Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 April 2014*

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* Language of the case: German.

(Appeals — Competition — Agreements, decisions and concerted practices — Market in gas insulated switchgear projects — Joint and several liability for payment of the fine — Concept of an 'undertaking' — Principle of personal liability and the principle that the penalty must be specific to the offender and the offence — Unlimited jurisdiction of the General Court — The ultra petita rule — Principles of proportionality and equal treatment)

In Joined Cases C-231/11 P to C-233/11 P,

three APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 and 16 May 2011,

European Commission, represented by A. Antoniadis, R. Sauer and N. von Lingen, acting as Agents, with an address for service in Luxembourg (C-231/11 P),

appellant,

the other parties to the proceedings being:

Siemens AG Österreich, established in Vienna (Austria),

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

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

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

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

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

applicants at first instance,

and

Siemens Transmission & Distribution Ltd (C-232/11 P),

Siemens Transmission & Distribution SA,

Nuova Magrini Galileo SpA (C-233/11 P),

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

appellants,

the other party to the proceedings being:

European Commission, represented by A. Antoniadis, R. Sauer and N. von Lingen, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, M. Safjan, J. Malenovský and A. Prechal (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 2 May 2013,

after hearing the Opinion of the Advocate General at the sitting on 19 September 2013,

gives the following

Judgment

1 By their appeals, the European Commission, Siemens Transmission & Distribution Ltd, Siemens Transmission & Distribution SA and Nuova Magrini Galileo SpA (those three companies, together, 'the appellant companies') seek to have set aside in part the judgment of the General Court of the European Union in Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission* [2011] ECR II-793 ('the judgment under appeal'), by which that court annulled in part and varied Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear), a summary of which was published in the *Official Journal of the European Union* (OJ 2008 C 5, p. 7) ('the contested decision').

I – Legal context

2 Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), entitled 'Fines', provides as follows:

'…

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

(a) they infringe Article 81 [EC] or Article 82 [EC] …

…

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

…'

3 Article 31 of that regulation, entitled 'Review by the Court of Justice', is worded as follows:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

II – Background to the dispute and the contested decision

4 The facts of the dispute, as set out in paragraphs 1 to 22 of the judgment under appeal, may be summarised as follows.

5 The disputes concern a cartel relating to the sale of gas insulated switchgear ('GIS'), which is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power sub-stations.

6 At paragraphs 1 to 3 of the judgment under appeal, the various companies involved in the dispute are described as follows:

'1 On 20 September 1998, VA Technologie AG ["VA Technologie"] acquired a subsidiary of Rolls-Royce, namely Reyrolle Ltd, which became VA Tech Reyrolle Ltd, then Siemens Transmission & Distribution Ltd … ("Reyrolle"). On 13 March 2001, VA Technologie, through its wholly-owned subsidiary VA Tech Transmission & Distribution GmbH & Co. KEG … ("KEG"), transferred Reyrolle into the newly created company VA Tech Schneider High Voltage GmbH ("VAS"), in which it held 60% of the shares through its subsidiary, the remainder of which were held by Schneider Electric SA [("Schneider")]. Schneider's transfer into VAS consisted of Schneider Electric High Voltage SA, which became VA Tech Transmission & Distribution SA, then Siemens Transmission & Distribution SA … ("SEHV"), and of Nuova Magrini Galileo SpA … ("Magrini"), which were previously wholly-owned subsidiaries of it. Since 1999 SEHV has regrouped the former high-tension activities of several subsidiaries of Schneider …

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

3 In 2005, Siemens AG ["Siemens"] acquired exclusive control of the group whose parent company was VA Technologie ("the VA Tech Group"), via a public bid announced by a subsidiary, namely … Siemens AG Österreich ("Siemens Österreich"). Following that take over, VA Technologie and, subsequently, VAS were merged with Siemens Österreich.'

7 On 3 March 2004, ABB Ltd ('ABB') informed the Commission of the existence of a cartel in the GIS sector and submitted an oral application for immunity from fines pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice'). On 25 April 2004, the Commission granted ABB conditional immunity.

8 On the basis of ABB's statements, the Commission initiated an investigation and, on 11 and 12 May 2004, carried out on-the-spot inspections at the premises of Siemens, Areva T&D SA (part of the VA Tech group), Hitachi Ltd and Japan AE Power Systems Corp. ('JAEPS'). On 20 April 2006, the Commission adopted a statement of objections, which was notified to 20 companies, including the appellant companies. A hearing of the companies concerned took place on 18 and 19 July 2006.

9 On 24 January 2007, the Commission adopted the contested decision, which was notified to the 20 companies to which the statement of objections had been communicated, namely, in addition to the appellant companies, Siemens Österreich, KEG, ABB, Alstom SA, Areva SA, Areva T&D AG, Areva T&D Holding SA and Areva T&D SA (the latter four companies, together, 'Areva'), Fuji Electric Holdings Co. Ltd and Fuji Electric Systems Co. Ltd (the latter two companies, together, 'Fuji'), Hitachi Ltd and Hitachi Europe Ltd (the latter two companies, together, 'Hitachi'), JAEPS, Schneider, Mitsubishi Electric System Corp. ('Mitsubishi') and Toshiba Corp. ('Toshiba').

10 At paragraphs 14 to 16 of the judgment under appeal, the characteristics of the cartel, as presented in the contested decision, were summarised as follows:

> '14 In recitals 113 to 123 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had coordinated the allocation of GIS projects worldwide — except for specific markets — according to agreed rules in order to maintain quotas largely reflecting estimated historic market shares. It pointed out that the allocation of GIS projects had been carried out on the basis of a joint "Japanese" quota and a joint "European" quota, which the Japanese and European producers then had to distribute among themselves. An agreement signed in Vienna [Austria] on 15 April 1988 ("the GQ Agreement") established rules allowing the allocation of GIS projects to either Japanese producers or European producers and to set their value against the corresponding quota. In addition, in recitals 124 to 132 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had entered into an unwritten agreement ("the common understanding"), under which GIS projects in Japan, on the one hand, and in the countries of European members of the cartel, on the other — together described as the "home countries" for GIS projects — were reserved to Japanese members and European members of the cartel respectively. GIS projects located in the "home countries" were not the subject of information exchanges between the two groups and were not charged to their respective quotas.
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> 15 The GQ Agreement also contained rules relating to the exchange of information necessary for operation of the cartel between the two groups of producers, carried out in particular by their respective secretaries, and to the manipulation of the bidding procedures concerned and the fixing of prices for GIS projects which could not be allocated. Under the terms of Annex 2 to the GQ Agreement, the agreement applied worldwide, except in the United States, Canada, Japan and 17 western European countries. Furthermore, under the common understanding, GIS projects in European countries, other than the "home countries", were also reserved for the European group, as the Japanese producers had undertaken not to submit bids for GIS projects in Europe.
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> 16 According to the Commission, the sharing of GIS projects among European producers was governed by an agreement also signed in Vienna on 15 April 1988, entitled "E-Group Operation Agreement for GQ Agreement" … It indicated that the distribution of GIS projects in Europe followed the same rules and procedures as those governing the distribution of GIS projects in other countries. In particular, GIS projects in Europe also had to be notified, recorded, allocated, arranged or have received a minimum price.'

11 On the basis of the findings of fact and legal assessments set out in the contested decision, the Commission concluded that the undertakings involved had infringed Article 81 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA

Agreement') and imposed on them fines calculated in accordance with the methods set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) and in the Leniency Notice.

12 The Commission decided that, pursuant to the Leniency Notice, it was required to grant ABB's application for immunity, but that all the leniency applications, including that submitted by VA Tech, had to be rejected.

13 Articles 1 and 2 of the contested decision provide as follows:

'Article 1

The following undertakings infringed Article [81 EC] … and Article 53 [of the EEA Agreement] by participating, during the periods indicated, in a complex of agreements and concerted practices in the [GIS] sector in the [European Economic Area] (EEA):

…

(m) [Magrini], from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004;

(n) [Schneider], from 15 April 1988 to 13 December 2000;

…

(p) Siemens [Österreich], from 20 September 1998 to 13 December 2000, and from 1 April 2002 to 11 May 2004;

(q) [Reyrolle], from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004;

(r) [SEHV], from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004;

…

(t) [KEG], from 20 September 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004.

Article 2

For the infringements referred to in Article 1, the following fines are imposed:

…

(j) Schneider … EUR 3 600 000;

(k) Schneider …, jointly and severally with [SEHV] and [Magrini]: EUR 4 500 000;

(l) [Reyrolle]: EUR 22 050 000, of which:

  (i) EUR 17 550 000 jointly and severally with [SEHV] and [Magrini], and

  (ii) EUR 12 600 000 jointly and severally with Siemens [Österreich] and [KEG];

…'

III – The actions before the General Court and the judgment under appeal

14 It is apparent from paragraphs 33, 34 and 229 of the judgment under appeal that, in support of their applications for annulment, the appellants relied on two pleas in law.

15 The first plea in law alleged infringement of Article 81(1) EC, Article 53(1) of the EEA Agreement, and of Articles 23(2) and (3) and 25 of Regulation No 1/2003. That plea was divided into four parts, alleging: (i) lack of evidence of the infringement alleged; (ii) errors of assessment in respect of the duration of the infringement alleged; (iii) that the fines imposed are excessive; and (iv) that the limitation period for the infringement alleged had expired for the period prior to 16 July 1998.

16 The second plea in law alleged infringement of substantive procedural requirements and of the right to be heard, in particular, of the applicants' right to examine the witness against them, deriving from Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

17 The General Court confirmed, for all essential purposes, that the companies concerned had committed the infringement identified by the Commission in the contested decision and the amount of the fine imposed on the VA Tech group as a whole, that is, the total amount to be paid by each of the companies comprising that group.

18 While the General Court reduced the duration of the infringement committed by the VA Tech group companies by excluding from it the period from 1 April to 30 June 2002 and, to that extent, annulled the contested decision (see paragraphs 63 to 72 and 236 and paragraph 1 of the operative part of the judgment under appeal), it went on to find, in the exercise of its unlimited jurisdiction, that, in accordance with the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, the reduction of the duration of the infringement had no effect on the amount of the fine imposed on those companies (see paragraph 261 of the judgment under appeal).

19 However, after setting out its reasons at paragraphs 137 to 165 of the judgment under appeal, the General Court went on to find, at paragraph 166 of the judgment, that, in holding Reyrolle, SEHV and Magrini jointly and severally liable for payment of a fine which clearly exceeds their joint liability, in not holding Siemens Österreich and KEG jointly and severally liable for payment of part of the fine imposed on SEHV and Magrini, and in not finding that Reyrolle should bear alone part of the fine imposed on it, the Commission infringed the principle that penalties must be specific to the offender and to the offence.

20 The General Court concluded, at paragraph 167 of the judgment under appeal, that it was necessary to annul Article 2 of the contested decision, in so far as concerns the calculation of the fine to be imposed on SEHV and Magrini and the determination of the amounts to be paid jointly and severally by the applicants.

21 At paragraphs 236 to 264 of the judgment under appeal, in the exercise of its unlimited jurisdiction, the General Court varied the fines imposed on the applicants and also set, in respect of the various fines, the share of the fine to be paid by each of those companies as a reflection of their internal relationships as joint and several debtors, in accordance with the principles set out at paragraph 158 and 159 of the judgment.

22 Accordingly, at paragraph 2 of the operative part of the judgment under appeal, the General Court annulled Article 2(j), (k) and (l) of the contested decision and, at paragraph 3 of the operative part, set the amount of the fines to be paid as follows:

— '[SEHV] and [Magrini], jointly and severally with [Schneider]: EUR 8 100 000;

— [Reyrolle], jointly and severally with Siemens [Österreich], [KEG], [SEHV] and [Magrini]: EUR 10 350 000;

— [Reyrolle], jointly and severally with Siemens [Österreich] and [KEG]; EUR 2 250 000;

— [Reyrolle]: EUR 9 450 000.'

IV – Forms of order sought by the parties and the procedure before the Court of Justice

23 By its appeal, the Commission claims that the Court should:

— set aside paragraph 2 of the operative part of the judgment under appeal, in so far as it is based on the General Court's finding, at paragraph 157 of that judgment, that the Commission is required to determine, for each company forming part of the same undertaking, its share of the fine for the payment of which the companies forming part of that undertaking are jointly and severally liable, and set aside paragraph 3 of the operative part of that judgment, in so far as the General Court, on the basis of the considerations set out paragraph 158 of the judgment, in conjunction with paragraphs 245, 247, 262 and 263 thereof, set new fines and determined the share of the fine to be paid by each company;

— in the alternative, set aside the judgment under appeal, in so far as it requires the Commission, at paragraph 157 of the judgment, to determine, for each company forming part of the same undertaking, its share of the fines for the payment of which the companies forming part of that undertaking are jointly and severally liable, and set aside the judgment, in so far as the General Court, on the basis of the considerations set out at paragraph 158 of the judgment, in conjunction with paragraphs 245, 247, 262 and 263 thereof, determines the share of the fines to be paid by each company, thus modifying the contested decision;

— reject the claims in Joined Cases T-122/07, T-123/07 and T-124/07, in so far as they seek the annulment of Article 2(j), (k) and (l) of the contested decision;

— order the respondents and the applicants at first instance to pay the costs both of the appeal and of the proceedings at first instance.

24 Reyrolle, SEHV and Magrini contend that the Court should:

— dismiss the appeal; and

— grant their claims in full.

25 By its appeal, Reyrolle claims that the Court should:

— amend the fourth indent of paragraph 3 of the operative part of the judgment under appeal, in order that the fine imposed on Reyrolle is reduced by at least EUR 7 400 000;

— in the alternative, annul paragraph 3 of the operative part of the judgment under appeal in so far as it concerns Reyrolle and refer the case back to the General Court;

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

26 By their appeal, SEHV and Magrini claim that the Court should:

— annul paragraph 2 of the operative part of the judgment under appeal, in so far as it annuls Article 2(j) and (k) of the contested decision;

— annul the first indent of paragraph 3 of the operative part of the judgment under appeal, uphold Article 2(j) and (k) of the contested decision and, in respect of Article 2(k) of that decision, declare that each of the joint and several debtors is to pay one third of the fine of EUR 4 500 000;

— in the alternative, annul the first indent of paragraph 3 of the operative part of the judgment under appeal and refer the case back to the General Court;

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

27 The Commission contends that the Court should:

— dismiss the appeal lodged by Reyrolle and the appeal lodged by SEHV and Magrini in their entirety;

— order the appellant companies to pay the costs of the proceedings.

28 By order of the President of the Court of 1 July 2011, Cases C-231/11 P to C-233/11 P were joined for the purposes of the written and oral procedure and of the judgment.

V – The appeals

A – *The Commission's appeal*

29 The Commission relies on seven grounds of appeal, alleging infringement of, respectively, Article 23 of Regulation No 1/2003, the unlimited jurisdiction of the General Court, the principle of personal liability and the principle that the penalty must be specific to the offender and the offence, the *ultra petita* rule, the *audi alteram partem* principle, the obligation to state reasons and the Commission's powers of discretion in the determination of the persons to whom liability may be imputed for the infringement in question.

30 It is appropriate to examine the first three grounds of appeal and the seventh ground of appeal together.

1. The first three grounds of appeal and the seventh ground of appeal

a) Arguments of the parties

31 By its first ground of appeal, the Commission claims that the General Court infringed Article 23 of Regulation No 1/2003, in that it interpreted that provision as conferring upon the Commission the power or, indeed, the obligation, to determine the respective shares to be paid by the various entities held jointly and severally liable for payment of the fine to the Commission on account of the infringement committed by the undertaking of which those entities form part.

32 The power to impose fines available to the Commission under that provision concerns only joint and several liability as imposed externally by the Commission upon the addressees of the decision who are jointly and severally liable for payment of the fine in their capacity as members of one and the same undertaking, not the internal relationship between the various persons who are jointly and severally liable.

33 The Commission's power to order a number of companies to pay a fine for which they are jointly and severally liable derives directly from the liability of 'undertakings'. On the other hand, wider powers enabling the Commission to determine the legal relationships between the entities held jointly and severally liable cannot be inferred from the concept of undertaking.

34 By its second ground of appeal, the Commission submits that, in interpreting Article 23 of Regulation No 1/2003 as encompassing the power, or indeed the obligation, to determine the issue of the internal relationships between those held jointly and severally liable and in specifically determining, on that basis, the shares to be paid by the various applicant companies, the General Court exceeded the powers which it enjoys under its unlimited jurisdiction, since that jurisdiction concerns only the external relationship between the Commission and the undertaking on which a fine is imposed.

35 By its third ground of appeal, the Commission takes issue with the General Court for finding, at paragraph 153 of the judgment under appeal, that the principle that the penalty must be specific to the offender and the offence requires that each addressee of the decision held jointly and severally liable for payment of the fine must be able to discern the share of the fine that he will have to pay vis-à-vis the other liable entities, once the fine has been paid to the Commission in full.

36 The Commission argues that, in the same way as the principle of personal liability, that principle applies to the undertaking per se, not to the different legal entities of which the undertaking is made up.

37 The principle that the penalty must be specific to the offender and the offence requires the Commission to examine, when determining the amount of fines, the relative gravity of the participation of each of the undertakings which committed an infringement, on the basis of the individual conduct of the undertakings concerned and, where appropriate, any aggravating or mitigating circumstances.

38 By its seventh plea, the Commission maintains that, in so far as paragraph 150 of the judgment under appeal may be interpreted as requiring the Commission to find all the entities which may be held liable for participation in an infringement committed by an undertaking jointly and severally liable for payment of the fine, that paragraph is at odds with the freedom of choice enjoyed by that institution in that regard.

b) Findings of the Court

39 Pursuant to Article 23(2) of Regulation No 1/2003, the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC or 82 EC.

40 In its first ground of appeal, the Commission takes issue with the General Court for finding, at paragraph 157 of the judgment under appeal, that is it exclusively for the Commission, in exercising its powers to impose fines under Article 23(2) of Regulation No 1/2003, 'to determine the respective shares of the various companies of the fines imposed on them jointly and severally, in so far as they formed part of the same undertaking, and that task cannot be left to the national courts'.

41 It should be recalled in that regard that EU competition law refers to the activities of undertakings (see, inter alia, Case C-508/11 P *ENI* v *Commission* [2013] ECR, paragraph 82, and Case C-440/11 P *Commission* v *Stichting Administratiekantoor Portielje* [2013] ECR, paragraph 36 and the case-law-cited).

42 The authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles 81 EC and 82 EC, and not other concepts such as the concept of a company or firm or of a legal person, used, inter alia, in Article 48 EC (see, to that effect, Case C-501/11 P *Schindler Holding and Others* v *Commission* [2013] ECR, paragraph 102).

43 The Court of Justice has consistently held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. That concept must be understood as covering an economic unit, even if, from a legal perspective, that unit is made up of a number of natural or legal persons (see, inter alia, Joined Cases C-628/10 P and C-141/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* [2012] ECR, paragraph 42 and the case-law cited).

44 When such an economic entity infringes the competition rules, it is for that entity, in accordance with the principle of personal responsibility, to answer for that infringement (see, inter alia, *Alliance One International and Standard Commercial Tobacco* v *Commission*, paragraph 42, and *Commission* v *Stichting Administratiekantoor Portielje*, paragraph 37 and the case-law cited).

45 It should be recalled in that connection that, in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking that infringed Article 81 EC.

46 Accordingly, it is settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see, inter alia, *Commission* v *Stichting Administratiekantoor Portielje*, paragraph 38 and the case-law cited).

47 Where, in a relationship entailing vertical capital links of that kind, the parent company in question is itself deemed to have infringed EU competition rules, its liability for the infringement is wholly derived from that of its subsidiary (see, to that effect, Case C-286/11 P *Commission* v *Tomkins* [2013] ECR, paragraphs 43 and 49, and Case C-50/12 P *Kendrion* v *Commission* [2013] ECR, paragraph 55).

48 The Commission will thus be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary (see, inter alia, Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 98).

49 The General Court was therefore correct to state, at paragraph 150 of the judgment under appeal, that, according to case-law, where several persons may be held personally responsible for participation in an infringement committed by one and the same undertaking for the purposes of competition law, they must be regarded as jointly and severally liable for that infringement.

50 The Commission's criticism of paragraph 150 of the judgment under appeal in its seventh ground of appeal must be rejected, since it does not follow from that paragraph, placed in context and in the light of the case-law cited there, that the Commission is in fact required to find all the persons who may be held personally responsible for participation in an infringement committed by one and the same undertaking jointly and severally liable for payment of a fine.

51 Where, in accordance with Article 23(2) of Regulation No 1/2003, the Commission has the possibility of holding jointly and severally liable for payment of a fine a number of legal persons forming part of one and the same undertaking that is responsible for the infringement, the Commission's determination of the amount of that fine — in so far as it is based, in any particular case, on the concept of an undertaking, which is a concept of EU law — is subject to certain limitations, which require due account to be taken of the characteristics of the undertaking concerned, as constituted during the period in which the infringement was committed.

52 When determining how joint and several liability is to be imposed from an external perspective, the Commission is under an obligation, in particular, to adhere to the principle that the penalty must be specific to the offender and the offence, which requires, in accordance with Article 23(3) of Regulation No 1/2003, the amount of the fine imposed to be determined by reference to the gravity of the infringement for which the undertaking concerned is held individually responsible and the duration of the infringement.

53 It should be noted in that regard that the factors capable of affecting the assessment of the gravity of infringements and which may, for that purpose, be taken into account in ensuring that the penalty imposed is appropriate to the economic entity in question, include the conduct of each of the undertakings concerned, the role played by each of them in the establishment of the concerted agreements or practices, the profit which they were able to derive from those agreements or practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 242).

54 In that connection, the General Court was also correct to find, first, at paragraph 153 of the judgment under appeal, that the Commission does not have complete freedom to determine the sums to be paid jointly and severally and, second, at paragraph 154 of the judgment, that, in the present case, the Commission had to take account of the findings which it made in recital 468 of the contested decision regarding the responsibility of the various undertakings for the infringement periods concerning them.

55 While it is true that a Commission decision imposing fines must necessarily be addressed to the legal persons comprising an undertaking, that limitation, which is of a purely practical nature, does not mean that, where the Commission makes use of its power to hold a number of legal entities jointly and severally liable for payment of a fine, as they formed a single undertaking at the time the infringement was committed, the rules and principles of EU competition law are to be applied not only to the undertaking concerned but also to the legal persons of which the undertaking is made up.

56 It follows from the foregoing that the rules governing EU competition law, including those relating to the Commission's power to impose penalties, the EU law principle of personal liability for an infringement and the principle that the penalty must be specific to the offender and the offence, which must be complied with when the power to impose penalties is being exercised, relate only to the undertaking per se, not the natural or legal persons forming part of the undertaking.

57 In particular, in so far as it is merely the manifestation of an *ipso jure* legal effect of the concept of an 'undertaking', the EU law concept of joint and several liability for payment of a fine concerns only the undertaking itself and not the companies of which it is made up.

58 While it follows from Article 23(2) of Regulation No 1/2003 that the Commission is entitled to hold a number of companies jointly and severally liable for payment of a fine, since they formed part of the same undertaking, it is not possible to conclude on the basis of either the wording of that provision or the objective of the joint and several liability mechanism that that power to impose penalties extends, beyond the determination of joint and several liability from an external perspective, to the power to determine the shares to be paid by those held jointly and severally liable from the perspective of their internal relationship.

59 On the contrary, the objective of joint and several liability resides in the fact that it constitutes an additional legal device available to the Commission to strengthen the effectiveness of the action taken by it for the recovery of fines imposed for infringement of the competition rules, since that mechanism reduces for the Commission, as creditor of the debt represented by such fines, the risk of insolvency, which is part of the objective of deterrence pursued generally by competition law, as the General Court essentially observed, correctly, at paragraph 151 of the judgment under appeal (see also, by analogy, Case C-78/10 *Berel and Others* v *Commission* [2011] ECR I-717, paragraph 48).

60 The determination, in the context of the internal relationship of those held jointly and severally liable for payment of a fine, of the shares each of them is required to pay does not pursue that dual objective. That is a contentious issue, to be resolved at a later stage, and, in principle, the Commission no longer has any interest in the matter, where the fine has been paid in full by one or more of those held liable.

61 Moreover, neither Regulation No 1/2003 nor EU law in general contain rules for the resolution of such a dispute, which concerns the internal allocation of the debt for the payment of which the companies concerned are held jointly and severally liable (see, by analogy, *Berel and Others* v *Commission*, paragraphs 42 and 43).

62 In those circumstances, where there is no contractual agreement as to the shares to be paid by those held jointly and severally liable for payment of the fine, it is for the national courts to determine those shares, in a manner consistent with EU law, by applying the national law applicable to the dispute.

63 In that context, the duty to cooperate in good faith with the judicial authorities of the Member States, by which the Commission is bound under Article 4 TEU, applies in actions for indemnity before the national courts and tribunals, notwithstanding the fact that such actions are, in principle, to be decided on the basis of the national law applicable. First, the Commission's decision establishing joint and several liability for payment of a fine, in that it identifies the entities held so liable and determines the maximum amount that may be claimed from each of those entities by the Commission, lays down the legal framework within which a ruling must be given on those actions. Second, the Commission may have information that may be relevant for the purpose of determining the shares of those held jointly and severally liable.

64 It follows from the foregoing that the General Court erred in law by finding, at paragraph 157 of the judgment under appeal, that it is exclusively for the Commission, in exercising its power to impose fines under Article 23(2) of Regulation No 1/2003, 'to determine the respective shares of the various companies of the fines imposed on them jointly and severally, in so far as they formed part of the same undertaking, and [that] that task cannot be left to the national courts'.

65 It also follows that the General Court committed further errors of law, first, by formulating, at paragraphs 153 to 159 of the judgment under appeal, certain principles relating to the internal relationship of those held jointly and severally liable.

66 First of all, since, as already observed at paragraph 56 above, the principle that the penalty must be specific to the offender and the offence relates only to the undertaking per se, not the natural or legal persons forming part of the undertaking, the General Court vitiated the judgment under appeal by an error of law by finding, at paragraph 153 of that judgment, that it follows from that principle that each

company must be able to discern from the decision imposing a fine on it to be paid jointly and severally with one or more other companies the amount which it is required to bear in relation to the other joint and several debtors, once payment has been made to the Commission.

67 Next, given that, as already stated at paragraph 62 above, it is for the national courts and tribunals to determine, in a manner consistent with EU law, the respective shares of the entities held jointly and severally liable for payment of a fine by applying the national law applicable to the dispute, the General Court erred in law by finding, at paragraph 155 of the judgment under appeal, first, that the concept of joint and several liability for the payment of fines is an autonomous concept which must be interpreted by reference to the objectives and system of competition law of which it forms part and, where necessary, to the general principles deriving from the national legal systems as a whole, and, second, that even though the nature of the payment obligation on the companies fined jointly and severally by the Commission as a result of an infringement of EU competition law differs from that of joint debtors of a private-law obligation, it is appropriate to seek guidance, in particular, in the rules on joint and several obligations.

68 Moreover, as the Commission's power to impose penalties relates only to the determination of joint and several liability from the Commission's external perspective, the General Court also erred in law by finding, at paragraph 156 of the judgment under appeal, that the decision by which the Commission holds several companies jointly and severally liable for payment of a fine necessarily produces all the effects which are inherent, by force of law, in the legal rules governing the payment of competition law fines, both in relations between creditors and joint and several debtors and in those between the joint and several debtors themselves.

69 Lastly, paragraphs 158 and 159 of the judgment under appeal are vitiated by an error of law in that, in those paragraphs, the General Court found, in essence, that in the absence of any finding in the Commission's decision imposing on several companies joint and several liability for payment of a fine that, within the undertaking, certain companies have a greater share of responsibility than others for the undertaking's participation in the cartel during a specific period, it must be presumed that they share equal responsibility and, accordingly, must pay an equal share of the fines for which they have been held jointly and severally liable.

70 EU law does not lay down such a rule imposing liability in equal shares that is applicable by default, since, as stated at paragraph 62 above, the shares to be paid by those held jointly and severally liable for payment of a fine must, subject to compliance with EU law, be determined in accordance with national law.

71 Accordingly, it should be noted that, in principle, EU law does not preclude the internal allocation of such a fine in accordance with a rule of national law which determines the individual shares of those held jointly and severally liable by taking account of their relative responsibility or culpability for the commission of the infringement for which the undertaking of which they formed part is responsible, as well as, where appropriate, a rule applicable by default, under which, if it cannot be shown by the companies claiming that there should not be equal shares that some companies have a greater degree of responsibility than others for the undertaking's participation in the cartel during a specific period, the companies concerned must be considered to be equally liable.

72 Second, paragraphs 245, 247, 262 and 263 of the judgment under appeal, which are criticised by the Commission, are also vitiated by an error of law, in so far as the General Court determines, in those paragraphs, in the exercise of the unlimited jurisdiction conferred on it, in accordance with Article 261 TFEU, by Article 31 of Regulation No 1/2003, the share of the fine to be borne by each company forming part of the undertaking in question for the infringement period concerned.

73 In determining that individual, internal allocation in those paragraphs of the judgment under appeal, the General Court relied expressly on the considerations set out at paragraphs 158 and 159 of the judgment. However, as already found at paragraph 70 above, in so far as it is claimed that EU law lays down a rule imposing liability in equal shares, applicable by default, those considerations are wrong in law.

74 Furthermore, since, as is apparent from this judgment, the power to impose penalties available to the Commission under Article 23(2) of Regulation No 1/2003 does not include the power to determine how the fine imposed is to be allocated as between those held jointly and severally liable from the perspective of their internal relationship, once the fine has been paid in full and the Commission subsequently has no further interest in the matter, so the General Court does not have any such power of allocation when exercising the unlimited jurisdiction conferred on it by Article 31 of that regulation to cancel, reduce or increase such a fine.

75 Given that, according to settled case-law, the unlimited jurisdiction enjoyed by the General Court enables it to substitute its own assessment for that of the Commission (see, inter alia, Case C-679/11 P *Alliance One International* v *Commission* [2013] ECR, paragraph 104 and the case-law cited), it follows that that jurisdiction cannot be said to extend to carrying out assessments falling outside the Commission's power to impose penalties.

76 It follows from all the foregoing considerations that the Commission's first three grounds of appeal must be upheld but that its seventh ground of appeal must be rejected.

77 In those circumstances, the Commission's appeal must be upheld, without there being any need for the Court to examine the Commission's fourth, fifth and sixth grounds of appeal. The latter grounds of appeal are put forward purely in the alternative to the first three grounds of appeal, since they are postulated on the premiss that those grounds of appeal are rejected by the Court. Moreover, if they were upheld, those grounds of appeal could not lead to a setting aside of the judgment under appeal going beyond that obtained as a result of the fact that the first three grounds of appeal are well founded.

2. The consequences flowing from the fact that the Commission's appeal is well founded

78 It should be noted at the outset that the fact that the Commission's appeal is well founded cannot lead to the setting aside of paragraph 2 of the operative part of the judgment under appeal, which is the Commission's principal claim.

79 It follows from paragraphs 137 to 167 and 237 of the judgment under appeal that the General Court annulled Article 2 of the contested decision in so far as concerns the calculation of the amount of the fine to be imposed on SEHV and Magrini and in so far as concerns the determination of the amounts for which the applicants were to be held jointly and severally liable, on the threefold ground that, by holding Reyrolle, SEHV and Magrini jointly and severally liable for payment of a fine the amount of which clearly exceeded the joint responsibility, by not holding Siemens Österreich and KEG jointly and severally liable for payment of part of the fine imposed on SEHV and Magrini, and by not finding that Reyrolle should bear alone part of the fine imposed on it, the Commission infringed the principle that the penalty must be specific to the offender and the offence.

80 As also observed by the Advocate General at point 27 of his Opinion, that threefold ground, which, moreover, has not been contested by the Commission before the Court of Justice and on which the General Court relied in annulling Article 2 of the contested decision, is not the result of the application of the principles relating to how joint and several liability is to be allocated internally, as set out at paragraphs 153 to 159 of the judgment under appeal, which form the subject matter of the Commission's appeal.

81 On the contrary, that ground is the result of the application of the rules governing joint and several liability as imposed externally by the Commission, that is, the liability of each company for payment in full to the Commission of the fine imposed on the undertaking of which they formed part at the time when the infringement was committed, as referred to by the General Court at paragraphs 148 to 152, the first sentence of paragraph 153, and paragraph 154 of the judgment under appeal, which are not vitiated by any error of law, as is clear from paragraphs 49, 54, 57 and 59 above.

82 On the other hand, the fact that the Commission's first three grounds of appeal are well founded has the effect of setting aside paragraph 3 of the operative part of the judgment under appeal, as also requested by that institution, since it follows expressly from paragraphs 245, 247, 262 and 263 of that judgment that the determination of the shares of the fine to be paid by the companies in question in the context of their internal relationship as carried out by the General Court in the exercise of its unlimited jurisdiction, on the basis of the principles relating to the internal allocation of the joint and several debt set out at paragraphs 158 and 159 of that judgment, forms part of the considerations on which the General Court based its decision to vary, and then impose, the fines set out at paragraph 3 of the operative part of the judgment.

83 It follows that paragraph 3 of the operative part of the judgment under appeal must be set aside in so far as it sets by implication the shares of the fines for the payment of which the applicants at first instance were held jointly and severally liable.

84 Since the actions were dismissed as to the remainder, in accordance with paragraph 4 of the operative part of the judgment under appeal, there is no need to grant the Commission's request that the claims in Case T-122/07, T-123/07 and T-124/07 should be dismissed in so far as concerns the annulment of Article 2(j), (k) and (l) of the contested decision, as requested by the applicants at first instance.

B – *Reyrolle's appeal*

85 Reyrolle puts forward two grounds of appeal, alleging infringement of the principle that the penalty should be specific to the offender and the offence and of the principles of equal treatment and proportionality.

1. The first ground of appeal, alleging infringement of the principle that the penalty should be specific to the offender and the offence

a) Arguments of the parties

86 By its first ground of appeal, Reyrolle contends that the General Court infringed the principle that the penalty should be specific to the offender and the offence, in so far as that court, in the exercise of its unlimited jurisdiction, failed to have regard to Article 23(2) of Regulation No 1/2003 by imposing a fine on the undertaking comprising Rolls-Royce and Reyrolle for the period from 1988 to 1998, not on the basis of that undertaking's situation, but in reliance, instead, on the economic power of an economic entity which came into existence only many years later with the sale of Reyrolle to VA Technologie.

87 Reyrolle submits that the General Court should not have calculated a single starting amount, taking into account the turnover and market share of the undertaking formed by the VA Tech group, but should instead have established a separate starting amount for Reyrolle in respect of the earlier period during which, as indicated at paragraph 6 above, it was a subsidiary of Rolls-Royce, namely the period between 15 April 1988 and 20 September 1998.

88 According to Reyrolle, the starting amount for the period prior to the sale of Reyrolle to VA Technologie should have been determined on the basis of the market share of the undertaking comprised of Rolls-Royce and Reyrolle and of that undertaking's turnover alone. Accordingly, the total fine imposed on Reyrolle should have been no more than EUR 2.05 million.

89 The Commission takes the view that this ground of appeal is unfounded. It contends that there is no justification for determining a separate starting amount for the period during which Reyrolle was part of Rolls-Royce, since no infringement claim could be leveled against the parent company of that undertaking. In any event, even if such a separate starting amount were used, the fine would be increased, not decreased, according to the information available.

b) Findings of the Court

90 Reyrolle claims that the principle that the penalty must be specific to the offender and the offence requires that, since, during the period in which it participated in the cartel at issue, it formed part of two undertakings in succession, namely Rolls-Royce, followed by the undertaking formed by the VA Tech group, the EUR 9 450 000 fine imposed on it individually by the General Court at the last indent of paragraph 3 of the operative part of the judgment under appeal, in the exercise of its unlimited jurisdiction, should have been calculated on the basis of two separate starting amounts for the two undertakings in question, covering the two successive infringement periods during which it formed part of each of those undertakings.

91 As already noted at paragraph 52 above, the principle that the penalty must be specific to the offender and the offence requires, for the purpose of the application of Article 23(3) of Regulation No 1/2003, the amount of the fine to be determined by reference to the gravity of the infringement for which the undertaking concerned is held individually responsible and the duration of the infringement. That principle is also applicable where, as in the present case, it is the General Court which determines the amount of the fine in the exercise of its unlimited jurisdiction.

92 As observed, in essence, by the Advocate General at points 131 to 134 of his Opinion, it is apparent from paragraphs 140, 144 and 164 of the judgment under appeal that, for the purpose of determining the fine to be imposed on Reyrolle separately in respect of the period during which it was part of the Rolls-Royce group, the General Court based its decision on the consideration that, during that period, the infringement was committed by Reyrolle independently, as the Commission found that the infringement was time-barred as regards Rolls-Royce's parent company. Moreover, it is common ground that, for the subsequent period of the infringement, Reyrolle continued to participate in the cartel as part of the undertaking formed by the VA Tech group, whose ultimate parent company, VA Technologie, was also held responsible for the infringement.

93 It follows that, in the present case, since no infringement claim has been levelled against Rolls-Royce individually, the principle that the penalty must be specific to the offender and the offence requires that the amount of the fine should be determined by reference to the individual characteristics not of that undertaking but of a single undertaking which consisted, prior to its acquisition by VA Technologie, of Reyrolle alone and, after that acquisition, of Reyrolle and other companies in the VA Tech group which participated in the cartel.

94 As a consequence, the General Court was entitled to establish a single starting amount for the undertaking formed by the VA Tech group on the basis of its turnover for 2003, the last full year of infringement, and then to apportion liability for the infringement committed among the various companies for the periods during which they participated in the cartel.

95 Accordingly, Reyrolle's first ground of appeal must be rejected.

2. The second ground of appeal, alleging infringement of the principles of equal treatment and proportionality

a) Arguments of the parties

96 By its second ground of appeal, Reyrolle claims that the General Court infringed the principles of equal treatment and proportionality in so far as, in the exercise of its unlimited jurisdiction, it applied different methods of calculation from those used for other companies, which placed it at a significant disadvantage in relation to those other companies.

97 First, with regard to SEHV and Magrini, companies which formed part of Schneider and VA Tech in succession, it is apparent from paragraph 241 of the judgment under appeal that the General Court used separate starting amounts for each period during which those companies belonged to a different undertaking. On the other hand, as far as concerns Reyrolle, the General Court applied a totally different method, since it set the fine on the basis of a uniform basic amount, even though, during the infringement period, that company belonged to different undertakings, which led to a disproportionate fine being imposed on Reyrolle.

98 Second, the discrimination suffered by Reyrolle is even greater if the method of calculating the fine applied to it is compared with the method adopted by the Commission for certain Japanese undertakings whose position was perfectly comparable to Reyrolle's, since, for those undertakings, the General Court used separate starting amounts for the period preceding that in which their activities in the GIS sector were integrated in a joint venture.

99 The Commission submits that the second ground of appeal is inadmissible, since it was not raised before the General Court and therefore constitutes a new plea. That ground of appeal is, in any event, unfounded, according to the Commission.

b) Findings of the Court

100 The Commission's claim that the second ground of appeal is inadmissible must be rejected.

101 While it is true that Reyrolle did not refer at first instance to the purported discrimination to which it alludes in its second ground of appeal, that fact is not such as to render that ground inadmissible.

102 Reyrolle is in fact entitled to lodge an appeal relying, before the Court of Justice, on pleas arising from the judgment under appeal itself which seek to criticise, in law, its merits (judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 17).

103 In the present case, Reyrolle takes issue with the General Court for discriminating against it when it determined, in the exercise of its unlimited jurisdiction, the amount of the fine to be imposed on it. While it is true that, for the purpose of calculating the fines, the General Court used the same method as that used by the Commission, the fact nevertheless remains that, in so doing, the General Court adopted that method and that the purported discrimination complained of by Reyrolle derives from the new calculation the fine, as carried out by the General Court, and therefore has its origins in the judgment under appeal.

104 Moreover, in so far as it relates to the calculation of the fine, as effected by the General Court in the exercise of its unlimited jurisdiction, the second ground of appeal cannot be rejected as inadmissible because, by its very nature, it could not have been raised at first instance (see, to that effect, *Alliance One International* v *Commission*, paragraph 35 and the case-law cited).

105 As regards the substantive examination of the second ground of appeal, it is established case-law that the exercise of unlimited jurisdiction in respect of the determination of fines cannot result in discrimination between undertakings which have participated in an agreement contrary to Article 101(1) TFEU (see, inter alia, Case C-70/12 P *Quinn Barlo and Others* v *Commission* [2013] ECR, paragraph 46 and the case-law cited).

106 It is also settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see, inter alia, Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 40 and the case-law cited).

107 However, the Court finds that, in the present case, the principle of equal treatment has not been infringed, as Reyrolle was not in a comparable situation to that of the Schneider group or that of the Japanese producers.

108 With regard, first of all, to the claim that Reyrolle was discriminated against by comparison with SEHV and Magrini, it has already been pointed out at paragraphs 92 and 93 above that Reyrolle participated in the infringement at issue by forming part of a single undertaking, namely that formed of the VA Tech group, the composition of which changed during the infringement period.

109 Next, that situation is different from that of SEHV and Magrini. Those companies participated, in turn, in the cartel at issue by forming part of two different undertakings, namely, first, as part of the undertaking whose parent company was Schneider and, subsequently, after they were sold to VA Technologie, as part of the undertaking formed by the VA Tech group. Furthermore, both Schneider and VA Technologie were held personally liable for participating in that cartel.

110 Similarly, Reyrolle and the Japanese producers cannot be regarded as being in a comparable situation. It is common ground that the Japanese producers in question, namely Fuji and Hitachi on the one hand and Mitsubishi and Toshiba on the other, initially participated in the cartel independently. While, on 1 October 2002, the activities of those companies in the GIS sector were integrated into two joint ventures, namely, respectively, JAEPS and TM T&D Corp., they nevertheless continued to exist as autonomous independent undertakings. On the other hand, that is not the case with Reyrolle since, following its sale to VA Technologie and its integration within the undertaking formed by the VA Tech group, it did not continue to exist as an autonomous independent undertaking.

111 Finally, as regards the alleged infringement of the principle of proportionality, according to its settled case-law, it is not for the Court of Justice, when ruling on points of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law. Accordingly, only inasmuch as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, on account of the inappropriateness of the amount of a fine (see, inter alia, *Quinn Barlo and Others* v *Commission*, paragraph 57 and the case-law cited).

112 The only evidence relied on by Reyrolle in support of its complaint that the fine imposed on it by the General Court was disproportionate consists of claims that it was discriminated against, which have proved to be unfounded. However, it has failed to formulate a more specific argument to show that the absolute amount of the fine payable is excessive. Accordingly, the complaint alleging infringement of the principle of proportionality must be rejected.

113 It follows that Reyrolle's second ground of appeal must also be rejected.

114 Consequently, as none of the grounds of appeal relied on by Reyrolle can be upheld, the appeal must be dismissed in its entirety.

C – *The appeal lodged by SEHV and Magrini*

115 It is appropriate to examine first, together, the first two grounds of appeal relied on by SEHV and Magrini.

1. The first two grounds of appeal, alleging, respectively, infringement of the ultra petita rule and failure to have regard to the principle of res judicata

a) Arguments of the parties

116 SEHV and Magrini point out, first, that their actions before the General Court related only to the fine of EUR 4 500 000 for which they were jointly and severally liable with Schneider, as provided for in Article 2(k) of the contested decision, not to the fine of EUR 3 600 000 to be paid by Schneider alone, pursuant to Article 2(j) of that decision. Second, those companies observe that, while only Schneider was entitled to contest that fine, that company did not bring proceedings before the General Court.

117 It follows that, by annulling the fine imposed in Article 2(j) of the contested decision and incorporating the amount of that fine in the fine for which Schneider, SEHV and Magrini are jointly and severally liable, the General Court not only infringed the ultra petita rule but also failed to have regard to the fact that that decision had become final with regard to Schneider.

118 The Commission is of the view that this appeal is wholly inadmissible, since the form of order sought is exactly the opposite of that sought in the proceedings before the General Court. In any event, since the question of the amount of the fine for which the companies that formed part of Schneider and VA Tech in turn were held jointly and severally liable was raised before the General Court in an action brought by the appellants at first instance, that court was entitled to vary the amount of that fine in the exercise of its unlimited jurisdiction, and did not fail to have regard to the ultra petita rule or the principle of res judicata.

b) Findings of the Court

119 First, it should be noted that, as confirmed by Article 113(1) of the Rules of Procedure in the version applicable at the time when the appeal was lodged, an appeal may seek the same form of order, in whole or in part, as that sought at first instance.

120 Accordingly, as observed by the Advocate General at point 150 of his Opinion, the present appeal is inadmissible in so far as, by their claims, the appellants request confirmation of Article 2(k) of the contested decision, whereas they sought annulment of that provision at first instance.

121 Next, as the Advocate General also observed at point 150 of his Opinion, the appeal lodged by SEHV and Magrini is also inadmissible in so far as the appellants claim that the Court should confirm Article 2(j) of the contested decision, since that provision concerns a fine which only Schneider could contest. However, that company did not bring proceedings before the General Court.

122 Lastly, the appeal is also inadmissible in so far as SEHV and Magrini claim that the Court should, as regards Article 2(k) of the contested decision, order each of the joint and several debtors to pay a third of the amount of EUR 4 500 000. It is apparent from paragraph 74 above that, when exercising its unlimited jurisdiction, the EU judicature does not have the power to determine how the fine imposed is to be allocated as between those held jointly and severally liable from the perspective of their internal relationship.

123 However, the Commission cannot claim that the form of order sought by SEHV and Magrini is inadmissible in so far as it seeks the setting aside in part of paragraphs 2 and 3 of the operative part of the judgment under appeal.

124 It should be noted that, in their appeal, SEHV and Magrini contend that the General Court ruled ultra petita by annulling, at paragraph 2 of the operative part of the judgment under appeal, Article 2(j) and (k) of the contested decision, in so far as the latter provision concerns Schneider. The appellants submit that Schneider did not bring an action for annulment before the General Court, so that the contested decision has become final in so far as concerns Schneider. According to the appellants, the fine varied by the General Court at the first indent of paragraph 3 of the operative part of that judgment, following the annulment of Article 2 of the contested decision in so far as concerns Schneider, is particularly disadvantageous for them.

125 Since, in support of their claims seeking the setting aside in part of paragraphs 2 and 3 of the operative part of the judgment under appeal, the appellants therefore raise pleas arising from that judgment itself, those claims must, in the light of the case-law cited at paragraph 102 above, be declared admissible.

126 As regards the substantive examination of the first two grounds of appeal, it should be recalled that the EU judicature is empowered to exercise its unlimited jurisdiction where the question of the amount of the fine is before it (see, inter alia, *Alliance One International* v *Commission*, paragraph 105).

127 In the present case, it is clear that the question of the amount of the fine imposed on Schneider individually by Article 2(j) of the contested decision was not submitted to the General Court for its appraisal.

128 As Schneider did not initiate proceedings to challenge the amount of that fine, it cannot form the subject-matter of the appeal brought by SEHV and Magrini, since it was not imposed on those companies.

129 In those circumstances, it must be concluded that the General Court ruled ultra petita in annulling, at paragraph 2 of the operative part of the judgment under appeal, Article 2(j) and (k) of the contested decision and in varying, at the first indent of paragraph 3 of the operative part, the fines imposed by those provisions, incorporating them in a single amount for the payment of which Schneider, SEHV and Magrini were held jointly and severally liable.

130 It is true, as mentioned by the General Court at paragraph 248 of the judgment under appeal, that while that variation does not alter the total amount of the fine that may be claimed by the Commission from Schneider, from the perspective of the joint and several liability imposed externally by the Commission, that fine is favourable to Schneider as regards the amount of the fine which that company will ultimately have to bear when the fine falls to be allocated internally. The fact nevertheless remains that the General Court was not entitled to make that variation, which may be to SEHV's and Magrini's disadvantage, both from the external and internal perspective of the imposition of joint and several liability. As it was not possible for the General Court, in the first place, to find that the imposition of the fine in question was unlawful without infringing the ultra petita rule, it was not possible for it then to exercise its unlimited jurisdiction to cancel, reduce or increase that fine.

131 It follows from all the foregoing considerations that SEHV's and Magrini's first two grounds of appeal must be upheld.

132 In those circumstances, the appeal lodged by SEHV and Magrini must be upheld, without there being any need for the Court to examine the third ground of appeal, alleging infringement of the audi alteram partem principle. That ground is put forward purely in the alternative to the first two grounds on the basis that, if the Court rejected the first two grounds of appeal, the third ground

would take issue with the General Court for having erred in law in any event by varying the fine imposed at the first indent of paragraph 3 of the operative part of the judgment under appeal without giving the companies in question the opportunity to define their position on the new determination of the fine. Moreover, if that ground of appeal were upheld, that could not lead to a setting aside of the judgment under appeal that went beyond that obtained as a result of the fact that the first two grounds of appeal examined have been upheld.

2. The consequences flowing the fact that the appeal lodged by SEHV and Magrini is well founded

133 In view of the inadmissibility in part of the claims made in the appeal lodged by SEHV and Magrini, as established at paragraphs 119 to 122 above, the finding that the first two grounds of their appeal are well founded leads to the setting aside of paragraph 2 of the operative part of the judgment under appeal, in so far as it annuls Article 2(j) and (k) of the contested decision, and to the setting aside of the first indent of paragraph 3 of the operative part of the judgment under appeal.

134 Since SEHV and Magrini have not claimed in their appeal that, for the remainder, the Court should grant the applications in Cases T-122/07 to T-124/07, those actions remain dismissed, as provided in paragraph 4 of the operative part of the judgment under appeal.

VI – Costs

135 Under the second paragraph of Article 184 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

136 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

137 As regards the appeal lodged by Reyelle (C-232/11 P), since that company has been unsuccessful and the Commission has applied for costs, Reyelle must be ordered to pay the costs of that appeal.

138 As the appeal lodged by the Commission (Case C-231/11 P) must be upheld and the Commission has requested that the applicants at first instance be ordered to pay the costs, the latter must be ordered to pay the costs relating to that appeal.

139 As the appeal lodged by SEHV and Magrini (Case C-233/11 P) must also be upheld and those companies have requested that the Commission be ordered to pay the costs, the Commission must be ordered to pay the costs relating to that appeal.

140 As to the remainder, there is no need to vary the allocation of costs relating to the proceedings as first instance, as provided for at paragraphs 5 to 7 of the operative part of the judgment under appeal.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Sets aside paragraph 2 of the operative part of the judgment of the General Court of the European Union of 3 March 2011 in Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission*, in so far as it annuls Article 2(j) and (k) of Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article [81 EC] and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear);**

2. **Sets aside the first indent of paragraph 3 of the operative part of the judgment in Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission;***

3. **Sets aside the second to fourth indents of paragraph 3 of the operative part of the judgment in Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission*, in so far as they fix by implication the share of the fines for the payment of which the applicants at first instance were held jointly and severally liable;**

4. **Dismisses the appeals as to the remainder;**

5. **Orders Siemens AG Österreich, VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission & Distribution Ltd, Siemens Transmission & Distribution SA and Nuova Magrini Galileo SpA to pay the costs relating to the appeal in Case C-231/11 P;**

6. **Orders Siemens Transmission & Distribution Ltd to pay the costs relating to the appeal in Case C-232/11 P;**

7. **Orders the European Commission to pay the costs relating to the appeal in Case C-233/11 P;**

8. **The costs relating to the proceedings at first instance remain allocated in accordance with paragraphs 5 to 7 of the operative part of the judgment of 3 March 2011 in Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission.***

[Signatures]