. The European Union judicature cannot examine a claim for compensation on the basis of non-contractual liability, disregarding the law which, *prima facie*, binds the parties, before ensuring that it has proper jurisdiction to hear and determine the claim, in so far as it must have ruled out any objection based on the contractual nature of the dispute.

47. To conclude, it is, in my view, logical to conduct as a matter of priority a preliminary examination of whether or not there exists a ‘law of the contract’ governing the relationship between the parties to an action based on non-contractual liability, in the light of the jurisdiction conferred by the Treaty on the European Union judicature.

48. That said, it remains necessary to determine the subject-matter and extent of the preliminary examination to be conducted in such circumstances and for those specific purposes.

49. Expressed in very simple terms, that means that the European Union judicature cannot, where an action based on non-contractual liability is brought before it in which the contractual nature of the dispute is challenged, rule on its jurisdiction after an examination as to the substance of the case, that is to say, concerning the merits of the allegations brought before it, and in particular by the party relying on the objection. It must, on the contrary, focus its examination only on the objective of determining whether or not there exists what I shall allow myself to describe as a sufficiently rich and

relevant contractual context precluding, as has already been noted, any reasonable possibility of resolving the dispute without taking into consideration the relationship binding the parties.¹⁶ The purpose of the examination to be carried out has an immediate impact on the intensity of review to be conducted.

50. More specifically, since the European Union judicature must determine the nature of the dispute which it has thus been asked to assess for the purpose of ruling on its own jurisdiction, it can only undertake a comprehensive examination, *prima facie*, of the contractual relationship between the parties, and do so for the sole purpose of establishing, in the light of the subject-matter of the dispute, the existence as such of a 'law of the contract' binding the parties and allowing the European Union judicature to conclude in a reasonably foreseeable manner that the dispute cannot be resolved without an in-depth consideration of that 'law of the contract'.¹⁷

51. I wish to further emphasise that specific point. Where it is seised on the basis of non-contractual liability of a dispute having a contractual context, the European Union judicature, which, in the absence of an arbitration clause, is not in a position to examine the content of the contractual relationship, since it lacks competence to apply the law governing contractual relationships, cannot rule on its jurisdiction specifically on the basis of the merits or otherwise of the defendant's claims. What is decisive, however, is that it is not requested, for the purpose of establishing or declining its jurisdiction, to go beyond a comprehensive assessment of whether there exists a sufficiently relevant contractual relationship, in relation to the subject-matter of the dispute, for it to be possible to find that that dispute cannot reasonably be resolved without, as a preliminary matter, evaluating the contractual provisions relied on in the light of the law applicable to them.

D – The errors committed by the General Court in its assessment of the objection of lack of jurisdiction

52. It seems clear to me that the General Court did not adopt the approach proposed above when it carried out its examination in the present case, as is clear both from the preliminary observations on jurisdiction in contractual and non-contractual matters set out in paragraphs 57 to 64 of the judgment under appeal, in which it outlines the examination that it intends to carry out, and from the subsequent grounds setting out that examination (paragraphs 65 to 104 of the judgment under appeal).

53. To recap, after presenting the relevant Treaty provisions governing the contractual and non-contractual liability of the European Union (paragraphs 57 to 59 of the judgment under appeal), the General Court, first, rightly stated, in paragraph 60 of the judgment under appeal, that, in order to determine its jurisdiction under Article 235 EC, it had to examine, by reference to the various relevant matters in the file, whether the applicants' claim for compensation was objectively and globally based

¹⁶ — *Guigard v Commission*, paragraph 42.

¹⁷ — See *Guigard v Commission*.

on obligations of a contractual or non-contractual nature, referring to *Guigard v Commission*. Having set out that premiss, the General Court referred to the matters which it intended to take into consideration in its examination, citing, non-exhaustively, the parties' claims, the fact giving rise to the alleged damage and the content of the contractual provisions relied on.¹⁸

54. Nevertheless, that having been set out, the General Court then formally examined, initially, the applicants' claim for compensation and the nature of the harmful conduct which they allege, in this case the unlawful disclosure of their know-how and an infringement of their rights in the Systran Unix software (paragraphs 65 to 83 of the judgment under appeal), before considering, subsequently, the 'matters relied on by the Commission in support of the existence of contractual authorisation to disclose to a third party information capable of being protected by copyright and know-how' (paragraphs 84 to 100 of the judgment under appeal).

55. I therefore consider that the approach actually followed by the General Court in the judgment under appeal warrants the Court's criticism on two counts.

56. It must be noted, first of all, that the General Court did not purely and simply conduct a preliminary analysis of the situation prevailing between the parties to the dispute in order to establish its own jurisdiction to hear and determine it. By reserving, as it were, the objection of lack of jurisdiction until final judgment, or rather through already having reserved the judgment, dealt with at that stage, to the objection,¹⁹ it sought to ensure, first of all, that the applicants were entitled to bring their claim in the light of the principles common to the laws of the Member States.

57. It is only secondly, and in responding in the strict sense to the objection of lack of jurisdiction, that it sought to establish the absence of any explicit, clear and precise contractual provision allowing the Commission's conduct, and concluded therefrom, in paragraph 103 of the judgment under appeal, that 'the dispute in question is of a non-contractual nature'.

58. Certainly, and it is important to point this out, the difficulty facing the General Court was substantial, and aggravated by the very line of argument put forward by the Commission, which relied, in its objection of lack of jurisdiction, on precise contractual provisions in order both already to call into question the applicants' rights and to claim its own.

59. On the one hand, the General Court endeavoured to show that the claims of the applicants were themselves well founded. Moreover, it is significant that it concludes its argument by stating that the applicants 'have established to the requisite legal and factual standard the elements necessary to enable the [General] Court to exercise the non-contractual jurisdiction conferred on it by the Treaty' (paragraph 101 of the judgment under appeal).

18 — The General Court's setting-out of its own view, in particular in paragraphs 61 and 62 of the judgment under appeal, raises a number of questions. For example, in paragraph 61, it points out that its jurisdiction in contractual matters 'derogates from the ordinary rules of law' and must therefore be construed 'narrowly', 'so that [it] may hear and determine only claims arising from the contract or that are directly connected with the obligations arising from that contract', which is in itself correct. However, while assuming that this is actually the meaning to be attached to it, the appropriateness of that observation remains unclear, since it is undisputed that the contracts at issue in this case as a matter of fact contained no arbitration clause conferring such contractual jurisdiction. Moreover, in paragraph 62, it states that it 'must examine the content of the various contracts entered into [between 1975 and 2002] on which the Commission relies in support of its arguments, such an exercise forms part of the examination of jurisdiction and cannot have the consequence – as such – of altering the nature of the dispute by conferring a contractual basis on it'. However, the very question which is, in this case, being raised before the European Union judicature is whether that is actually the meaning of that statement, that is to say, as will be seen subsequently, whether it is really possible and even necessary for the latter to carry out a strict examination of the content of the various agreements for the purpose of ruling on its jurisdiction. Moreover, and on the other hand, it must be observed that that statement refers, discreetly but clearly, to paragraph 43 of *Guigard v Commission*, but reversing the meaning of the latter. In that paragraph, the Court in fact did no more than point out that the basically contractual nature of the dispute brought before it, duly noted previously, could not be altered by the mere fact that the person concerned relied on legal rules which did not arise under the contract at issue but were imposed on the parties.

19 — It is important, in that regard, to place particular emphasis on the fact that, as will be seen subsequently, the General Court makes, in the substantive grounds of the judgment under appeal, numerous and very substantial references to its analysis on admissibility. See, inter alia, paragraphs 153, 205, 215 and 219 of the judgment under appeal.

60. However, and the first complaint which must be made against the General Court's approach stems from this, the Commission, quite logically, intended, by its objection of lack of jurisdiction and at that stage, not to refute all appearance that the applicants' claims were correct, but rather to ensure that the very marked contractual context of those claims was taken into account in the context of the assessment of its objection, even though its argument was focused on certain particular contractual provisions. It is in that regard that the insistence with which it relies on the judgment in *Guigard v Commission* must be understood.

61. On the other hand, and the second criticism that must be made of the General Court's approach stems from this, the General Court carried out, in connection with the Commission's objection in the strict sense and as already noted above, a targeted examination of the substance of the dispute, that is to say, limited to the provisions relied on by the Commission, with a view to ensuring that those contractual provisions were not such as to justify the criticised conduct of the Commission and rejecting the objection that the European Union judicature lacks jurisdiction. However, the review which it was incumbent upon the General Court to conduct in the context of its examination of the Commission's objection of lack of jurisdiction could not at that stage relate to the merits of the contractual rights claimed by the Commission.

62. In so doing, the General Court by no means undertook a comprehensive examination, as I have just advocated, of the contractual context of the dispute which it was supposed to carry out for the purpose of determining whether it could reasonably and with sufficient certainty be concluded that the dispute came directly within its jurisdiction.

63. In the light of the foregoing considerations, I consider that the General Court erred in law both in its examination of the contractual relationships which were established between the Commission and the various companies in the Systran group, which have developed or contributed to the development of the various versions of the Systran software over time, and that it, therefore, wrongly declared itself as having jurisdiction to hear and determine the action for compensation for the damage allegedly caused to Systran by the Commission's conduct.

64. Consequently, and without it being necessary to consider at this stage the other complaints made by the Commission under its first plea, that plea must be upheld and, accordingly, the judgment under appeal must be set aside.

E – The Court is itself in a position to rule on the objection of lack of jurisdiction

65. There remains to be examined the consequences of the proposed setting-aside of the judgment and specifically to be established whether the Court should decide the case and give final judgment on the objection of lack of jurisdiction raised by the Commission at first instance or whether it must, on the contrary, refer the matter back to the General Court for the latter to give final judgment on the objection of lack of jurisdiction.

66. It follows from the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union that, if the appeal is well founded, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

67. I consider that the Court possesses, in the present case, all the information necessary for it to give final judgment on the objection of lack of jurisdiction raised by the Commission in the proceedings before the General Court.²⁰

68. As is clear from the foregoing considerations, the present dispute between the Commission and Systran and Systran Luxembourg forms part of a larger dispute relating, essentially, to the scope of their respective rights in the EC-Systran Unix software. Since that software is the result of a long collaboration between the parties, which takes legal form in successive joint development, maintenance and migration agreements, comprising, in particular, contractual provisions for the licensing of intellectual property rights, the present dispute has accordingly arisen within a very marked contractual context.

69. Moreover, it should be pointed out here that, far from including an arbitration clause in favour of the European Union judicature, the various agreements concluded clearly contain provisions submitting any dispute between the parties to the jurisdiction of the courts of a Member State (the migration agreements) or to arbitration (the collaboration agreements) and designating the law applicable to those agreements.²¹

70. The existence of that contractual context, the content of which is already largely revealed in the foregoing considerations, makes it possible, without the need to engage in a more extensive and more precise analysis of that content, to conclude with sufficient certainty that, having regard to the subject-matter of the claim for compensation and in view of the contractual rights and obligations of the parties, it is not possible reasonably to give a ruling on the dispute without an in-depth examination of the various agreements²² in the light of the law which is applicable to them.²³

71. Therefore, I invite the Court to give final judgment on the objection of lack of jurisdiction raised by the Commission, by ruling that the General Court should, on the basis of Article 268 TFEU and the second and third paragraphs of Article 340 TFEU, have declined jurisdiction to hear and determine the dispute as submitted to it and have invited the parties to refer the matter to the competent national courts designated by mutual agreement so that, under the law applicable to the contracts and in so far as is relevant, those courts may give a ruling on the scope of the parties' respective rights and obligations and adjudicate on the existence of any contractual breaches and contractual liability on the part of the European Union.

20 — See, in particular, Case C-193/01 P *Pitsiorlas v Council and ECB* [2003] ECR I-4837, paragraph 32; Case C-521/06 P *Athinaïki Techniki v Commission* [2008] ECR I-5829, paragraph 66; Case C-319/07 P *3F v Commission* [2009] ECR I-5963, paragraph 99; and Case C-322/09 P *NDSHT v Commission* [2010] ECR I-11911, paragraphs 65 and 66.

21 — It may also be noted, in that regard, that, during the some three years between the publication of the contested invitation to tender and the introduction of the action based on non-contractual liability before the General Court, Systran sought in particular to find 'a contractual solution' to the dispute, as is clear from the explanations that it provided in its written response to the second part of the seventh plea raised by the Commission, alleging a break in the chain of causation, examined below.

22 — That examination would even enable a distinction to be made between breaches of contract and tortious acts, an activity which may also prove to be very delicate. See, to that effect, Varet, E, *Le contentieux des licences de logiciel dans tous ses états*, JCP-E, 2012, No 10, p. 1173.

23 — In this case the law designated by mutual agreement by the parties to the agreements, whether contract law or the substantive law transposing Directive 91/250 and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigenda, OJ 2004 L 195, p. 16, and OJ 2007 L 204, p. 27), and implementing the Convention for the Protection of Literary and Artistic Works, signed at Berne on 9 September 1886 (the Paris Act of 24 July 1971), as amended on 28 September 1979 ('the Berne Convention').

72. It may, from that perspective, be pointed out in general terms that the assessment of the respective rights and obligations of the parties to the dispute entails, in particular, a precise and detailed examination of the nature, the subject-matter and the purpose of the various agreements at issue and of the main contractual provisions agreed upon, in the light of both the law applicable to those agreements and industry practice,²⁴ taking into account all the relevant circumstances and in particular the principle of good faith in the performance of agreements and loyalty, weighting and collaboration obligations incumbent upon the parties.²⁵

73. It is important to add here that, quite apart from any outcome of bringing the dispute before the competent national courts, doing so in no way prejudices the jurisdiction of the European Union judicature to order compensation for any damage which may ultimately arise not from a breach of contract but from any conduct constituting a tortious act, in accordance with the general principles common to the laws of the Member States.

VI – The other pleas in law

74. As I have stated above, the following analysis is presented only in the alternative, in the event that the Court does not concur with the conclusion I draw from the examination of the first plea submitted by the Commission. I shall first examine the Commission's second plea, alleging infringement of the rules on the taking of evidence and the rights of the defence (heading A), and then its third plea, in which it challenges the existence of the copyright claimed by the applicants (heading B). I shall next examine (heading C) the various pleas and complaints calling into question the assessment by the General Court of the various conditions giving rise to the non-contractual liability of the European Union, that is to say, the unlawful nature of the conduct complained of (heading 1), the existence of the alleged damage (heading 2), the existence of a causal link between that conduct and that damage (heading 3), and, finally, the assessment of that damage (heading 4).

A – Infringement of the rules on the taking of evidence and of the rights of defence of the Commission (second plea)

75. By its second plea, the Commission claims that the General Court infringed the rules on the taking of evidence and its rights of defence by holding that the Golvers report and the Gosselies statement were submitted out of time and are therefore inadmissible, under Article 48(1) of the Rules of Procedure of the General Court (paragraphs 252 and 253 of the judgment under appeal).

76. According to Articles 44(1)(e) and 46(1)(d) of the Rules of Procedure of the General Court, it is for the applicant and the defendant to submit the nature of any evidence offered by them in the application and in the defence, respectively.

24 — Concerning the relevant circumstances to be taken into consideration in the interpretation of the agreements, see in particular, by way of guidance, Article 5:102 of the Principles of European Contract Law, 1998, drawn up by the Commission on European Contract Law, known as 'the Lando Commission', in Lando, O. and Beale, H., (eds), *Principles of European Contract Law, Parts I and II*, Kluwer Law International, 2000. See also Article 8:102 of the Draft Common Frame of Reference, in von Bar, C., Clive, E. and Schulte-Nölke, H. (eds), *Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, Sellier, European Law Publishers, 2009. On that topic, see Communication from the Commission to the Council and the European Parliament of 11 July 2001 on European contract law, COM(2001) 398 final; Communication from the Commission to the European Parliament and the Council of 11 October 2004 – European contract law and the revision of the *acquis*: the way forward, COM(2004) 651 final; and Communication from the Commission to the European Parliament and the Council of 12 February 2003 – A more coherent European contract law – An action plan, COM(2003) 68 final (OJ 2003 C 63, p. 1).

25 — See to that effect, in particular, Montero, E., 'La communication des codes sources de logiciels. État de la question à la lumière de la jurisprudence belge et française et de la pratique contractuelle', *Revue de droit intellectuel – l'Ingénieur Conseil*, Bruylant, 1995, Nos 3 to 5, p. 60.

77. Those provisions, corresponding to Articles 120(e) and 124(1)(d) of the Rules of Procedure of the Court of Justice, thus determine the stage of the proceedings at which the evidence initially offered²⁶ must normally be submitted. Enacted in the interest of the proper administration of justice and in full compliance with the adversarial principle and the principle of equality of arms, they are expressions of requirements resulting from a fair hearing and, more particularly, from protection of the rights of the defence.²⁷

78. Nevertheless, in accordance with Article 48(1) of the Rules of Procedure of the General Court, which corresponds to Article 128(1) of the Rules of Procedure of the Court of Justice, in reply or rejoinder the parties may offer further evidence, provided, however, that they give reasons for the delay in offering it.

79. The Court of Justice has held that, as an exception to the rules on the submission of offers of evidence, Article 48(1) of the Rules of Procedure of the General Court requires the parties to give reasons for the delay in offering their evidence,²⁸ an obligation which necessarily implies that the court is granted jurisdiction to review the merits of the reasons for the delay in producing the evidence offered and, where appropriate, the content thereof and, where the application is not substantiated to the requisite legal standard, the power to dismiss the evidence.²⁹

80. In this case, it must first of all be pointed out that, as the General Court found, both the Golvers report and the Gosselies statement were submitted at an extremely late stage,³⁰ long after the close of the written procedure.

81. Indeed, it is clear from paragraph 251 of the judgment under appeal that the Commission submitted the Golvers report and the Gosselies statement in answer to the third series of questions put to the parties by the General Court on the factors to be taken into consideration in assessing the damage. However, the application was filed on 25 January 2007 and the General Court put forward a first series of questions on 1 December 2008 and then a second series of questions at the opening of the oral procedure. The hearing took place on 27 October 2009 and then the General Court, by order of 26 March 2010, ordered the reopening of the oral procedure in order to invite the parties to reply to the third series of questions at issue.

82. The General Court also expressly found that no reasons were given for that delay. Nevertheless, it took great care to examine those documents,³¹ for the sake of completeness, in the context in which they were submitted, that is to say, as answers to the question of evaluating the damage.

83. The General Court cannot, under those circumstances, be criticised for having disregarded *Baustahlgewebe v Commission*.

84. The Commission's second ground of appeal, alleging infringement of the rules on the taking of evidence and of the rights of the defence, is therefore unfounded and accordingly must be rejected.

26 — The Court held that those provisions ought to be read in the light of Article 66(2) of the Rules of Procedure of the General Court and that, therefore, they did not relate to evidence in rebuttal and the amplification of the offers of evidence (see Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraphs 71 and 72).

27 — Judgment of 14 April 2005 in Case C-243/04 P *Gaki-Kakouri v Court of Justice*, paragraph 32. See also the judgment of 5 October 2009 in Joined Cases T-40/07 P and T-62/07 P *de Brito Sequeira Carvalho v Commission*, paragraph 113.

28 — For examples of rejections for being out of time or for an inadequate statement of the reasons, see Case C-308/87 *Grifoni v EAEC* [1994] ECR I-341, paragraph 7; Case C-221/97 P *Schröder and Others v Commission* [1998] ECR I-8255, paragraph 27; *Baustahlgewebe v Commission*, paragraphs 71 to 75; and Case T-36/89 *Nijman v Commission* [1991] ECR II-699, paragraphs 28 and 29.

29 — *Gaki-Kakouri v Court of Justice*, paragraph 33.

30 — Paragraph 252 of the judgment under appeal.

31 — Paragraphs 254 to 260 of the judgment under appeal.

B – The ownership of the copyright in Systran (third ground of appeal)

85. By its third ground of appeal, the Commission argues that the General Court erred in law in applying the general principles of copyright which are contained in Directive 91/250, in particular by holding, in the context of the assessment of its own non-contractual jurisdiction to hear and determine the dispute (paragraphs 70 to 76 of the judgment under appeal), that the applicants were the holders of the copyright that they claimed.

86. It points out, first of all, that Article 2(1) of Directive 91/250 provides that the author of a computer program is to be the natural person or group of natural persons who has created the program. Whilst recalling that there are several exceptions to that rule as regards collective works or the creation by an employee of computer programs in the execution of his duties, it considers, however, that the latter have been neither relied on by the applicants nor referred to by the General Court.

87. It then criticises the application by the General Court of the rule on the presumption of authorship, in particular under Article 5 of Directive 2004/48,³² according to which a person who brings infringement proceedings is not required to adduce evidence of his rights if he establishes that his name appears on the work. It points out, in that regard, that the software at issue is called EC-Systran Unix, which proves that it is the co-author of the software with Systran, that the rights in that software are held jointly and that any dispute concerning the scope of those rights should be decided on the basis of the contract. It adds that that presumption is merely rebuttable, and that it has established that it has the right to use the EC-Systran Unix software.

88. In this case, the General Court held, in paragraph 71 of the judgment under appeal, that the Commission failed to prove that the applicants were not the holders of the copyright that they claimed in the Systran Unix version of the Systran software, and endorsed the applicants' line of argument that it follows from the general principles contained in the Berne Convention and from Directives 91/250 and 2004/48 that the capacity of author belongs, in the absence of proof to the contrary, to the person or persons under whose name the computer program is disclosed (paragraph 69 of the judgment under appeal).

89. It must be pointed out that, in so doing, the General Court gave substance to the statutory presumption set out in Article 15 of the Berne Convention and reproduced in Article 5 of Directive 2004/48, according to which, for the purposes of applying the measures, procedures and remedies provided for in that directive, for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it is to be sufficient for his/her name to appear on the work in the usual manner.

90. It is therefore on the basis of a misreading of the judgment under appeal that the Commission argues that the General Court erred in applying the presumption of ownership of the EC-Systran Unix software, and accordingly the argument must be rejected as manifestly unfounded.

91. Furthermore, the General Court found, in paragraph 209 of the judgment under appeal, that, according to the data submitted by the applicants, in this case a legal opinion, a legal person's capacity as author was enshrined in the case-law in France and in Belgium, and pointed out that the Commission had not successfully rebutted that opinion.

³² — Cited in footnote 23.

92. Admittedly, that finding was made in the context of the examination of the merits of the dispute and not in the context of the examination of the admissibility of the action and the arguments specifically dealing with the presumption of Systran's ownership of the rights. However, the fact remains that it was taken into consideration by the General Court in the context of the analysis of the applicants' rights in the Systran Unix version of the Systran software, without being challenged by the Commission in its appeal. The General Court cannot therefore be criticised for not having formally referred to the provisions of Directive 91/250 relied on.

93. The third ground of appeal raised by the Commission must therefore be rejected as unfounded.

C – The assessment by the General Court of the non-contractual liability of the European Union (fourth to eighth grounds of appeal)

94. In the context of its other grounds of appeal, the Commission challenges the assessment by the General Court of the three conditions giving rise to non-contractual liability of the European Union, that is to say, the unlawful or wrongful nature of its conduct (fourth, fifth and sixth grounds of appeal), the existence of any damage and the existence of a causal link between the alleged unlawful act and the alleged damage (seventh ground of appeal). It criticises, finally, the assessment of the alleged damage (eighth ground of appeal). Those various grounds of appeal will therefore be addressed in that order, it being noted that it is in its eighth ground of appeal that the Commission formally raises the absence of any damage.

1. The unlawfulness of the conduct (fourth, fifth and sixth grounds of appeal)

a) Summary of the grounds of the judgment under appeal

95. As to the substance, the General Court, in paragraphs 200 to 261 of the judgment under appeal, concluded its analysis of the Commission's allegedly unlawful conduct by stating that 'by granting itself the right to carry out works that necessarily entailed the modification of the elements relating to the Systran Unix version of the Systran software found in the EC-Systran Unix version, without having obtained the prior consent of the Systran group, the Commission [had] committed an unlawful act by reference to the general principles common to the laws of the Member State[s] applicable in such matters', an unlawful act 'which constitutes a sufficiently manifest infringement of the Systran group's copyright and know-how in the Systran Unix version of the Systran software' (paragraph 261 of the judgment under appeal).

96. It came to that conclusion after a three-stage examination. It examined, first of all, whether the applicants could, by reference to the general principles common to the laws of the Member States, rely on the right to object to the Commission's entrusting without their consent the works on certain aspects of the EC-Systran Unix version to a third party (paragraphs 204 to 215 of the judgment under appeal). It then assessed the Commission's claim that the various agreements concluded since 1975 allow the Commission to entrust to a third party the works set out in the contract at issue (paragraphs 216 to 227 of the judgment under appeal). It finally analysed the content of the work referred to in the invitation to tender, in order to ascertain whether it was likely to entail the modification or disclosure of elements or information protected by the copyright and know-how of the applicants (paragraphs 228 to 260 of the judgment under appeal).

b) Summary of the Commission's arguments

97. First, the Commission argues, in the context of its fourth plea, that its conduct could not be regarded as unlawful or as wrongful. That plea is subdivided into two parts, one dealing with copyright, the other with know-how.

98. On the one hand, the modification by the Commission or a third party of components of the EC-Systran Unix software cannot be regarded as infringement (first part of the fourth plea). The General Court, more precisely and in the first place (first complaint), distorted the facts and evidence by drawing from the substantial similarity between the Systran Unix and EC-Systran Unix software the conclusion that the applicants could rely on their rights in the Systran Unix software to object to the disclosure to a third party, without their consent, of the EC-Systran Unix version (paragraphs 143, 147 and 212 of the judgment under appeal).³³ The General Court also, and in the second place (second complaint), committed a manifest error of assessment and a distortion of the facts in finding the existence of an infringement, since it is the kernel of the EC-Systran Unix version of the software, in which it has undisputed rights under the migration agreements, which was modified and not the kernel of their Systran Unix version.

99. On the other hand, the General Court erred in law in holding that, by granting two lots of the contract at issue to Gosselies and the subsequent communication of information relating to Systran Unix, the Commission wrongfully disclosed Systran's know-how (second part of the fourth plea).

100. Secondly, the Commission claims, in its fifth ground of appeal, that that conduct does not, in any event, constitute a 'sufficiently serious' infringement of Systran's copyright and know-how, within the meaning of *Bergaderm and Goupil v Commission*,³⁴ in so far as it is not inexcusable in nature and the rule breached does not satisfy the requirements laid down.³⁵ It adds that it is necessary to take into account, in that assessment, the context in which the alleged wrongful acts were committed, that is to say, the functioning of its directorate-general responsible for the translation of all the institution's official documents, which constitutes an overriding public interest.³⁶

101. Finally, and thirdly, the Commission raises, in its sixth ground of appeal, two complaints based on exceptions to the exclusive right of the author laid down in Directive 91/250. It claims that the General Court erred in its interpretation of the exception laid down in Article 5(1) of Directive 91/250 by ruling, in paragraph 226 of the judgment under appeal, that the Commission had been unable to establish why it could rely on that legal exception to the acts subject to restrictions in order to entrust to a third party the works to be carried out in the context of the contract at issue. On the one hand, that directive does not exclude the possibility that the works referred to in Article 5(1) may be carried out by third parties. On the other hand, the legal exception covers the adaptation of a program to an updated operating system, which was the subject-matter of the invitation to tender of 4 October 2003. Moreover, the Commission also relied on the decompilation exception, laid down in Article 6 of Directive 91/250, in the context of its answers to the second series of questions from the General Court, a point on which the latter did not rule, contrary to Article 36 of the Statute of the Court of Justice.

33 — That complaint itself contains several arguments which will be more specifically analysed below.

34 — Case C-352/98 P [2000] ECR I-5291.

35 — Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 56.

36 — Case T-351/03 *Schneider Electric v Commission* [2007] ECR II-2237, paragraph 122 et seq.

c) Assessment

102. Since the Commission disputes, without adopting the General Court's threefold analysis, any infringement of copyright (heading i) – and, in that context, a misinterpretation of Directive 91/250 (heading ii) – and any disclosure of Systran's know-how (heading iii), while claiming that, even if those unlawful acts were established, they are not in any event 'sufficiently serious' (heading iv), I shall examine those four points in turn, noting in this connection that account should be taken of the grounds put forward by the General Court in its assessment of the objections of admissibility, since, on the one hand, the General Court itself makes reference to that analysis in the substantive grounds for its judgment³⁷ and, on the other hand, the Commission formally raises, in the context of its fourth plea, a complaint concerning those findings of the General Court.

i) The infringement of copyright (first part of the fourth plea)

– The second complaint of the first part of the fourth plea

103. The second complaint made by the Commission in the context of the first part of its fourth plea must first of all be rejected as manifestly unfounded.

104. The General Court held, referring to its analysis of its own jurisdiction, in paragraphs 68 to 73 of the judgment under appeal, that 'the Systran group [wa]s entitled to rely on copyright in the Systran Unix version of the Systran software which it developed and which it markets under its own name without having to produce other evidence' (paragraph 205 of the judgment under appeal). It pointed out, in that regard, that '[t]he discussion [wa]s ... not about the EC-Systran Unix version, but about the rights on which the applicants can rely where works affecting the EC-Systran Unix version are carried out, on the basis of the rights held in the original and earlier Systran Unix version' (paragraph 211 of the judgment under appeal).

105. In so doing, the General Court very clearly indicated that it is the modification of the EC-Systran version which infringed the rights held by the applicants in the Systran Unix version (paragraph 211 of the judgment under appeal).

106. The finding thus made by the General Court as to the substance is, moreover, perfectly consistent with the analysis carried out in the context of the examination of admissibility, in paragraphs 137 to 147 of the judgment under appeal, after which it held that the applicants had established in a sufficiently probative manner that there was a substantial similarity between the Systran Unix version and the EC-Systran Unix version, with the result that they could rely on rights held in the Systran Unix version to object to the disclosure to a third party without their consent of the EC-Systran Unix derivative version.

107. The Commission cannot, therefore, complain that the General Court committed a manifest error of assessment or distorted the facts by refusing to find that it is the EC-Systran Unix version which had been modified.

³⁷ — See paragraphs 205 and 215 of the judgment under appeal.

– The first complaint of the first part of the fourth ground of appeal

108. The first complaint made by the Commission in the context of the first part of its fourth ground of appeal raises, for its part, an issue of admissibility. The Commission considers, I repeat, that the legal conclusions drawn by the General Court from the substantial similarity of the Systran Unix and EC-Systran Unix versions of the Systran software constitute a distortion of the facts and evidence, and puts forward three supporting arguments.

109. It notes, first, that, since it was not in possession of the Systran Unix version, it has not been in a position to dispute the claimed substantial similarity between the EC-Systran Unix version and Systran Unix version. It points out, secondly, that, even if that were established, that similarity results from the common filiation of the Systran Unix and EC-Systran Unix systems, in this instance to the EC-Systran Mainframe system, and from the fact that it ordered Systran to migrate the EC-Systran Mainframe version to the Unix environment, referring, in that regard, to the Golvers report. Finally and thirdly, it argues that the existence of a wrongful act or infringement is excluded, on the one hand, by the rights that it considers that it holds under the various agreements concluded successively since 1975, arguments which it developed in the context of its first plea alleging the General Court's lack of jurisdiction, and, on the other hand, by the exceptions to the exclusive rights of the author on which it relies in the context of its sixth plea.

110. The Commission's first two arguments are inadmissible, in so far as they complain of a distortion of the facts or evidence, without providing any details concerning the inaccurate substantive findings or distortion of evidence which are claimed to vitiate the judgment under appeal.

111. It is important, in that regard, to recall that, according to settled case-law, it is clear from the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice, pursuant to which appeals are to be on points of law only, that the General Court has exclusive jurisdiction, first, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, secondly, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them.³⁸

112. The Court of Justice thus has no jurisdiction to find the facts or, as a rule, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it.³⁹ That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice.⁴⁰

113. In any event, the Golvers report was, as stated above in the context of the examination of the second plea, rightly declared inadmissible by the General Court, with the result that the Court cannot take it into consideration, even though it might reveal a distortion of the facts or evidence. Moreover, the Commission had already relied, in the proceedings before the General Court, on the fact that it had

38 — See, in particular, Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, paragraph 51, and Case C-90/09 P *General Química and Others v Commission* [2011] ECR I-1, paragraph 71.

39 — See, in particular, *Baustahlgewebe v Commission*, paragraph 24.

40 — See, in particular, Case C-122/01 P *T. Port v Commission* [2003] ECR I-4261, paragraph 27, and *General Química and Others v Commission*, paragraph 72.

never been in possession of the source codes of the Systran Unix version (paragraph 197 of the judgment under appeal), a point on which the General Court ruled, in paragraph 254 of the judgment under appeal, in the context of the examination of the Golvers report which it carried out, in the alternative, and the Commission did not, as a matter of fact, challenge that assessment.

114. According to settled case-law, an appeal must, under the provisions of the second subparagraph of Article 256(1) TFEU, Article 58 of the Statute of the Court of Justice and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, clearly state which aspects are criticised in the judgment of the General Court which the Court of Justice is requested to set aside and the legal arguments which specifically support the request. An appeal which simply repeats or reproduces verbatim the pleas in law and arguments already submitted to the General Court, including those based on factual allegations expressly dismissed by that court, does not meet that requirement; such an appeal merely seeks, in reality, reconsideration of the application submitted before the General Court, which, under Article 49 of the Statute of the Court of Justice, falls outside the latter's jurisdiction.⁴¹

115. The third argument calls for particularly careful consideration. The Commission, in fact, is formally claiming that the General Court erred in concluding that neither the agreements relied on nor the exceptions to the exclusive rights of the author prevented the characterisation of the Commission's conduct as unlawful or wrongful.

116. Since the effect of the exceptions to the exclusive rights of the author is at the heart of the Commission's sixth plea, it will be discussed below.

117. The argument based on the agreements could be understood as criticising, in essence, the legal characterisation of the facts accepted by the General Court as constituting a wrongful or unlawful act, a question of law concerning which an appeal may be brought. That argument could actually be interpreted, consistent with the line of argument put forward in the context of the first plea in point 29 of this Opinion, as challenging not the distortion of clear and precise contractual provisions, but the overall distortion of the agreements relied on. It would therefore be necessary to assess not the distortion of any particular fact, but the distortion of an act, or of a series of acts, in this case the agreements at issue, and the error of legal classification which necessarily stems therefrom.

118. However, in so far as the Commission merely complains of a distortion of the facts and evidence by referring to the various agreements relied on, without providing any details or any explanation in that regard, and in so far as it has not expressly relied on a distortion of those agreements or even the authenticity of the documents, I consider that that complaint must also be rejected. It should, in particular, be noted in that regard that the Commission did not see fit to formally challenge, in its appeal, the conclusion which the General Court reached in paragraph 221 of the judgment under appeal with regard to the 'philosophy' of the order contracts which it had relied on at first instance.

119. Therefore, the first part of the Commission's fourth plea must be rejected as inadmissible in its entirety.

120. Since examination of the effect of the exceptions to the exclusive rights of the author laid down in Article 5 of Directive 91/250, the subject-matter of the sixth plea, is necessary as a logical consequence of the foregoing, the second part of the fourth plea, relating to the disclosure of know-how, will accordingly not be examined until later.

41 — See, in particular, the order in Case C-244/92 P *Kupka-Floridi v ESC* [1993] ECR I-2041, paragraphs 9 to 11, and Case C-401/09 P *Evropaïki Dynamiki v ECB* [2011] ECR I-4911.

ii) The effect of the exceptions to the exclusive rights of the author laid down in Directive 91/250 (sixth ground of appeal)

121. In the context of its sixth ground of appeal, the Commission raises two complaints, the first concerning Article 5(1) of Directive 91/250 and the second concerning Article 6 of that directive.

– The first complaint

122. By its first complaint raised in the context of its sixth plea, the Commission, in essence, criticises the General Court for having erred in its interpretation of Article 5(1) of Directive 91/250 by ruling that the legal exception to acts coming with the exclusive right of the author of a computer program provided for therein is intended to apply only to works carried out by the legitimate acquirer of that program and not to works entrusted to a third party by that acquirer (paragraph 225 of the judgment under appeal).

123. Article 5(1) of Directive 91/250 provides that, in the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) of that directive, including ‘the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof’, do not require authorisation by the rightholder provided that they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

124. The Court, which has not yet had the opportunity to examine whether, as the General Court asserts, the exception to the exclusive right of the author may be applicable to works of adaptation entrusted to a third party by the lawful acquirer of a program, is therefore called upon to rule on that matter.⁴²

125. It is clear, in that regard, from the 20th and 22nd recitals in the preamble to Directive 91/250 that an objective of that exception is to make it possible to achieve the interoperability of an independently created program with other programs or to connect all components of a computer system, including those of different manufacturers, so that they can work together. The 21st recital in the preamble to that directive states that the acts of reproduction and translation provided for in Article 4(a) and (b) of that directive may be performed by or on behalf of a person having a right to use a copy of the program.

126. Accordingly, even though the combined provisions of Articles 4 and 5 of Directive 91/250 should, in that they provide for an exception to the exclusive right to act or to grant authority of the rightholder of a computer program, be interpreted strictly, it seems difficult to accept that the directive prevents, in principle, works which fall within their scope from being carried out by a third party on behalf of a person holding a right of authorisation.

127. The first complaint made by the Commission in the context of its sixth plea therefore seems to me to be well founded, and accordingly the judgment under appeal should also be set aside on that ground alone, even though it is only an element considered in the alternative in the General Court’s reasoning.

42 — In its appeal, the Commission states that, in its Report to the Council, the European Parliament and the Economic and Social Committee of 10 April 2000 on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs (COM(2000) 199 final), it had pointed out that there was a discrepancy between the Member States on that matter, but that it shared the view of some commentators that lawful acquirer did in fact mean a purchaser, licensee, renter or a person authorised to use the program on behalf of one of those persons.

128. It is important, in that regard, to add that the Commission relied on the relevant provisions of Belgian and Luxembourg law (paragraph 224 of the judgment under appeal) but that the General Court rejected its arguments on the basis of an interpretation of Article 5(1) of Directive 91/250 (paragraph 225 of the judgment under appeal), after ruling that it had to assess the wrongfulness of the Commission's conduct by reference to the general principles common to the laws of the Member States (paragraph 103 of the judgment under appeal).

129. Under those circumstances, if the Court were to set aside the judgment under appeal solely on that ground, the case should then be referred back to the General Court for the latter to examine the other conditions for the application of that exception and, more specifically, whether, as the Commission argues, the adaptation of a program to a new operating system falls within its scope and whether the works described in the invitation to tender at issue and carried out by Gosselies were, in accordance with Article 5(1) of Directive 91/250, necessary for the use of the program in accordance with its intended purpose.

– The second complaint

130. The second complaint made by the Commission, alleging the absence of an examination of the decompilation exception laid down in Article 6 of Directive 91/250, must, for its part, be rejected as manifestly inadmissible. Although it is true that the judgment under appeal does not contain any analysis of the decompilation exception put forward by the Commission, the General Court nevertheless cannot be criticised, on that basis, for giving insufficient reasons for its judgment or failing to rule on an issue, or even ruling *infra petita*.

131. Indeed, as the Commission itself points out in its appeal, it referred to the decompilation exception only in its answer to the second series of questions asked by the General Court. Neither the defence nor the rejoinder submitted in the proceedings before the General Court refers to that exception or to the provisions of Article 6(2)(c) of Directive 91/250 which provide for it. The argument based on the decompilation exception therefore cannot be regarded as a defence plea requiring the General Court to give an express response if it is not to be criticised.

iii) The disclosure of know-how (second part of the fourth ground of appeal)

132. By the second part of its fourth ground of appeal, the Commission also complains that the General Court held that, by awarding the contract resulting from the invitation to tender of 4 October 2003 to Gosselies, it had unlawfully disclosed Systran's know-how, referring both to the grounds relating to admissibility, in paragraphs 78 to 82 of the judgment under appeal, and to those concerning the substance of that judgment, in paragraph 200 thereof. On the one hand, the conditions for the application of Article 339 TFEU are not fulfilled in this case, as is clear from Case 145/83 *Adams v Commission* [1985] ECR 3539. On the other hand, neither the applicants nor the General Court have identified a rule or any other general principle guaranteeing the protection of know-how, with the result that the application should on that point have been declared inadmissible.

133. It must, in that regard, first be noted that the General Court actually ruled, at the request of the applicants,⁴³ that the Commission had unlawfully disclosed Systran's know-how.⁴⁴ In particular, it found, in paragraph 215 of the judgment under appeal, at the end of the examination of the rights relied on by the applicants, that the Systran group was entitled to rely on the protection of the know-how in the technical and secret information relating to the Systran Unix version of the Systran software,⁴⁵ referring, in that regard, to the analysis carried out in paragraphs 78 to 81 of the judgment under appeal concerning the admissibility of the action for damages.

134. In the present case, it held that technical information which forms part of an undertaking's business secrets and which has been communicated to the Commission for specific purposes cannot be disclosed to a third party for other purposes without the authorisation of the undertaking concerned (paragraph 81 of the judgment under appeal).

135. It reached that conclusion by recalling, first of all, the case-law of the Court according to which, on the one hand, the duty of confidentiality placed on the Commission and its staff by Article 339 TFEU was a general principle of law and, on the other hand, that same provision was the expression of the general principle that undertakings are entitled to protection of their business secrets. It also recalled the provisions of Article 41 of the Charter of Fundamental Rights of the European Union guaranteeing respect for the legitimate interests of confidentiality and of professional and business secrecy. It then endeavoured to define business secrets and the conditions for the application of Article 287 EC.

136. Accordingly, the second part of the fourth plea raised by the Commission must be rejected as manifestly unfounded.

iv) Sufficiently serious breach (fifth ground of appeal)

137. The Commission argues in essence that, in the light of the criteria laid down in the case-law of the Court of Justice,⁴⁶ the General Court committed a manifest error of assessment in concluding that the alleged wrongful acts of infringement and disclosure of know-how constituted a sufficiently serious breach within the meaning of the case-law. The conditions for the existence of a sufficiently serious breach, and in particular the requirements relating to the inexcusable nature of the conduct complained of and the clarity of the rule breached, were clearly not fulfilled and the General Court failed to take into account the overriding public interest.

138. The General Court first of all pointed out, citing the case-law of the Court,⁴⁷ that the unlawful conduct alleged to have been committed by an institution should constitute a sufficiently serious breach of a rule of law intended to confer rights on individuals and that, where the institution in question had only considerably reduced, or even no, discretion, the mere infringement of Community law could be sufficient to establish the existence of a sufficiently serious breach.⁴⁸

139. At the end of its analysis of the rights relied on by the applicants and of the illegality of the Commission's conduct,⁴⁹ it held that, 'by granting itself the right to carry out works that necessarily entailed the modification of the elements relating to the Systran Unix version of the Systran software found in the EC-Systran Unix version, without having obtained the prior consent of the Systran

43 — See, in particular, paragraphs 66, 67, 78, 109 and 115 of the judgment under appeal.

44 — See, in particular, paragraphs 215 and 261 of the judgment under appeal.

45 — Paragraph 215 of the judgment under appeal.

46 — *Brasserie du Pêcheur and Factortame*, paragraph 56.

47 — Paragraph 127 of the judgment under appeal.

48 — *Bergaderm and Goupil v Commission*, paragraphs 42 and 44.

49 — Paragraphs 127 to 261 of the judgment under appeal.

group, the Commission [had] committed an unlawful act by reference to the general principles common to the laws of the Member State[s] applicable in such matters' and that that unlawful act constituted a sufficiently manifest infringement of the Systran group's copyright and know-how in the Systran Unix version of the Systran software.⁵⁰

140. Contrary to what the applicants claim, that complaint cannot be declared inadmissible on the ground that it was not raised by the Commission in the proceedings before the General Court. That complaint is actually raised in the context of a plea alleging an error in the classification of the Commission's conduct and the absence of any unlawful or wrongful act committed by the latter, and thus disputing the very existence of one of the three elements of any non-contractual liability of the European Union, which was examined by the General Court in the judgment under appeal. In any event, the Commission is entitled to raise a complaint arising from the judgment under appeal itself and seeking to criticise the merits of that judgment.⁵¹

141. In this case, the criticisms raised by the Commission in the appeal are incapable of supporting the conclusion that the General Court committed an error of law in that regard, even though the judgment under appeal is, in fact, certainly open to criticism by the Court on that point.

142. It is important to point out that, according to the settled case-law of the Court on which the General Court based its decision in the judgment under appeal, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.⁵²

143. It follows, as the Court has had the opportunity to clarify, that the General Court cannot, without committing an error of law, conclude that there exists a sufficiently serious breach of Community law without having determined the discretion available to the institution or, at least, without having set out adequately for legal purposes the reasons or circumstances which might exceptionally have explained why such an analysis would serve no purpose.⁵³

144. However, since the General Court has neither determined that discretion nor explained why it was not necessary to undertake such an analysis, the judgment under appeal is open to criticism by the Court on that point.

145. None the less, the judgment under appeal should not be set aside on that ground.

146. The action against the Commission has actually been brought, not on the basis of its legislative activities, and more precisely on the basis of the consequences arising from a legislative measure adopted within the scope of a wide margin of discretion,⁵⁴ but on the basis of the conditions for the awarding of a public service contract. Although an institution of the European Union clearly has all the discretion necessary to decide to launch a procedure for the award of a public contract, it none the less has no discretion with regard to compliance with the law applicable to it in the context of such a procedure.

50 — Paragraph 261 of the judgment under appeal.

51 — See, to that effect, the judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others v Commission*, paragraph 17.

52 — *Brasserie du Pêcheur and Factortame*, paragraph 51; *Bergaderm and Goupil v Commission*, paragraphs 41 and 42; Case C-312/00 P *Commission v Camar and Tico* [2002] ECR I-11355, paragraphs 53 and 54; and Case C-472/00 P *Commission v Fresh Marine* [2003] ECR I-7541, paragraphs 25 and 26.

53 — Case C-198/03 P *Commission v CEVA and Pfizer* [2005] ECR I-6357, paragraphs 63 to 69.

54 — *Brasserie du Pêcheur and Factortame*, paragraphs 50 and 51.

147. Consequently, and without it being necessary to examine whether or not it would be appropriate for the Court to establish⁵⁵ a system of non-contractual liability based on administrative activity distinct from the system of non-contractual liability based on legislative activity, I consider, as the General Court found, that the infringement by an institution, within the context of a procedure for the award of a public contract, of the copyright or know-how of a natural or legal person, if established, constitutes a sufficiently serious breach of a rule of law intended to confer rights on individuals which is capable of giving rise to a right to compensation.

148. The complaint alleging an error committed by the General Court in its assessment of the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals must, therefore, also be rejected.

149. Accordingly, the fifth plea raised by the Commission must be rejected in its entirety.

2. The existence of the damage

a) Summary of the grounds of the judgment under appeal

150. In paragraph 291 of the judgment under appeal, the General Court found that, notwithstanding the proposed insufficiently precise initial evaluation of the damage suffered by the applicants, it was not possible to disregard the fact that the Systran group had suffered ‘real and certain damage’, which took the form of ‘the loss in value of Systran’s know-how following its disclosure by the Commission’ (paragraph 292 of the judgment under appeal). It concluded, more specifically, that there was material damage, which comprised three main elements, and non-pecuniary damage.

151. It found, first, that the statements by the applicants’ distributors established that the Commission’s attitude caused damage to the Systran group’s business activities, damage taking the form of ‘the loss of potential customers and the complication of discussions with current customers’ (paragraph 293 of the judgment under appeal). Secondly, the statements or witness statements by financial companies (paragraph 295 of the judgment under appeal) demonstrate that ‘Systran [was made] less attractive to its shareholders, current or potential investors or again acquirers’ (paragraph 295 of the judgment under appeal). Thirdly, Systran’s auditors’ statement (paragraph 298 of the judgment under appeal) shows that Systran had to make a provision in its accounts of EUR 11.6 million for the depreciation of its intangible assets, that is to say, the loss of value of its intellectual property rights (paragraph 298 of the judgment under appeal).

152. It found, moreover, that, in the lump-sum assessment of the amount of the damages, the non-pecuniary damage suffered ought to be taken into consideration, pointing out, in that regard, that, by its conduct, the Commission had denied Systran the rights which it could derive from its creation, conduct which was all the more serious because, as an institution, the Commission is at the origin of the various provisions harmonising Community law on copyright which have not been complied with in the present case (paragraph 324 of the judgment under appeal).

⁵⁵ — Which, to my knowledge, it has never really had the opportunity to do, having been required to hear and determine only actions for damages resulting from the legislative activity of the institutions. The General Court has, however, embarked on that course in civil service disputes. It is appropriate, in that regard, to compare the judgments of the General Court of 10 December 2008 in Case T-57/99 *Nardone v Commission*, paragraph 162; 16 December 2010 in Case T-143/09 P *Commission v Petrilli*, paragraph 46; and 12 July 2012 in Case T-308/10 P *Commission v Nanopoulos*, paragraph 103, in the light of the decision of the Court of Justice (Special Chamber provided for in Article 123b of the Rules of Procedure) in Case C-17/11 RX [2011] ECR I-299, paragraphs 3 and 4, concerning review of the judgment in *Commission v Petrilli*.

b) Summary of the Commission's arguments

153. In the context of its eighth ground of appeal, which, as we shall see below, criticises, in essence, the quantification of the material and non-pecuniary damage suffered by the applicants and the evidence relied on by the General Court in its lump-sum assessment of that damage, the Commission nevertheless formally disputes the existence of any material damage. It considers that the award of the public contract at issue to Gosselies in no way constitutes an unlawful act and that that award could therefore not cause any damage. It also expressly disputes the existence of any non-pecuniary damage, emphasising, in particular, that the General Court did not identify any non-pecuniary damage distinct from the material damage evaluated at EUR 12 million.

154. It is therefore for the Court to examine those two complaints, even though, as is shown below, they can be easily rejected.

c) Assessment

155. It must first of all be noted that the Commission's appeal does not specifically refer to the disputed elements of the judgment, concerning the existence of the material damage identified by the General Court, which it seeks to have set aside or to the legal arguments specifically supporting that request. The Commission's line of argument in no way challenges either the business and financial difficulties or even the making of an accounting provision of EUR 11.6 million identified by the General Court as elements constituting the material damage relied on by the applicants.

156. Since that complaint does not meet the requirements of the first paragraph of Article 58 of the Statute of the Court of Justice and Article 168(1)(d) of the Rules of Procedure of the Court of Justice,⁵⁶ it must accordingly be rejected as inadmissible.

157. Moreover, the General Court clearly held that the non-pecuniary damage suffered by Systran lay in the denial of the rights which it could derive from its creation. The statement of reasons in the judgment under appeal is on that point admittedly succinct, or even elliptical, but constitutes a response to the applicants' specific line of argument, summarised in paragraph 272 of the judgment under appeal.

158. It is not possible, under those circumstances, to criticise the General Court for failing to identify that non-pecuniary damage.

159. It follows from the foregoing analysis that the complaints by which the Commission calls into question the General Court's analysis of the very existence of the material and non-pecuniary damage identified must be rejected as, in part, manifestly inadmissible and, in part, unfounded, and it should be noted in that connection that the grounds of the judgment under appeal (paragraphs 301 to 326 thereof) dealing with the evaluation of the amount of that damage will be discussed below, in the context of the analysis of the eighth ground of appeal raised by the Commission.

⁵⁶ — See, in particular, Case C-458/98 P *Industrie des poudres sphériques v Council* [2000] ECR I-8147, paragraphs 65 to 67; the orders in Case C-1/01 P *Asia Motor France and Others v Commission* [2001] ECR I-6349, paragraph 44, and in Case C-420/04 P *Gouvras v Commission* [2005] ECR I-7251; and Case C-354/04 P *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-1579, paragraph 22.

3. The causal link (seventh ground of appeal)

a) Summary of the Commission's arguments

160. The seventh ground of appeal raised by the Commission, which deals with the critical analysis of the causal link between the unlawful conduct and the damage identified, is divided into two parts.

161. In the context of the first part, the Commission argues that the General Court committed an error of law resulting from factually inaccurate findings and from the distortion of evidence in concluding that there was a sufficiently direct link between its own conduct and the damage Systran allegedly suffered as a result of having to make, at the end of 2008, a part of the provision of EUR 11.6 million for depreciation of its intangible assets. It similarly considers that its conduct is not the cause of the disruption of Systran's business relations and that that conduct was not a major obstacle for any investor likely to be interested in Systran (first complaint). It also notes that, by the reference to paragraphs 324 and 325 of the judgment under appeal made in paragraph 300 thereof, the General Court failed to provide adequate reasons for its judgment as regards the causal link between the non-pecuniary damage relied on by Systran and its conduct (second complaint).

162. In the context of the second part, the Commission argues that the General Court erred in law in finding there was a causal link without examining whether Systran had shown reasonable diligence in preventing or limiting its loss or damage. It points out in that regard that the applicants failed to use the remedies available to them in order to object to the award of the contract at issue, in this case an action for annulment under Article 263 TFEU or an injunction to end the infringement under Belgian or Luxembourg law.

b) Assessment

163. I must at the outset state that I am of the view that the complaint made by the Commission in the context of the second part of its seventh ground of appeal, alleging the General Court's failure to examine a possible break in the chain of causation, is well founded, with the result that it should not be necessary to examine the two complaints made in the context of the first part of that plea. Nevertheless, and in accordance with the approach adopted until now in this Opinion, I shall set out a number of considerations in that regard, so as to clarify for the Court, if that is necessary, all the points of law under discussion in the present case.

i) The break in the chain of causation (second part of the seventh ground of appeal)

164. It must be pointed out that it is the settled case-law of the Court that the injured party must, according to a general principle common to the legal systems of the Member States, show reasonable diligence in preventing the loss or damage or in limiting its extent, or risk having to bear it himself.⁵⁷

165. The Court has also held that the General Court, when hearing and determining an action for damages, erred in law in failing to consider whether the person who has suffered damage had contributed to it.⁵⁸

57 — See Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, paragraph 33. See also *Brasserie du Pécheur and Factortame*, paragraph 85; Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [2000] ECR I-203, paragraph 168; Case C-284/98 P *Parliament v Bieber* [2000] ECR I-1527, paragraphs 56 and 57; Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 61; Case C-419/08 P *Trubowest Handel and Makarov v Council and Commission* [2010] ECR I-2259, paragraph 61; and the order of 12 May 2010 in Case C-451/09 P *Pigasos Alietiki Naftiki Etaireia v Council and Commission*, paragraphs 39 and 40.

58 — *Parliament v Bieber*, paragraph 55. See also *Commission v Fresh Marine*, paragraphs 45 to 49.

166. In this case, it must be noted that, as the Commission points out, it is not clear from the reasons for the judgment under appeal (paragraphs 291 to 300) dealing with the examination of the causal link between the alleged unlawful act and the damage claimed that the General Court examined that issue.

167. The fact, referred to by the applicants, that the General Court decided to reopen the oral procedure so that the parties could be requested to give their views, in the context of their answer to the third series of questions,⁵⁹ on the issue of whether it should take into account, in assessing the amount of damage, the fact that the applicants did their utmost to reduce the amount of loss suffered cannot be regarded as being capable of remedying that omission.

168. Even if the General Court had actually taken into account those circumstances in its lump-sum assessment of the damage, the fact remains that, in the absence of any reasons in the judgment under appeal on that point, the Court is not in a position to exercise its powers of review in that regard.

169. The second part of the seventh ground of appeal raised by the Commission, based on the absence of an examination of a possible break in the chain of causation, must therefore be upheld.

170. The judgment under appeal should accordingly also be set aside on that ground and the case should be referred back to the General Court for examination of that point, since the Court of Justice is not itself in a position to reach a final decision.

ii) The existence of a direct causal link (first part of the seventh ground of appeal)

171. According to the settled-case law of the Court, when the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them.⁶⁰

172. The Court has more specifically ruled that, so far as the non-contractual liability of the Community is concerned, the question whether there is a causal link between the wrongful act and the damage, a condition for that liability to be incurred, is a question of law which, as a consequence, is subject to review by the Court of Justice. In those circumstances, a plea alleging that the General Court has incorrectly held there to be a direct causal link between the Commission's wrongful act and the loss an appellant undertaking claims to have sustained is admissible inasmuch as it seeks specifically to review the General Court's legal characterisation of the facts in holding there to be a direct causal link and inasmuch as that review can be carried out without calling into question the relevant findings and assessments of facts.⁶¹

173. In this case, it must be pointed out that the General Court, in paragraphs 291 to 300 of the judgment under appeal, examined the reality of the damage suffered by Systran in conjunction with the causal link between that damage and the Commission's conduct, characterising that link as 'sufficiently direct' on two occasions, at the start and at the end of its analysis (paragraphs 291 and 300 of the judgment under appeal).

59 — See paragraph 46 of the judgment under appeal.

60 — See, in particular, Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* [2008] ECR I-4951, and Case C-510/06 P *Archer Daniels Midland v Commission* [2009] ECR I-1843, paragraph 105.

61 — See Case C-440/07 P *Commission v Schneider Electric* [2009] ECR I-6413, paragraphs 191 to 193.

174. However, the fact that those grounds of the judgment under appeal are difficult to dissociate or that the General Court has not distinctly analysed the causal link required in specific and separate grounds cannot, in itself, lead to the conclusion that the General Court erred in the legal characterisation of the facts, provided that it is clear from those grounds that it drew the appropriate conclusions from its own findings in characterising the Commission's conduct as the direct and certain cause of the damage established.⁶²

175. It must, in that regard, be pointed out that the General Court stated, in paragraph 292 of the judgment under appeal, that it had endeavoured to 'measure the effects of the Commission's conduct on the activities of the Systran group', by addressing to the parties the second series of questions.

176. It considered that the statements by the applicants' distributors, submitted by the applicants in answer to those questions, 'illustrate[d] the perfectly plausible fact that a dispute between an undertaking ... and one of its institutional customers, ... ma[d]e ... that undertaking's business relations with its current and potential customers more difficult' (paragraph 294 of the judgment under appeal). It likewise considered that the witness statements and statements of the financial companies explained in a 'sufficiently probative manner the reactions of several investors when they are considering whether to maintain, invest in or acquire a company marketing computer software the rights in which are disputed by the Commission' (paragraph 296 of the judgment under appeal). It finally held that Systran's auditors' statement permitted it to be established that the provision of EUR 11.6 million for depreciation of the intangible assets was linked with the three reasons set out in those accounts, the first being the dispute with the Commission.

177. It must be noted that the various elements thus accepted by the General Court did not make it possible for the General Court to find that there was a sufficiently direct and immediate causal link between the Commission's alleged conduct and the various components of the damage alleged by the applicants. At most they support a finding that the intellectual property dispute between Systran and the Commission may have had an impact on the deterioration of Systran's economic and accounting situation.

178. Accordingly, on the one hand, the link between the dispute and the complication of Systran's business relations was ruled to be, to use the actual wording of the General Court, 'perfectly plausible'. On the other hand, the General Court itself pointed out that the provision of EUR 11.6 million for depreciation of the intangible assets was justified on three grounds. However, it failed to provide any details on the portion of the resulting damage which it considered as being attributable to the dispute between the Commission and Systran and as justifying its lump-sum assessment of the material damage suffered.

179. It should be added here that although, in principle, and as pointed out above, it is not for the Court to call into question, in an appeal, the General Court's choice of a lump-sum assessment of the damage, that choice cannot, however, allow the General Court to dispense with a stringent examination of the third condition giving rise to non-contractual liability of the European Union, that is to say, the existence of a direct and immediate causal link between the unlawful act relied on and the alleged damage.

180. The first complaint raised by the Commission in the first part of its seventh plea and alleging an error in the legal classification of the causal link must therefore be upheld.

62 — *Commission v Schneider Electric*, paragraph 204.

181. However, the second complaint raised by the Commission in the first part of its seventh plea and alleging a failure to state adequate reasons in the judgment under appeal concerning the causal link between its conduct and the non-pecuniary damage relied on by the applicants must, having regard to the analysis of that damage carried out above, be rejected.

4. The quantification of damages (eighth plea)

182. In the light of the conclusion which I reached at the end of the examination of the seventh plea concerning the condition relating to the causal link, the examination of the eighth plea criticising the evaluation of the damage identified is carried out only in the alternative.

a) Summary of the Commission's arguments

183. The Commission considers that the General Court erred in law in using the value of a notional adaptation licence as the basis for evaluating the damage suffered by Systran between 2004 and 2010. More specifically, the Commission claims that the General Court committed a manifest error of assessment and a distortion of the facts by choosing that period, while the works performed by Gosselies were carried out over three years from 2004 to 2006, a finding of fact which the General Court made in paragraph 313 of the judgment under appeal. Accordingly, the judgment under appeal is also vitiated by a contradiction and a failure to state adequate reasons. Moreover, the General Court, in complete contradiction to the evidence in the case-file, found that a licence to modify the source code was unusual in so far as it is not part of the traditional economic model of software publishers, while the various agreements concluded with the companies in the Systran group since 1975 provided that the Commission had the right to carry out or to have carried out works adapting and developing the EC-Systran software.

184. The Commission claims that the evaluation by the General Court of the 'supplementary' amount of EUR 5 million is also based on a manifest contradiction between the findings of fact made and the method of calculation used. The General Court actually considered, in paragraph 321 of the judgment under appeal, that Systran's activity and development had been affected each year since 2004 to the extent of a lump-sum amount of EUR 650 000, whereas it had previously pointed out that the news of the Commission's disclosure of the software and the related know-how had spread only in 2005 and had become public only in 2006.

185. The Commission also challenges, quite apart from the existence of any non-pecuniary damage as stated above, the evaluation of any such damage. It notes that compensation must, in principle, be strictly equivalent to the damage, so that the seriousness of the wrongful act allegedly committed cannot be taken into account in the evaluation of the damage. Accordingly, by ordering in paragraphs 324 and 325 of the judgment under appeal that the Community pay Systran EUR 1 000 in compensation for its non-pecuniary damage, in view of the seriousness of the alleged wrongful act committed by the Commission, the General Court disregarded the general principles common to the laws of the Member States and the case-law of the Court.

b) Assessment

186. As a preliminary point, it should be recalled that, once the General Court has found the existence of damage, it alone has jurisdiction to assess, within the confines of the claim, the method and extent of compensation for the damage, and that the General Court's judgment must be sufficiently reasoned and, in particular, indicate the criteria taken into account for the purpose of determining the amount decided upon,⁶³ so as enable the Court of Justice to exercise its powers of review.

63 — See, in particular, Case C-257/98 P *Lucaccioni v Commission* [1999] ECR I-5251, paragraphs 34 and 35.

i) The material damage

187. In this case, the General Court decided, in accordance with Article 13(1)(b) of Directive 2004/48, to set the damages as a lump sum (paragraphs 301 to 326 of the judgment under appeal). It took care to point out, in that regard, that the application of the negative economic consequences method, provided for in Article 13(1)(b), gave rise to significant difficulties, since the Commission's financial expert systematically objected to all attempts at evaluation made by the applicants' financial expert (paragraphs 303 to 306 of the judgment under appeal).

188. The General Court then set out in detail the elements on the basis of which that lump-sum compensation should be paid, differentiating between a principal amount, comprising the amount of royalties or rights which would have been due if the Commission had requested authorisation to use the intellectual property rights in question (paragraphs 307 to 319 of the judgment under appeal), a supplementary amount, held to be necessary to take account of the elements which the award of those royalties alone could not make good (paragraphs 320 to 323 of the judgment under appeal), and, finally, the amount to make good the non-pecuniary damage suffered by Systran (paragraphs 324 and 325 of the judgment under appeal).

189. The Commission criticises two elements of the evaluation by the General Court of the principal amount and the supplementary amount.

190. First of all, it claims that the General Court could not use, as the reference basis for calculating the principal lump-sum amount, a licence to modify the source code of software rather than a simple licence to use the software. What it criticises, more specifically, is that that choice is based on the argument that a licence to modify the source code of software is unusual, as it is not part of the traditional economic model of software publishers (paragraph 308 of the judgment under appeal). It considers that that statement contradicts the evidence in the case-file, that is to say, the agreements which it entered into with companies in the Systran group showing, in the circumstances of this case, that such licences are not unusual.

191. However, it must be noted that the General Court endeavoured to calculate the principal amount by assessing the amount of royalties for a hypothetical annual licence to modify the source code of software calculated by reference to the amount of a hypothetical annual licence to use that software, and accordingly by proceeding on the assumption that a licence to modify was, given its scope, more onerous than a simple licence to use. The agreements relied on by the Commission do not make it possible, in the absence of any statistical evidence, to call into question the relevance of that distinction, and, accordingly, it cannot be considered that the General Court committed a manifest error of assessment by proceeding on that assumption.

192. The Commission then criticises the period taken into account by the General Court in evaluating the principal amount of the material damage identified. In so far as the works carried out by Gosselies took place from 2004 to 2006, the General Court committed, in the Commission's view, a manifest error of assessment in finding that the amount of royalties for a hypothetical annual licence to modify the source code should be calculated for the period from 2004 to 2010 (paragraph 318 of the judgment under appeal).

193. However, it is sufficient to note, in that regard, that the calculation of the amount of royalties for a hypothetical annual licence to modify the source code is intended not directly to compensate for the damage caused to Systran by the works carried out by Gosselies, but to evaluate the principal lump sum of the damages deemed to make good the damage, assuming it is found to exist, suffered by Systran based on the fact that the Commission granted itself the right to carry out unauthorised works that necessarily entailed the modification of the elements relating to the Systran Unix version of the EC-Systran Unix software. The General Court therefore logically concluded from this, albeit

implicitly,⁶⁴ that such royalties were due each year for the entire period of use of the modified software, that is from 2004, when the damage actually materialised with the conclusion of the disputed contract awarded to Gosselies, until 2010, when the judgment of the General Court was delivered.

194. However, the Commission rightly claims that the General Court did not give reasons for the choice of the period which it took into account in order to evaluate the supplementary amount of the material damage identified.

195. The General Court stated that that supplementary amount was necessary to take account of the other material elements of the damage suffered by Systran from 2004 which could not be made good solely by the award of royalties for a hypothetical annual licence to modify the source code (paragraph 320 of the judgment under appeal). It pointed out, in that regard, that it was the activity and development of Systran which had been affected each year since 2004 to the extent of an amount of EUR 650 000, corresponding to 6% of its turnover in 2003 (paragraph 321 of the judgment under appeal) and fixed that supplementary amount, converted to current value for the years 2004 to 2010, at EUR 5 million (paragraph 322 of the judgment under appeal).

196. However, as the Commission has pointed out, the General Court itself found that news of the dispute between Systran and the Commission spread in 2005 and became public in 2006 (paragraph 289 of the judgment under appeal). That finding must be linked with the various components of the damage identified by the General Court in the grounds examined before (paragraphs 291 to 300 of the judgment under appeal). It follows that it is possible to determine the date not of the start of the business (paragraphs 293 and 294 of the judgment under appeal) and financial difficulties (paragraphs 296 and 297 of the judgment under appeal) identified by the General Court, but only of the need to make the accounting provision, which is dated 31 December 2008.

197. It follows that the complaint alleging a failure to state reasons for the evaluation of the supplementary amount of EUR 5 million is well founded and the eighth plea raised by the Commission must accordingly be upheld on that point.

ii) The non-pecuniary damage

198. Departing from the application lodged by Systran, the General Court, in paragraph 325 of the judgment under appeal, evaluated its non-pecuniary damage at the symbolic sum of EUR 1 000, after having found that, by its conduct, the Commission had denied Systran the rights which it could derive from its creation, which conduct is all the more serious because, as an institution, the Commission is at the origin of the various provisions harmonising European Union law on copyright which have not been complied with in the present case (paragraph 324 of the judgment under appeal).

199. It must therefore be found that the General Court, in the context of determining the lump-sum amount of damages, evaluated at its absolute discretion the non-pecuniary damage suffered by Systran, an assessment which is beyond the Court of Justice's powers of review, taking into account aggravating circumstances, in this case the fact that the Commission is at the origin of the provisions of European Union law infringed, in accordance with the requirements laid down in the case-law of the Court.⁶⁵

200. Therefore, the second part of the eighth plea raised by the Commission must be rejected.

⁶⁴ — See, for example, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 372, and Case C-47/10 P *Austria v Scheucher-Fleisch and Others* [2011] ECR I-10707, paragraph 104.

⁶⁵ — See, on precisely that point, Case C-259/96 P *Council v de Nil and Impens* [1998] ECR I-2915, paragraph 25.

D – *Alternative conclusion*

201. As is clear from the foregoing, I consider that the judgment under appeal is also in many respects open to criticism by the Court as to the substance. Both its assessments of the two conditions giving rise to non-contractual liability of the European Union relating to the existence of unlawful conduct (first complaint of the sixth plea) and to the existence of a direct causal link between the wrongful conduct established and the damage identified (first complaint of the first part and second part of the seventh plea) and its evaluation of that damage (eighth plea) are vitiated by errors of law.

202. Under those circumstances, I propose in the alternative that the Court set aside the judgment under appeal on those various grounds, even though it could be set aside on the basis of a single one alone, and, having regard to the nature of the errors of law thus established, refer the case back to the General Court, first of all, for reconsideration of the existence of the alleged unlawful act and in particular the impact of the exceptions to the exclusive right of the rightholder laid down in Article 5 of Directive 91/250, secondly, for reassessment of the existence of a direct causal link between any wrongful conduct established and the alleged damage and for assessment of the elements at the root of any break in the chain of causation in question, and, finally, for review of the grounds justifying the quantification of that damage and in particular the supplementary material damage.

VII – Conclusion

203. Having regard to the foregoing analysis, I invite the Court to:

- (1) set aside the judgment of the General Court of the European Union of 16 December 2010 in Case T-19/07 *Systran and Systran Luxembourg v Commission*;
- (2) declare that the action based on non-contractual liability brought by Systran SA and Systran Luxembourg SA before the General Court of the European Union is inadmissible;
- (3) order Systran SA and Systran Luxembourg SA to pay the costs.

In the alternative, I invite the Court to:

- (1) set aside the judgment of the General Court of the European Union of 16 December 2010 in Case T-19/07 *Systran and Systran Luxembourg v Commission*;
- (2) refer the case back to the General Court of the European Union;
- (3) order that costs be reserved.