Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 25 June 2015 [1]

Case C-373/14 P

Toshiba Corporation
v

European Commission

(Appeals — Agreements, decisions and concerted practices — Power transformers market — Oral market-sharing agreement ('Gentlemen's agreement') — Concept of restriction of competition by object — 'Public distancing' test — Point 18 of the 2006 Guidelines)

1. By the present appeal, Toshiba Corporation asks the Court to set aside the judgment of the General Court of the European Union in *Toshiba* v *Commission* (T-519/09, EU:T:2014:263, 'the judgment under appeal'), whereby the General Court dismissed its action for annulment of Decision C(2009) 7601 final of the European Commission of 7 October 2009 relating to a proceeding under Article 81 EC (COMP/39.129 — Power Transformers) ('the decision at issue').

2. With this action, the Court is again required to address the concept of restriction of competition 'by object', within the meaning of Article 81(1) EC (now Article 101(1) TFEU) and, more specifically, to indicate the elements of analysis necessary to establish the conditions in which a practice may constitute such a restriction.

3. The concept of 'public distancing' and point 18 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 [2] ('the 2006 Guidelines') are also central to these proceedings.

1 — Original language: French.
2 — OJ 2006 C 210, p. 2.

I – **Legal framework**

A – *EU law*

1. The Treaty on the Functioning of the European Union

4. According to Article 101(1)(a) TFEU:

‘The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

2. The 2006 Guidelines

5. According to point 13 of the 2006 guidelines:

‘In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA [European Economic Area]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement …’

6. However, point 18 of the 2006 Guidelines derogates from that rule, when it states:

‘Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned.’

7. Last, point 37 of the 2006 Guidelines states that '[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21'.

II – **Background to the dispute**

8. The sector to which the present case relates is the sector for power transformers, auto transformers and shunt reactors with a voltage range of 380 kV and above. A power transformer is a major electrical component whose function is to reduce or increase the voltage in an electrical circuit.

9. Toshiba Corporation ('Toshiba') is a Japanese company active essentially in three sectors: digital products, electronic devices and components and infrastructure systems.

10. As regards Toshiba's activities in the sector at issue, it is appropriate to distinguish two phases during the period taken into account by the Commission in its investigation (from June 1999 until May 2003, 'the relevant period'). Between 9 June 1999 and 30 September 2002, Toshiba was active through its subsidiary Power System Co. From 1 October 2002, the appellant's activity was carried out through TM T&D, a joint venture between Toshiba and Mitsubishi Electric in which those two undertakings had combined their power transformer production.

11. On 30 September 2008, the Commission decided to initiate proceedings in relation to the power transformers market. The statement of objections was adopted on 20 November 2008, Toshiba replied on 19 January 2009 and the hearing was held on 17 February 2009.

12. By the decision at issue, the Commission found that Toshiba had participated, throughout the relevant period, in an unlawful cartel covering the entire EEA and Japan. The cartel consisted of an oral agreement between European and Japanese producers of power transformers to respect each other's home markets and to refrain from selling in those markets ('the Gentlemen's Agreement').

13. The Commission characterised that Gentlemen's Agreement as a restriction of competition by object.

14. At recitals 165 to 169 to the decision at issue, the Commission examined the argument, put forward by certain undertakings covered by the procedure at issue, that the cartel had no impact on competition, as the Japanese and European producers were not competitors owing to insurmountable barriers to entry to the EEA market. In that regard, it asserted, in essence, that the Korean producer Hyundai had recently entered the European power transformer market and that Japanese undertakings had already recorded considerable sales in the United States. Those undertakings had not succeeded in establishing that the barriers to entry to the United States market were very different from the barriers to entry to the European market.

15. As regards the organisation of the Gentlemen's Agreement, the Commission found that each group of producers had to nominate a secretary undertaking. It also found that the market-sharing agreement was supplemented by a second agreement to notify the secretary of one of the groups of any enquiries from the territory of the other group, so that they could be reallocated.

16. Furthermore, the Commission held that, during the relevant period, the undertakings had met once or more a year; the meetings had taken place in Malaga from 9 to 11 June 1999, in Singapore on 29 May 2000, in Barcelona from 29 October to 1 November 2000, in Lisbon on 29 and 30 May 2001, in Tokyo on 18 and 19 February 2002, in Vienna on 26 and 27 September 2002 ('the Vienna meeting') and in Zurich on 15 and 16 May 2003 ('the Zurich meeting'). According to the Commission, those meetings were used in particular to confirm the Gentlemen's Agreement.

17. In the light of all of those considerations, the Commission found that Toshiba had infringed Article 81 EC and Article 53 of the EEA Agreement. It therefore imposed a fine of EUR 13.2 million on that undertaking. TM T&D and Mitsubishi Electric were not the subject of the decision at issue.

III – **The proceedings before the General Court and the judgment under appeal**

18. By application lodged at the Registry of the General Court on 23 December 2009, Toshiba brought an action for annulment of the decision at issue, relying on four pleas in law. The present appeal concerns only the considerations of the General Court in response to three of the pleas in law raised before it.

19. When it examined the second plea, which concerned, in particular, the existence of a restriction of competition, the General Court held, in the first place, that the Commission had been right to conclude that the Gentlemen's Agreement must be classified as a practice having as its object the restriction of competition and that, consequently, there was no need to demonstrate that it had anti-competitive effects.

20. In the second place, the General Court analysed Toshiba's argument that, notwithstanding its nature, the Gentlemen's Agreement was not capable of affecting competition, on the ground that the Japanese producers were not competitors of the European undertakings on the EEA market. In that regard, the General Court observed that the question whether an agreement had the object of preventing, restricting or distorting competition must be examined not only in the light of the agreement's content but also in the light of its economic context and that, since Article 101 TFEU protects not only actual competition but also potential competition, an agreement such as the Gentlemen's Agreement was capable of restricting competition, unless insurmountable barriers to entry to the European market existed which ruled out any competition from Japanese producers.

21. In order to determine whether the barriers to entry were insurmountable in this instance, the General Court observed, first of all, that the very existence of the Gentlemen's Agreement could be considered to be a strong indication that a competitive relationship existed between the Japanese and European producers.

22. Next, the General Court noted, referring to paragraphs 91 to 98 of the decision at issue, that the Japanese producer Hitachi had accepted projects coming from European customers. It observed, moreover, that in the letter of 30 March 2009 which Hitachi had sent to the Commission during the administrative procedure ('the Hitachi letter'), Hitachi had altered its statements and accepted the Commission's finding relating to the existence and scope of the Gentlemen's Agreement as set out in the statement of objections.

23. As regards the third plea, which related, inter alia, to Toshiba's claim that it had distanced itself from the cartel, the General Court began by recalling that where an undertaking participates, even if not actively, in meetings having an anti-competitive object and does not publicly distance it from what occurred at them, thus giving the impression to the other participants that it is a party to the cartel resulting from the meetings, it may be concluded that it has participated in the cartel in question.

24. Next, while accepting that the available documents could give rise to doubts concerning Toshiba's participation in the Gentlemen's Agreement after the Vienna meeting, the General Court considered that those documents could not show that Toshiba had distanced itself from the Gentlemen's Agreement during that meeting.

25. As those documents showed that the undertakings participating in the Vienna meeting had confirmed the unlawful cartel and the rules requiring notification of the projects falling within that cartel, it followed, according to the General Court, that the parties to the Gentlemen's Agreement, including Toshiba, had wanted to prolong the Gentlemen's Agreement in any event until the next meeting.

26. As regards the arguments relating to Toshiba's participation in the cartel until the Zurich meeting and the claim that that meeting did not have an anti-competitive object, the General Court considered that they were ineffective as they were not capable of challenging the Commission's finding that Toshiba had participated in the Gentlemen's Agreement until 15 May 2003.

27. The General Court found, moreover, that Toshiba could not claim to have ceased to participate in the cartel at the time of the creation of TM T&D. The applicant had not publicly distanced itself from the cartel and had not informed the other participants that TM T&D would not participate in it.

28. As regards the fourth plea, concerning the calculation of the fine, the General Court considered that the Commission had been correct to apply the methodology provided for in point 18 of the 2006 Guidelines and that, consequently, it could not be accepted that only sales in Japan and the EEA must be taken into account for the purposes of calculating the fine. In that regard, the General Court found, in essence, that the Commission's reference to world market shares meant that it was entitled to take into account the fact that the worldwide, competitive potential of the undertakings in question had not been used to conquer the EEA market.

29. In addition, according to the General Court, the Commission was correct to rely on the assumption that, in the absence of the Gentlemen's Agreement, the market shares of the Japanese producers in the EEA would have been equivalent to their market shares on the worldwide market.

30. As regards, more specifically, the proportionate nature of the fine, the General Court considered that it would not be appropriate to take into account the Japanese producers' actual sales in the EEA, since that would amount to rewarding Toshiba for having conformed to the letter of the Gentlemen's Agreement. In addition, the General Court found that a methodology that took worldwide market shares into account, in the case of a market-sharing agreement between undertakings which compete at a worldwide level, gives a more appropriate representation of the capacity of those undertakings to cause significant harm to other operators in the European market and gives an indication of their contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had they not participated. Last, the General Court considered that such an approach enabled the possible barriers to entry that might exist in the various segments of the worldwide market to be taken into account.

IV – **Forms of order sought and procedure before the Court**

31. Toshiba claims that the Court should:

— set aside the judgment under appeal in so far as it dismissed Toshiba's claim for annulment of Articles 1 and 2 of the decision at issue, and annul that decision;

— in the alternative, refer the case back to the General Court for determination in accordance with the judgment of the Court of Justice as to points of law;

— order the Commission to pay the costs both at first instance and on appeal.

32. In support of its appeal, Toshiba raises four grounds of appeal.

33. By the first ground of appeal, Toshiba maintains that the General Court applied the wrong legal test when considering that the Japanese manufacturers of power transformers were potential competitors on the EEA market on the ground that the barriers to entry to the EEA market were not insurmountable and on the basis of the existence of the Gentlemen's Agreement. In Toshiba's submission, the General Court ought to have ascertained whether the Japanese producers had real concrete possibilities of entering the EEA market and whether such entry might have been an economically viable strategy. In the absence of potential competition between Japanese and European producers, the Gentlemen's Agreement could not infringe Article 81 EC and the Commission did not have jurisdiction to initiate proceedings. The judgment under appeal should therefore be set aside and the decision at issue annulled in so far as they relate to Toshiba.

34. By the second ground of appeal, Toshiba maintains that the General Court distorted the content of a letter in which another party present in the procedure (namely Hitachi) stated that it would not challenge the Commission's findings. The Commission considered that that letter superseded that undertaking's previous statements that it had not made any sales in the EEA market. In Toshiba's submission, that amounted to a distortion of the evidence on which the General Court relied in order to find that the barriers to entry on the EEA market were not insurmountable.

35. By the third ground of appeal, Toshiba maintains that, by considering that Toshiba's argument regarding its non-participation in the Zurich meeting was 'ineffective', the General Court provided inconsistent reasoning and applied the wrong test for public distancing, thus breaching the principle of personal liability. The judgment under appeal should therefore be set aside and the decision at issue annulled in so far as they conclude that Toshiba continued to participate in the Gentlemen's Agreement until May 2003.

36. By the fourth ground of appeal, Toshiba maintains, last, that the General Court misinterpreted point 18 of the 2006 Guidelines on the measure of setting fines in relying on worldwide sales as a proxy for its weight in the infringement.

37. The Commission contends that the Court should dismiss the appeal and order Toshiba to pay the costs of the proceedings.

V – **Assessment**

A – *First ground of appeal, alleging errors of law in the application of the concept of restriction of competition by object*

38. By its first ground of appeal, Toshiba maintains that the General Court erred in law in characterising the Gentlemen's Agreement as a restriction of competition by object. In Toshiba's submission, in order to arrive at that conclusion, the General Court ought to have ascertained whether any possible entry to the EEA market represented a viable economic strategy for Japanese producers; yet it merely found that the parties could be regarded as potential competitors owing, first, to the absence of insurmountable barriers to entry to the EEA market and, second, to the actual existence of the Gentlemen's Agreement.

39. This ground of appeal therefore raises, in essence and once again, the question of the definition of restriction of competition by object and of its procedural consequences in terms of proof.

1. Preliminary general observations on the definition of restriction of competition by object

40. In order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'.

41. The distinction between restrictions of competition by object and restrictions of competition by effect is therefore inherent in the Treaty. Although that difference is not new, it must be stated that it was at the centre of several cases which have attracted critical attention by authors in recent years. [3]

42. A clarification of the case-law in that regard is no doubt desirable.

a) What the case-law tells us about the distinction between restriction of competition by object and restriction of competition by effect

43. The alternative nature of the condition relating to the existence of an agreement or a concerted practice having as its 'object or effect' the restriction of competition referred to in Article 101(1) TFEU was asserted by the Court in the mid-1960s with the judgment in *LTM* (56/65, EU:C:1966:38) and has consistently been confirmed since then. [4]

44. The Court made clear at the outset that the non-cumulative, but alternative, nature of that condition, indicated by the conjunction 'or', led to the need to consider first of all the actual object of the agreement, in the economic context in which it was to be applied. [5]

45. It is only in the alternative situation where the analysis of the terms of the agreement in question does not reveal a sufficient degree of harm to competition that it is necessary to consider the effects of the agreement. In that case, in order for the agreement to be caught by the prohibition, the presence of the factors which show that competition has in fact been prevented, restricted or distorted to an appreciable extent must be found. [6]

46. The actual effects of a concerted practice therefore do not need to be taken into account where it is apparent that the object of the agreement is to prevent, restrict or distort competition within the internal market. [7] In other words, there is no need to examine the effects of an agreement once its anti-competitive object has been established. [8]

3 — Judgments in *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643); *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610); *Football Association Premier League and Others* (C-403/08 and C-429/08, EU:C:2011:631); *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:649); *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160); *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866); and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204).

4 — Judgments in *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraph 15); *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 28); and *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55).

5 — Judgments in *LTM* (56/65, EU:C:1966:38); *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraph 15); *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 28); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55); and *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 33).

6 — Judgments in *LTM* (56/65, EU:C:1966:38); *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraph 15); *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 28); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55); and *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 34).

7 — Judgments in *Consten and Grundig* v *Commission* (56/64 and 58/64, EU:C:1966:41); *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraph 16); and *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 29).

8 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 30); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55); and *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 34).

47. In order to assess that nature, regard must be had in particular to the content of the provisions of the agreement, the objectives which it seeks to attain and the economic and legal context of which it forms part.[9] In addition, although the parties' intention is not a necessary factor in determining whether a concerted practice or an agreement is restrictive, there is nothing to prohibit the Commission or Courts of the European Union from taking that aspect into account.[10]

48. It is sufficient, moreover, that the agreement should have the *potential* to have a negative impact on competition, that is to say, that it be capable in an individual case, regard being had to the legal and economic context of which it forms part, of resulting in the prevention, restriction or distortion of competition within the common market.[11] As Advocate General Wahl observed in his Opinion in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958), while the 'more standardised assessment resulting from recourse to the concept of restriction by object requires a detailed, individual examination of the agreement in question, [that examination] must be clearly distinguished from the examination of the actual or potential effects of the conduct of the undertakings concerned'.[12]

49. That distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[13]

50. It is therefore 'established that certain types of collusive behaviour, such as those leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1) TFEU], to prove that they have actual effects on the market'.[14] On the other hand, '[w]here the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should … be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent'.[15]

51. It is no misnomer to describe that case-law as consistent.

52. However, in one of the most recent judgments among those cited above, the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160), the Court identified a number of additional factors to be taken into account in the assessment of the economic and legal context which have the effect of blurring the evidential consequence of the distinction between 'restriction by object' and 'restriction by effect'.

9 — Judgment in *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58). See also, concerning a concerted practice, judgment in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 27).

10 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 27); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58); *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 37); and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 54).

11 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 31) and *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 38).

12 — Point 40. See also point 44.

13 — Judgments in *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraph 17); *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 29); *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 35); *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 50); and *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 114).

14 — Judgment in *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 51).

15 — Ibid. (paragraph 52).

53. According to the Court, '[w]hen determining that context, it is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question'. [16] That means, in concrete terms, that the court responsible for evaluating the risk that competition on the relevant market will be eliminated or seriously weakened 'should in particular take into consideration the structure of [the] market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned'. [17]

54. In that respect, I share the view expressed by Advocate General Wahl in his Opinion in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958) that the direction thus taken by the case-law seems 'to have made it difficult to draw the necessary distinction between the examination of the anti-competitive object and the analysis of the effects on competition of agreements between undertakings'. [18] Like him, I think that 'the boundary between the concepts of restriction by object or restriction by effect [cannot be fluid and that] recourse to that concept must be more clearly defined'. [19] The present appeal seems to me to provide the Court with a fresh opportunity to clarify its case-law; I shall return to the point after I have set out the advantages of and the need for such a boundary.

b) The significance of the distinction between restriction of competition by object and restriction of competition by effect

55. No one is questioning the alternative nature of the condition relating to the existence of an agreement or a concerted practice having as its 'object or effect' the restriction of competition that is inherent in the wording of Article 101(1) TFEU.

56. The significance of that distinction is evidential: where there is a restriction by object, there is no need to prove its actual or potential anti-competitive effects in order to bring the device of incompatibility into play. [20] The finding of an anti-competitive object is sufficient for classification as a restriction of competition and, therefore, condemnation. [21] If the anti-competitive object of the agreement (or concerted practice) concerned is demonstrated, the investigation can stop and the infringement is proved without the effects, whether actual or potential, of the agreement (or concerted practice) on competition having to be demonstrated. [22]

57. There are those who maintain that a 'presumption' of unlawfulness applies to restrictions by object. [23] The use of that word none the less gives rise to confusion. As Advocate General Kokott explained very well in her Opinion in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110), the prohibition of restrictions of competition by object may not be interpreted 'as meaning that an

16 — Judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 36).

17 — Ibid. (paragraph 48).

18 — Point 46.

19 — Point 52. To my mind, the Court did not make that clear in the judgment in *CB* v *Commission* (C-67/13 P, EU:C:2014:220).

20 — Petit, N., *Droit européen de la concurrence*, Montchrestien-Lextenso publications, Paris, 2013, No 574.

21 — Prieto, C., and Bosco, D., *Droit européen de la concurrence. Entente et abus de position dominante*, Bruylant, Brussels, 2013, No 566.

22 — See, in particular, Geradin, D., Layne-Farrar, A., and Petit, N., *EU competition law and economics*, Oxford University Press, 2012, No 3-114, p. 135, and Whish, R., and Bailey, D., *Competition law*, 7th Ed., Oxford University Press, 2012, pp. 119 and 120. See also Graham, C., 'Methods for Determining whether an Agreement Restricts Competition: Comment on *Allianz Hungária*', *EL Rev.*, 2013 (38), pp. 542 to 551, especially p. 543; Nagy, C.I., 'The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?', *World Competition*, 2013, No 4, pp. 541 to 564, especially p. 543; Harrison, D., 'The *Allianz Hungária* case. The ECJ's judgment could have ugly consequences', *Competition Law Insight.*, 2013, Vol. 12, pp. 10 to 12, especially p. 10; and Idot, L., and Prieto, C., 'La Cour de justice revient une nouvelle fois sur la notion d'"objet anticoncurrentiel"', *Revue des contrats*, 2013, pp. 955 to 959, especially p. 957.

23 — Lemaire, Chr., *New frontiers of antitrust 2012*, Bruylant, Brussels, 2013, No 8; Petit, N., *Droit européen de la concurrence*, Montchrestien-Lextenso publications, Paris, 2013, No 594; Bourgeois, J.H.J., 'On the Internal Morality of EU Competition Law', in *Mundi et Europae civis: liber amicorum Jacques Steenbergen*, Larcier, Brussels, 2014, pp. 347 to 374, especially p. 350; Waelbroeck, D., and Slater, D., 'The scope of object vs effect under [A]rticle 101 TFEU', *in* Bourgeois, J., and Waelbroeck, D. (ed.), *Ten years of effects-based approach in EU competition law. State of play and perspectives*, Bruylant, 2013, pp. 131 to 157, especially pp. 135 and 137. See also, to that effect, point 64 of the Opinion of Advocate General Cruz Villalón in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2012:663, point 64).

anti-competitive object gives rise merely to some kind of presumption of unlawfulness which may be rebutted, however, if in the specific case no negative consequences for the operation of the market can be demonstrated. Such an interpretation would be tantamount to an improper mingling of both independent alternatives provided for by Article [101](1) [TFEU]: the prohibition on collusion having an anti-competitive *object* and the prohibition on collusion having anticompetitive *effects*'. [24]

58. The advantages of that distinction are well known. Seen from the procedural aspect described above, recourse to the concept of anti-competitive object 'undoubtedly *provides* predictability, and therefore *legal certainty*, for undertakings in that it enables them to know the legal consequences (including prohibitions and sanctions) of some of their actions … [and the identification of] agreements, decisions and concerted practices which have the object of restricting competition also has *a deterrent effect* and helps to prevent anti-competitive conduct. [Last], it *furthers procedural economy* in so far as it allows the competition authorities, when faced with certain forms of collusion, to establish their anti-competitive impact without any need for them to conduct the often complex and time-consuming examination of their potential or actual effects on the market concerned'. [25]

59. However, as Advocate General Wahl observed in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 36), such advantages materialise and are justified only if recourse to the concept of restriction by object is clearly defined. In fact, and in that respect I share the point of view expressed by Advocate General Kokott in her Opinion in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110): on the one hand, too extensive an interpretation of the concept of agreement or concerted practice having an anti-competitive object is to be avoided, owing to the radical consequences to which undertakings may be exposed when they infringe Article 101(1) TFEU, but, on the other hand, that concept must not be given too strict an interpretation either, as otherwise the prohibition of restrictions of competition by object enshrined in primary law might by eliminated in practice. [26]

60. In that regard, it must be acknowledged that the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160) was perceived as being capable, if not of eliminating, at least of blurring the distinction between restriction by object and restriction by effect [27] whereas it is essential to have a clear definition of restriction by object and of the criteria necessary for its determination. [28]

24 — Point 45.

25 — Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 35, emphasis added). As Geradin, D., Layne-Farrar, A., and Petit, N., observe, 'In a nutshell, it imposes a light evidentiary burden on the competition authority, which does not need to assess the effects of the agreement under scrutiny' (Geradin, D., Layne-Farrar, A., and Petit, N., *EU competition law and economics*, Oxford University Press, 2012, No 3-118, p. 136). On that advantage, see also Nagy, C.I., 'The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?', *World Competition*, 2013, No 4, pp. 541 to 564, especially p. 545, and Graham, C., 'Methods for Determining whether an Agreement Restricts Competition: Comment on *Allianz Hungária*', *EL Rev*., 2013 (38), pp. 542 to 551, especially p. 547.

26 — Opinion of Advocate General Kokott in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, point 44).

27 — Concerning the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160): '[t]he reasoning of the Court of Justice seems to *blur* the distinction between the two classifications. Too much subtlety is likely to damage the understanding not only of undertakings but also of the decision-making practice of the competition authorities and of the national courts. *Such a dilation of restriction by object gives rise to confusion*. It may result in its de facto disappearance, which would amount to the triumph of the effects-based approach' (Prieto, C., and Bosco, D., *Droit européen de la concurrence. Entente et abus de position dominante*, Bruylant, Brussels, 2013, No 582; emphasis added); 'the Court of Justice seems to propose a new approach which would *blur* the distinction between agreements with the object and those with the effect of restricting competition' (Graham, C., 'Methods for Determining whether an Agreement Restricts Competition: Comment on *Allianz Hungária*', *EL Rev*., 2013 (38), pp. 542 to 551, especially p. 542, *Abstract*; emphasis added); 'the Court of Justice's judgment in *Allianz Hungária* would seem to *blur* this distinction' (Nagy, C.I., 'The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?', *World Competition*, 2013, No 4, pp. 541 to 564, especially p. 547; emphasis added).

28 — See, to that effect, Lemaire, Chr., *New frontiers of antitrust 2012*, Bruylant, Brussels, 2013, No 66: 'Since the effect category can be deduced from the object one, *it is crucial* to have a clear definition of what is anticompetitive by object' (emphasis added).

61. As stated above, in that judgment the Court made clear to the national court which had requested a preliminary ruling that, when assessing the economic and legal context, it should 'in particular take into consideration the structure of [the] market, the existence of alternative distribution channels and their respective importance and the market power of the companies concerned'. [29]

62. I think, however, that it is possible to reconcile the consistent case-law of the Court, as outlined above, and the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160).

c) The criteria necessary for the determination of a restriction of competition 'by object'

63. As I observed when examining the relevant case-law, there is no need to examine the effects of an agreement where its anti-competitive object is established. [30] It is, by contrast, and as a consequence, essential to determine the anti-competitive object of the agreement in question.

64. For the purpose of determining whether that is so, the intention of the parties is not an essential element, but it may, where appropriate, be taken into consideration. [31] On the other hand, regard must be had to the content of the provisions of the agreement, the objectives which it seeks to attain and the economic and legal context of which it forms part. [32]

65. In fact, although the anti-competitive effects do not have to be demonstrated where there is a restriction of competition by object, the fact none the less remains that the restriction of competition in question must clearly be capable of having at least some impact on the market. [33]

66. In other words, to use the expression employed by Advocate General Wahl in his Opinion in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 41), the examination of the question whether a contract had a restrictive object cannot be *divorced* from the economic and legal context in the light of which it was concluded by the parties. [34]

29 — Judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 48).

30 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 30); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55); and *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 34).

31 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 27); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58); *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 37); and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 54).

32 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 27, concerning a concerted practice) and *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58).

33 — '… the fact that there is no need to prove anti-competitive effects in the case of object restrictions does not mean that there is no quantitative component to object analysis at all. There is a rule that any restriction of competition must be *appreciable*: even a restriction of competition by object could fall outside Article 101(1) if its likely impact on the market is minimal. … Because of the need to prove appreciability, it is necessary for the Commission to define the relevant market even in a case involving an object restriction' (Whish, R., and Bailey, D., *Competition law*, 7th Ed., Oxford University Press, 2012, p. 120). See also, to that effect, Opinion of Advocate General Mazák in *Pierre Fabre Dermo-Cosmétique* (C-439/09, EU:C:2011:113): 'while certain forms of agreement would appear from past experience to be prima facie infringements by object, this does not relieve the Commission or a national competition authority of the obligation of carrying out an individual assessment of an agreement. I consider that such an assessment may be quite truncated in certain cases, for example where there is clear evidence of a horizontal cartel seeking to control output in order to maintain prices, but it may not be entirely dispensed with' (point 27).

34 — To illustrate his remarks, Advocate General Wahl uses a clear example when he refers to 'an infringement which, in the light of experience, is presumed to cause one of the most serious restrictions of competition, namely a horizontal agreement concerning the price of certain goods. [In fact, w]hilst it is established that in general such a restrictive agreement is highly harmful for competition, that conclusion is not inevitable where, for example, the undertakings concerned hold only a tiny share of the market concerned' (Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 42)). See also, to that effect, Waelbroeck, D., and Slater, D., 'The scope of object vs effect under article 101 TFEU', *in* Bourgeois, J., and Waelbroeck, D. (ed.), *Ten years of effects-based approach in EU competition law. State of play and perspectives*, Bruylant, 2013, pp. 131 to 157, especially pp. 135 and 146.

67. The economic and legal context is there to assist the authority responsible for examining the alleged restriction by object to *understand* the economic function and the real significance of the agreement. [35]

68. As Advocate General Kokott explained in her Opinion in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:110, point 46), taking into account the economic and legal context therefore means that the agreement at issue must simply be capable *in an individual case* of resulting in the prevention, restriction or distortion of competition within the common market.

69. It is important not to overlook the fact that the advantage in terms of predictability and easing the burden of proof entailed by identifying agreements that are restrictive by object would be 'undermined if that identification ultimately depend[ed] on a thorough examination of the consequences of that agreement for competition which [went] well beyond a detailed examination of the agreement'. [36]

70. None the less, a superficial approach can be justified only in the case of conduct, and I again use here an expression of Advocate General Wahl, that entails *an inherent risk of a particularly serious harmful effect*, [37] that is to say, restrictions which inherently present a degree of harm. [38]

71. That approach, moreover, is consistent with the case-law of the Court, according to which 'the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition "by object" is the finding that such coordination reveals in itself a sufficient degree of harm to competition'. [39]

72. In concrete terms, I believe that the experience acquired over more than 60 years means that the situations referred to in Article 101(1) TFEU can now be considered to meet the 'intrinsically harmful' requirement.

73. If the situations listed in Article 101(1) TFEU are taken to constitute the '*hard core*' of restrictions of competition by object, [40] that satisfies the twofold requirement that emerges from the Court's case-law, namely, first, that the types of agreements envisaged in Article 101(1) TFEU do not constitute an exhaustive list of prohibited collusion, [41] while, second, the concept of restriction of competition by object cannot be interpreted widely. [42]

74. In the case of the agreements expressly referred to in Article 101(1) TFEU, there is no need to depart from the Court's consistent case-law, according to which the existence of a plausible alternative explanation for the conduct complained of (in the case in point, the absence of a commercial interest) must not lead to the imposition of stricter requirements as to the evidence to be

35 — See, to that effect, Nagy, C.I., 'The Distinction between Anti-competitive Object and Effect after Allianz: The End of Coherence in Competition Analysis?', *World Competition*, 2013, No 4, pp. 541 to 564, especially p. 558.

36 — Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 60).

37 — Opinion of Advocate General Wahl in *CB* v *Commission* (C-67/13 P, EU:C:2014:1958, point 55).

38 — Ibid. (point 58).

39 — Judgment in *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 57).

40 — This is, in a sense, the idea of the 'object box' proposed by some writers.

41 — Judgment in *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraph 23).

42 — Judgment in *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 58). The strict interpretation of restrictions by object is inherent in the 'presumption' of illegality which they entail: 'The finding of "*restriction by object*" must be underpinned by strong evidence from past experience and/or consensus on the underlying economic theory. A narrow reading of this provision, limited to cases based on solid empirical and theoretical foundations can potentially justify a reversal of the presumption of innocence' (Waelbroeck, D., and Slater, D., 'The scope of object vs effect under article 101 TFEU', in Bourgeois, J., and Waelbroeck, D. (ed.), *Ten years of effects-based approach in EU competition law. State of play and perspectives*, Bruylant, 2013, pp. 131 to 157, especially p. 156).

adduced.[43] Conversely, while it is not precluded that other types of agreements, atypical or complex, may have an object capable of preventing, restricting or distorting competition, their prohibition requires a more thorough analysis of the economic and legal context of which they form part, although that analysis does not go so far as an examination of the effects of the agreement.

75. The recent judgments in *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866) and *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160) are not contradictory and may form part of the framework which I propose.

76. In the first of these judgments, the Court was called upon, in particular, to examine the application by the General Court of the principles governing the burden of proof and the taking of evidence in relation to restrictions of competition by object. Its decision is therefore entirely relevant to the problem with which we are concerned. The Court not only considered that 'agreements which aim to share markets pursue, in themselves, an object restrictive of competition *and fall within a category of agreements expressly prohibited by Article 101(1) TFEU*',[44] but also inferred that '[s]uch an object [could] not be justified by an analysis of the economic context of the anti-competitive conduct concerned'.[45]

77. In the second of these judgments, on the other hand, the Court was faced with a situation that I should describe as atypical — and which, in any event, was not part of any of the categories referred to in Article 101(1) TFEU. That particular feature explains why it made two specific points in relation to the analysis of the economic and legal context.

78. The Court first of all stated that, when assessing that context, it was appropriate to 'take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question'.[46]

79. It then added, for the benefit of the national court which had requested a preliminary ruling, that, in order to evaluate the risk that competition would be eliminated or seriously weakened, that court must take into consideration the structure of the market, and also 'the existence of alternative distribution channels and their respective importance and the market power of the companies concerned'.[47]

80. To my mind, the reference to those additional criteria, touching on the analysis of the effects of an agreement or a cartel, is explained solely by the specific nature of the facts giving rise to the request for a preliminary ruling and by the Court's desire to provide the referring court with the fullest possible answer.

81. That case concerned a series of agreements under which car insurance companies agreed bilaterally either with car dealers operating as car repair shops or with an association representing those dealers concerning the hourly charge to be paid by the insurance company for repairs to vehicles insured by it, stipulating that that charge depends, inter alia, on the number and percentage of insurance contracts that the dealer has sold as intermediary for that company.[48]

43 — Judgment in *Sumitomo Metal Industries and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 45).

44 — Judgment in *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 218). Emphasis added.

45 — Ibid.

46 — Judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 36).

47 — Ibid. (paragraph 48).

48 — This specific feature may be explained by the fact that Hungarian dealers are able to act as insurance intermediaries or brokers on behalf of their customers when selling or repairing motor vehicles.

82. Those dealers were therefore connected with the insurers in two ways. First, in the event of accidents, they repaired cars insured by the insurers and, second, they acted as intermediaries for the insurers by offering, as agents of their own insurance brokers or associated brokers, car insurance to their customers on the occasion of the sale or repair of vehicles.

83. Taken independently, each of those agreements was therefore not in itself harmful to the proper functioning of competition on the relevant market (the market for the repair of damaged motor vehicles, on the one hand, and the market for vehicle insurance brokerage, on the other). However, when analysed jointly and overall, it was not excluded that the agreements should have such an impact.

84. The particular elements of assessment set out in paragraph 48 of the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160) — namely the taking into consideration of the existence of alternative distribution channels and their respective importance and the market power of the companies concerned — are therefore specific to that case and cannot be applied generally without giving rise to confusion between restrictions by object and restrictions by effect.

85. The case-law subsequent to that judgment confirms the specific and isolated nature of the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160).

86. The Court has continued to point out that it was necessary, in order to determine whether an agreement between undertakings or a decision by an association of undertakings was sufficiently harmful, to have regard to the content of its provisions, the objectives which it seeks to achieve and the economic and legal context of which it forms part. Although, as regards the determination of that context, the Court now appears to apply some of the factors first mentioned in the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160), referring to the nature of the goods and services affected and also to the real conditions of the functioning and structure of the market or markets in question,[49] it no longer also refers to the detailed criteria specific to that case.

d) An attempt to summarise in the assessment of the situations of restriction of competition by object

87. Following those preliminary general observations on the definition of a restriction of competition by object, I distinguish two hypotheses.

88. The principle is the same in both cases: in order to determine whether an agreement between undertakings (or a decision by an association of undertakings) reveals, by its very nature, a sufficient degree of harm to be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, to its object, that is to say, to the objectives which it seeks to achieve, and to the economic and legal context of which it forms a part. *Mutatis mutandis*, that principle also applies to concerted practices.

89. If the outcome of that analysis is positive and the agreement, decision by an association of undertakings or concerted practice forms part of a category expressly referred to in Article 101(1) TFEU, the analysis of the economic and legal context may be a secondary consideration.

49 — These are the criteria set out in paragraph 36 of the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 36) and since applied in the judgments in *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 53) and *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 117). See also the Opinion of Advocate General Kokott in Joined Cases *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2014:2439, point 209) and the Opinion of Advocate General Wahl in *ING Pensii* (C-172/14, EU:C:2015:272, point 41).

90. If, on the other hand, it follows from that analysis that the agreement, decision by an association of undertakings or concerted practice does not come within one of the situations referred to in Article 101(1) TFEU or has features that render the agreement, decision by undertakings or concerted practice atypical or complex, the analysis of the economic and legal context will have to be more thorough.

91. In the latter case, the nature of the goods or services affected and also the real conditions of the functioning and structure of the market or markets in question may be taken into consideration in the assessment of the economic and legal context and also, in exceptional cases, the additional features referred to at paragraph 48 of the judgment in *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160). Furthermore, although the parties' intention does not constitute an essential factor for the purpose of determining the restrictive nature of an agreement, decision by an association of undertakings or concerted practice, it is not forbidden to take it into account. [50]

2. The assessment of the existence of a restriction by object in the present case

92. By its first ground of appeal, Toshiba maintains that the General Court erred in law in considering that 'an agreement such as the Gentlemen's Agreement, which is designed to protect the European producers in their home territories from actual or potential competition from Japanese producers, is capable of restricting competition, unless insurmountable barriers to entry to the European market exist which rule out any potential competition from Japanese producers'. [51]

93. In Toshiba's submission, the General Court ought to have verified if the Japanese producers had real and concrete possibilities to enter the market and whether such an entry was an economically viable strategy. The General Court was wrong to confine itself to verifying whether the barriers to entry were insurmountable and to conclude that 'the Commission could therefore restrict itself to showing that the barriers to entry to the European market were not insurmountable'. [52]

94. In addition, Toshiba maintains that the General Court also erred in law by relying on the existence of the Gentlemen's Agreement to demonstrate the existence of a competitive relationship between the Japanese producers and the European producers when it decided that 'the very existence of the Gentlemen's Agreement provides a strong indication that a competitive relationship existed between the Japanese and European producers'. [53]

95. Toshiba's criticism is therefore directed, in essence, against the General Court's response to the argument development before it, according to which the Commission had not carried out a detailed economic analysis of the situation.

96. In that regard, it must be stated that the General Court asserted, before the paragraphs criticised by Toshiba:

— first, that Article 81(1) EC prohibits cartels whose object or effect is to restrict competition and that where a cartel has the object of restricting competition it is unnecessary to show that it had actual effects (paragraph 227 of the judgment under appeal), and

50 — Judgments in *T-Mobile Netherlands and Others* (C-8/08, EU:C:2009:343, paragraph 27); *GlaxoSmithKline Services and Others* v *Commission and Others* (C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 58); *Allianz Hungária Biztosító and Others* (C-32/11, EU:C:2013:160, paragraph 37); and *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 54).

51 — Paragraph 230 of the judgment under appeal.

52 — Ibid.

53 — Paragraph 231 of the judgment under appeal.

— second, that the Commission had 'rightly held … that, as a market-sharing agreement, the Gentlemen's Agreement had to be classified as a restriction by object' (paragraph 228 of the judgment under appeal) and that, consequently, the Commission had been 'fully entitled to state … that it was not obliged to show that the Gentlemen's Agreement had had anti-competitive effects' (paragraph 228 of the judgment under appeal).

97. That analysis seems to me to be perfectly consistent with the approach which I developed above.

98. As the Gentlemen's Agreement was the embodiment of an informal cartel whereby the European producers and the Japanese producers had agreed not to sell on the respective territories of the two groups, its classification as a restriction by object is consistent with the common understanding of that type of agreement or cartel. [54]

99. Consequently, in accordance with the evidential consequences and the extent of the review associated with recognition of a restriction of competition by object, the General Court was correct to hold that 'an agreement such as the Gentlemen's Agreement, which is designed to protect the European producers in their home territories from actual or potential competition from Japanese producers, is capable of restricting competition, unless insurmountable barriers to entry to the European market exist which rule out any potential competition from Japanese producers [and that] the Commission could therefore restrict itself to showing that the barriers to entry to the European market were not insurmountable', [55] which it did in reliance on the fact that one Japanese producer had entered the European market.

100. Nor did the General Court err in law when it itself regarded the Gentlemen's Agreement as 'a strong indication that a competitive relationship existed between the Japanese and European producers' [56] and also that the barriers to entry to the European market were not insurmountable. In fact, the Gentlemen's Agreement is, as such, an element of the relevant economic and legal context.

101. To require the General Court to verify 'if the Japanese producers had real concrete possibilities to enter the EEA market and that such an entry was an economically viable strategy', as Toshiba maintains in support of its first ground of appeal, would be to impose stricter requirements as to the evidence to be adduced. Such a requirement would be contrary to the case-law of the Court of Justice [57] and to the framework proposed in my preliminary general observations.

102. It must therefore be concluded that the first ground of appeal is unfounded.

B – *Second ground of appeal, alleging distortion of the evidence on which the General Court relied in order to find that the barriers to entry to the EEA market were not insurmountable*

103. In order to demonstrate that the possible barriers to entry to the European market were not insurmountable, the General Court relied not only on the actual existence of the Gentlemen's Agreement but also on the fact that one of the Japanese undertakings participating in that agreement had accepted projects from customers in Europe.

54 — Article 101(1)(c) refers expressly to decisions or practices which 'share markets or sources of supply'. See also Geradin, D., Layne-Farrar, A., and Petit, N., *EU competition law and economics*, Oxford University Press, 2012, No 3-114, p. 135, and Whish, R., and Bailey, D., *Competition law*, 7th Ed., Oxford University Press, 2012, p. 122; Lemaire, Chr., *New frontiers of antitrust 2012*, Bruylant, Brussels, 2013, No 68; Bourgeois, J.H.J., 'On the Internal Morality of EU Competition Law', in *Mundi et Europae civis: liber amicorum Jacques Steenbergen*, Larcier, Brussels, 2014, pp. 347 to 374, especially p. 351; Harrison, D., 'The *Allianz Hungária* case. The ECJ's judgment could have ugly consequences', *Competition Law Insight*., 2013, Vol. 12, pp. 10 to 12, especially p. 10.

55 — Paragraph 230 of the judgment under appeal.

56 — Paragraph 231 of the judgment under appeal.

57 — Judgment in *Sumitomo Metal Industries and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 45).

104. Toshiba maintained, on the contrary, that Hitachi had asserted, in its reply to the request for information of 28 February 2008 and at the hearing, that it had not sold power transformers in the European Union or the EEA during the period between 2001 and 2003. Faced with that assertion, the General Court considered that 'in that context, it should be remembered that in its letter of 30 March 2009 Hitachi [had] altered its statements and [had] accepted the Commission's findings relating to the existence and scope of the Gentlemen's Agreement as set out in the statement of objections'. [58]

105. Toshiba maintains that, in doing so, the General Court distorted the content of the Hitachi letter and misinterpreted it.

106. According to consistent case-law, it is clear from Article 256 EC and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the appeal is limited to questions of law and that, therefore, the General Court has exclusive jurisdiction to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and to assess those facts. In other words, the appraisal of the facts does not constitute, save where the clear sense of the evidence produced before the General Court is distorted, a point of law which, as such, is subject to review by the Court of Justice. [59]

107. An alleged distortion of the facts must be obvious — without any need for a new assessment of the facts and the evidence — from the documents in the file. [60]

108. However, it is not apparent on examining the Hitachi letter that the General Court distorted the facts. It is expressly stated in that letter that Hitachi accepts the findings as to the existence and the scope of the Gentlemen's Agreement as set out in the statement of objections. It is apparent from Toshiba's own response to the statement of objections that the question of Hitachi's acceptance of three projects on the European market had already been mentioned by the Commission in the statement of objections. [61]

109. The General Court was therefore able to find at paragraphs 232 to 234 of the judgment under appeal, without distorting the facts set out in the Hitachi letter, that subsequent to its response to the Commission's request for information of 28 February 2008 and the hearing, Hitachi had altered its statements and had accepted the Commission's findings relating to the existence and scope of the Gentlemen's Agreement as set out in the statement of objections.

110. I would observe, moreover, that Toshiba's second ground of appeal refers only to paragraph 233 of the judgment under appeal. In the preceding paragraph, however, the General Court already states that the Commission's reference in the decision at issue to the fact that three European projects had been accepted by Hitachi 'shows that the barriers to entry were not insurmountable for a Japanese producer'. However, neither that paragraph, nor those in which the General Court analyses the question (and to which the General Court refers at the end of paragraph 233 of its judgment) [62] are criticised by Toshiba in the appeal.

111. That lack of criticism on the part of Toshiba contradicts the possibility of a distortion of the facts which, it will be recalled, must emerge clearly from the documents in the file without any need for a fresh assessment of the facts and the evidence.

58 — Paragraph 233 of the judgment under appeal.

59 — See in particular, to that effect, judgments in *Wunenburger* v *Commission* (C-362/05 P, EU:C:2007:322, paragraph 66); *YKK and Others* v *Commission* (C-408/12 P, EU:C:2014:2153, paragraph 44); and *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 38).

60 — See in particular, to that effect, judgments in *Wunenburger* v *Commission* (C-362/05 P, EU:C:2007:322, paragraph 67); *YKK and Others* v *Commission* (C-408/12 P, EU:C:2014:2153, paragraph 44); and *Marktgemeinde Straßwalchen and Others* (C-531/13, EU:C:2015:79, paragraph 39).

61 — See paragraphs 83 to 88 of Toshiba's response to the statement of objections, Annex A.03.24a to the appeal.

62 — That is to say, paragraphs 59 to 62 of the judgment under appeal.

112. Consequently, it must be concluded that examination of the Hitachi letter does not reveal that the General Court manifestly distorted the facts contained in that letter.

C – *Third ground of appeal, relating to the duration of Toshiba's participation in the infringement, alleging contradictory reasoning and distortion of the evidence, incorrect application of the concept of 'public distancing' and breach of the principle of personal liability*

113. Toshiba's third ground of appeal relates to the duration of its participation in the Gentlemen's Agreement. This ground of appeal consists of three parts. First, Toshiba submits that the judgment of the General Court contains contradictory reasoning by reference to the findings of fact and the evidence found previously, which entails a distortion of the evidence. Second, the General Court misapplied the 'public distancing' test. Third, it breached the principle of personal liability when it considered that Toshiba's complaint concerning its non-participation in the Zurich meeting was 'ineffective'. The second and third parts relate in reality to the same considerations of the General Court and I shall examine them together.

1. Contradictory reasoning and distortion of the evidence

114. In Toshiba's submission, the General Court contradicted itself in finding, first, at paragraph 208 of the judgment under appeal, that Toshiba 'had ruled out its individual participation in future meetings' and in deciding, on the other hand, that 'there were doubts concerning the applicant's future participation in the Gentlemen's Agreement' (paragraph 209 of the judgment under appeal) and that its participation would depend on the participation of TM T&D (paragraph 211 of the judgment under appeal).

115. Toshiba's allegations are undoubtedly the consequence of an incomplete reading of the judgment under appeal and the documents on which that reading is based.

116. What the General Court said at paragraph 208 of its judgment is that owing to the creation of the joint venture TM T&D Toshiba's participation in future meetings had still to be decided. The General Court inferred from certain documents that Toshiba had indeed ruled out its individual participation in future meetings, but the other participants had clearly indicated that without Toshiba there would no longer be an interest in continuing the Gentlemen's Agreement.

117. Very logically, after observing, at paragraph 210 of the judgment under appeal that it could not be inferred from any document that Toshiba had distanced itself from the Gentlemen's Agreement during the Vienna meeting, the General Court went on to state, at paragraph 211 of the judgment, that 'it is also apparent from the documents relied on by the applicant that, after its announcement that the participation of TM T&D in the future meetings had still to be decided and that [Toshiba's] participation would depend on that decision, the undertakings participating in that meeting nevertheless confirmed the Gentlemen's Agreement and the rules requiring notification of the projects falling within that cartel'.

118. Contrary to Toshiba's contention, each of the documents relied on confirms that it was uncertain, first, whether Toshiba would be present at the next meeting and, second, whether Toshiba would continue to participate in the Gentlemen's Agreement, individually or through TM T&D.

119. First of all, according to the memorandum of the Vienna meeting drawn up by Mr Okamoto (Fuji), Toshiba's participation in meetings after the creation of the joint venture had not yet been decided. While it is also stated, in parentheses, that '[t]here would not be a tepid decision such as to continue to attend as [Toshiba]', that sentence is immediately followed by the words 'Yes or No'. Apart from the ancillary nature of that element, indicated by the use of parentheses, the addition of

the alternative 'Yes or No' definitely indicates that this was a first thought that had not yet been decided. [63]

120. Next, contrary to Toshiba's suggestion, the interpretative note annexed to Fuji's leniency statement to the Commission does not merely assert that '[t]he possibility of Toshiba attending the meetings after TM T&D had been established (while Mitsubishi does not attend) was denied by Toshiba', but also states that 'since Mitsubishi was no longer participating in these meetings …, a decision had to be made whether TM T&D would be allowed to attend the meetings'. [64]

121. Last, it is incorrect to assert that the minutes of the Vienna meeting are not clear, since they state unambiguously that Toshiba's future participation in the next meetings '[would] be decided relatively soon' and further state that future meetings will make sense only if Toshiba continues to participate. That paragraph of the minutes concludes, moreover, with the statement that that issue will be the main topic at the next meeting. [65] Meanwhile, the Gentlemen's Agreement is confirmed. [66]

122. Consequently, it must be concluded that examination of the documents on which the General Court relied does not disclose that the General Court manifestly distorted the elements of fact in those documents or reveal a contradiction in its reasoning.

2. Incorrect application of the 'public distancing' test and breach of the principle of personal liability

123. In Toshiba's submission, the General Court misapplied the 'public distancing' test when, at paragraph 218 of the judgment under appeal, it rejected Toshiba's argument that it had not participated in the Zurich meeting after the creation of TM T&D, which the General Court described as 'ineffective'. In other words, Toshiba maintains, referring to paragraphs 213 and 220 of the judgment under appeal, that the General Court erred in law in considering that Toshiba's absence from the Zurich meeting was irrelevant for the purposes of evaluating the 'public distancing' test when it had previously inferred from the documents on which Toshiba had relied that doubts had been cast as to its future participation in the cartel.

124. Although the 'public distancing' test is regularly invoked by undertakings alleged to have engaged in anti-competitive conduct, it must be stated that it has not featured largely in the case-law of the Court of Justice [67] and has prompted little interest in the literature. To my mind, the judgment in *Comap* v *Commission* (C-290/11 P, EU:C:2012:271) provides an appropriate illustration of what it entails.

63 — The original document, in English, reads as follows: 'Whether or not to participate in AC after the establishment of T5/T4 JV is not yet decided. (There would not be a tepid decision such as to continue to attend as T5. Yes or No.)' (internal Fuji memo relating to the Vienna meeting, drafted by Mr Okamoto, Annex A.14 to the appeal).

64 — The original document, in English, reads as follows: 'In addition, since Mitsubishi was no longer participating in these meetings …, a decision had to be made whether TM T&D would be allowed to attend the meetings. The possibility of Toshiba attending the meetings after TM T&D had been established (while Mitsubishi does not attend) was denied by Toshiba' (Fuji's leniency statement to the Commission, Annex A.16 to the appeal).

65 — The original document, in English, reads as follows: 'Future participation of T5 (and maybe T4) in AC mtgs will be decided relatively soon. Depending on that decision, future AC mtgs make only sense, if continuation. In next mtg this item will be main topic.' (minute of the Vienna meeting, Siemens/Hitachi, Annex A.15 to the appeal).

66 — The original document, in English, reads as follows, under the heading '3. GA and Inhouse business': 'Confirmation on rules: GA enquiries via Secs' (minute of the Vienna meeting, Siemens/Hitachi, Annex A.15 to the appeal).

67 — See, in particular, judgments in *Aalborg Portland and Others* v *Commission* (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 (EU:C:2004:6); *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408); *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166); *Comap* v *Commission* (C-290/11 P, EU:C:2012:271); *Quinn Barlo and Others* v *Commission* (C-70/12 P, EU:C:2013:351); and order in *Adriatica di Navigazione* v *Commission* (C-111/04 P, EU:C:2006:105). A suggestion of the idea of public distancing may be found in the judgment in *Commission* v *Anic Partecipazioni* (C-49/92 P, EU:C:1999:356), where the Commission maintained that '[i]t is … incumbent on any undertaking which claims that it *dissociated itself* from decisions reached on agreed action to provide express proof *thereof*' (paragraph 95). Emphasis added.

125. In that judgment, the Court of Justice held that the concepts of public distancing and continuity of an anti-competitive practice 'represent factual situations, the existence of which is established by the court adjudicating on the substance, in each particular case, on the basis of an assessment of a "a number of coincidences and indicia" submitted to it and then by an "overall evaluation of all the relevant evidence and indicia"'.[68] It follows from that definition that, '[p]rovided that that 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 before it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice'.[69]

126. That approach, which is consistent with that taken in previous case-law,[70] is confirmed in the judgment in *Quinn Barlo and Others* v *Commission* (C-70/12 P, EU:C:2013:351, paragraphs 28 to 30).

127. Generally, public distancing is invoked by an undertaking which participated in a meeting without intending to participate in the agreement or anti-competitive practice discussed during that meeting. The Court's case-law in relation to that situation, which may be characterised as consistent in spite of the limited number of judgments in which it has ruled on the question, may be summarised as follows: '[in order] to prove to the requisite standard that an undertaking participated in a cartel, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded, without manifestly opposing them. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs'.[71] In that regard, the Court further observes that 'it is indeed the understanding which the other participants in a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement'.[72]

128. In the present case, by the second and third parts of the third ground of appeal, Toshiba suggests, in essence, that the General Court erred in law when it held that Toshiba could be considered to have participated in the Gentlemen's Agreement until the Zurich meeting, in spite of the fact that it had stated at the Vienna meeting in September 2002 that it distanced itself from that agreement, and also the fact that it had not participated, at least individually, in the Zurich meeting in May 2003 and the fact that the Commission had not included the joint venture TM T&D among the addressees of the decision at issue.

129. Admittedly, in the present case the facts are somewhat different from those at issue in the judgments which I have just cited. In the present case, Toshiba claims that it publicly distanced itself during the Vienna meeting, when it stated that it would not participate, at least individually, in the next meetings owing to the creation of a joint venture with Mitsubishi (whose participation was till to be decided), all of which was confirmed by its absence from the Zurich meeting.

68 — Paragraph 71.

69 — Ibid.

70 — See, to that effect, in addition the judgments in *Comap* v *Commission* (C-290/11 P, EU:C:2012:271, paragraphs 76 to 78) and *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 132) and the order in *Adriatica di Navigazione* v *Commission* (C-111/04 P, EU:C:2006:105, paragraphs 50 and 54).

71 — Judgment in *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 119), which refers to the judgment in *Aalborg Portland and Others* v *Commission* (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, EU:C:2004:6, paragraph 81).

72 — Judgment in *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 120).

130. Even in that particular situation, however, I consider that the question whether Toshiba could be considered to be a party to the Gentlemen's Agreement during the period between the Vienna meeting and the Zurich meeting remains a finding of fact, which is outside the jurisdiction of the Court of Justice, unless the evidence has been distorted.[73] The ground of appeal raised by Toshiba 'ultimately amounts to calling in question the General Court's assessment of the facts and of the evidence produced before it, concerning the [appellant's] failure publicly to distance [itself]'.[74]

131. Unlike in *Total marketing services* v *Commission* (C-634/13 P, pending before the Court), we are not in a situation where there is not the slightest evidence that the undertaking concerned continued to participate in the cartel at issue after a certain date. On the contrary, to employ the distinction applied by Advocate General Wahl in his Opinion in that case,[75] we are in a situation where the absence of express distancing allows the presumption, based on solid indicia, that an undertaking which participated in meetings having an anti-competitive object participated in a cartel caught by the prohibition in Article 101(1) TFEU to be maintained.

132. Although, as Toshiba explains by way of preliminary point at paragraph 25 of the appeal, it had already maintained in its submissions to the General Court that there was no evidence that it continued its involvement after the Vienna meeting and that the other members of the Gentlemen's Agreement had clearly understood on the basis of various factors that it had publicly distanced itself from that agreement, the fact none the less remains that, as it had participated in the various meetings, including the Vienna meeting, the onus was on Toshiba, in accordance with the case-law cited above, to adduce evidence that it had publicly distanced itself from the Gentlemen's Agreement[76] and that that was indeed the understanding which the other participants in the cartel had of its intention.[77]

133. In that context, the General Court examined the evidence which Toshiba had submitted for its assessment for that purpose and, more specifically, the minutes of the Vienna meeting, the Fuji internal memorandum concerning that meeting and Fuji's explanatory note on the meeting annexed to its leniency application.[78]

134. However, Toshiba has not disputed the General Court's assessment in that respect,[79] with the exception of paragraphs 209 and 211 of the judgment under appeal and has done so in the context of the first part of the third ground of appeal. On that point, I concluded that examination of the documents on which the General Court had relied did not disclose any manifest distortion of the elements of fact in those documents or reveal a contradiction in its reasoning.

135. Those documents demonstrate, on the contrary, that there was some doubt as to Toshiba's future participation in the forthcoming meetings and, pending that decision, that the Gentlemen's Agreement was confirmed.

136. Consequently, since it seeks to call into question the General Court's assessment of the facts and the evidence, and in the absence of any distortion of that evidence, the second part of the third ground of appeal is inadmissible.

73 — 'As the determination of the duration of an infringement is a question of fact, it is not amenable to review by the Court of Justice on appeal, unless the evidence adduced before the General Court has been distorted. The same applies, in particular, to the application of the "concepts of public distancing and the continuous nature of an anti-competitive practice …"' (Bernardeau, L., and Christienne, J.-Ph., *Les amendes en droit de la concurrence — Pratique décisionnelle et contrôle juridictionnel du droit de l'Union*, Larcier, coll. Europe(s), 2013, No II.1314).

74 — Judgment in *Quinn Barlo and Others* v *Commission* (C-70/12 P, EU:C:2013:351, paragraph 28).

75 — C-634/13 P, EU:C:2015:208, point 56.

76 — See, to that effect, judgment in *Comap* v *Commission* (C-290/11 P, EU:C:2012:271, paragraph 76).

77 — See, to that effect, judgment in *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 120).

78 — See paragraph 207 of the judgment under appeal.

79 — That is to say, paragraphs 208 to 214 of the judgment under appeal.

137. As regards the third part of the third ground of appeal, I consider that the General Court did not err in law in declaring that Toshiba's complaints concerning the Commission's interpretation of the role played by Mr R at the Zurich meeting and the allegation that the Zurich meeting lacked any anti-competitive nature were ineffective.

138. The General Court was correct to consider that, on the assumption that they were well founded, those complaints would not be capable of challenging the Commission's finding that Toshiba had participated in the Gentlemen's Agreement until 15 May 2003. Although the General Court concluded, at paragraph 220 of the judgment under appeal, that 'even on the assumption that the applicant did not participate in the Zurich meeting and that that meeting did not have an anti-competitive object, it must be held that, in the absence of any public distancing from the Gentlemen's Agreement, the applicant [had] participated in the Gentlemen's Agreement until that meeting', it did so in reliance on the matters set out in paragraphs 205 to 214 of the judgment. Not only is paragraph 220 not the subject of the appeal but, as we have already seen, paragraphs 205 to 214 do not disclose any distortion of the facts and/or the evidence analysed by the General Court.

139. Last, the General Court was also correct to consider, at paragraph 221 of the judgment under appeal, that Toshiba could not successfully claim that it had ceased to participate in the Gentlemen's Agreement at the time of the creation of the joint venture TM T&D, on 1 October 2002. On that date, it had not publicly distanced itself from the cartel at issue in the sense meant by the case-law of the Court of Justice, the understanding which the other participants in a cartel have of the intention of the undertaking concerned being of critical importance in that respect.[80] Following the Vienna meeting, before 1 October 2002, the presence of Toshiba and/or TM T&D was still not certain in the minds of the other participants. On the contrary, the latter had, first, confirmed the Gentlemen's Agreement and the rules requiring notification of the projects falling within that agreement and, second, considered that there would be no interest in continuing the Gentlemen's Agreement without Toshiba's participation.

140. Consequently, the third ground of appeal is inadmissible in part and unfounded in part.

D – *Fourth ground of appeal, alleging errors of law in setting the amount of the fine*

141. By its fourth ground of appeal, Toshiba takes issue with the General Court for having misapplied point 18 of the 2006 Guidelines, in so far as it endorsed the Commission's use of the global market shares of the participants in the cartel in order to calculate the notional value of sales in the EEA.

142. According to point 18 of the 2006 Guidelines, where the geographic scope of an infringement extends beyond the EEA, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned.

143. That provision of the Guidelines has not yet, to my knowledge and with the exception of the judgment in *ICF* v *Commission* (C-467/13 P, EU:C:2014:2274),[81] been interpreted by the Court.

80 — See, to that effect, judgment in *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 120).

81 — The point at issue in that judgment is different from the one with which we are concerned, however, since it relates to the concept of the 'total value of the sales of goods or services to which the infringement relates' referred to in point 18 of the 2006 Guidelines and not to the concept of the 'relevant geographic area (wider than the EEA)' at issue in the present case.

144. However, as point 18 of the 2006 Guidelines constitutes a derogation from the basic rule laid down in point 13 of those Guidelines, the indications relating to point 13 and the context of which it forms part may be of assistance when it comes to defining the scope of point 18.

145. In that regard, it is worth bearing in mind that the 2006 Guidelines were adopted in order to ensure the transparency and impartiality of the decisions adopted by the Commission on the basis of Article 23(2)(a) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC]. [82]

146. That article is designed, inter alia, to ensure that the fine has sufficient deterrent effect, which justifies the taking into consideration of the size and the economic power of the undertaking concerned. [83]

147. The Court has inferred that point 13 of the 2006 Guidelines 'pursue[d] the objective of adopting, as the starting point for the calculation of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it'. [84]

148. Thus, the Court considers that it would be contrary to the goal pursed by point 13 of the 2006 Guidelines if the concept of 'value of sales' which is uses were to be understood 'as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by [the] cartel [in question]'. [85].

149. Where it derogates from the delimitation of the geographic sector in point 13 of the 2006 Guidelines and extends it beyond the EEA, point 18 of those Guidelines pursues the same objective: to reflect in the most appropriate way the undertaking's contribution to the infringement.

150. That objective is itself justified by Article 23(2)(a) of Regulation No 1/2003, which is designed to ensure that the fine is sufficiently deterrent, having regard to the economic power of the undertaking concerned.

151. In those circumstances, a literal reading of point 18 of the 2006 Guidelines, to the effect that the 'relevant geographic area (wider than the EEA)' should be limited to the territories covered by the unlawful cartel, would not necessarily take into account the real economic power of the undertaking concerned and would therefore be likely to run counter to the objective of deterrence referred to above.

152. That is perfectly illustrated by the present case. If only sales in the EEA and in Japan had been taken into account, at least one Japanese member of the cartel would have avoided any fine on the ground that it had so sales in the European market.

153. Furthermore, and more generally, the restrictive interpretation of point 18 of the 2006 Guidelines advocated by Toshiba has the effect, in the case of a market-sharing agreement, of rewarding compliance with that agreement. By complying with the agreement, an undertaking has no sales on the partner's territory and therefore, in fact and in law, avoids the fine.

82 — OJ 2003 L 1, p. 1. See point 3 of the 2006 Guidelines.

83 — See, to that effect, judgment in *Dole Food and Dole Fresh Fruit Europe* v *Commission* (C-286/13 P, EU:C:2015:184, paragraph 142).

84 — Ibid. (paragraph 148).

85 — See judgment in *Guardian Industries and Guardian Europe* v *Commission* (C-580/12 P, EU:C:2014:2363, paragraph 57).

154. The General Court was therefore correct, and did not err in law, when it held, at paragraph 281 of the judgment under appeal, that 'since the applicant [had] participated in a market-sharing agreement designed to restrict access by Japanese producers to the EEA, the Commission [had] rightly held that it would not be appropriate to apply a methodology which [was] based on its actual sales in the EEA' and when the General Court itself considered, at paragraph 282 of that judgment, that 'in the light of the nature of the infringement in question, a methodology which [took] into account the worldwide market shares [was] appropriate for reflecting the weight of the infringement'.

155. Furthermore, while the Guidelines are generally seen by the Court as constituting rules of conduct from which the Commission cannot depart without being found to be in breach of general principles of law, such as equal treatment and the protection of legitimate expectations,[86] the Court has none the less made clear that those Guidelines remain, for the Commission, a rule of conduct *indicative* of the practice to be followed and from which it may depart, in a particular case, provided that it gives reasons that are compatible with the principle of equal treatment.[87]

156. Express provision for that possibility is also made at point 37 of the 2006 Guidelines, which states that 'the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from [the general] methodology' set out in the Guidelines on the method of setting fines.

157. In the present case, however, it must be stated that the Commission did not fail to explain, in its decision, the reasons why it used worldwide sales rather than sales in the territories affected by the infringement: it did so, first, because 'the undertakings' sales in the EEA and Japan do not adequately reflect the weight of each undertaking in the infringement'[88] and, second, because '[i]f … only sales of power transformers in the EEA and Japan were to be taken into account, the fine for Fuji would be zero'.[89]

158. The Commission, moreover, was careful to base its decision on point 37 of the 2006 Guidelines, pointing out that 'any other method of calculating the basic amount of the fine [than the method used in this instance] would lead to an arbitrary and unbalanced result *and does not provide for deterrence*'.[90]

159. Accordingly, the fourth ground of appeal is also unfounded.

VI – **Costs**

160. Under Article 138(1) of the Rules of Procedure of the Court, which, pursuant to Article 184(1) of the Rules of Procedure, is to apply to the procedure on appeal, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has claimed that Toshiba should be ordered to pay the costs and Toshiba has been unsuccessful, it must be ordered to pay the costs.

VII – **Conclusion**

161. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeal, and

86 — See, to that effect, judgment in *Archer Daniels Midland* v *Commission* (C-510/06 P, EU:C:2009:166, paragraph 60).

87 — See, to that effect, judgment in *Quinn Barlo and Others* v *Commission* (C-70/12 P, EU:C:2013:351, paragraph 53).

88 — Paragraph 229 of the decision at issue.

89 — Paragraph 235 of the decision at issue.

90 — Ibid. (paragraph 236). Emphasis added.

— order Toshiba Corporation to pay the costs.