Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

19 January 2016*

(Competition — Agreements, decisions and concerted practices — Market in gas insulated switchgear projects — New decision taken following annulment in part of the initial decision by the Court — Fines — Obligation to state reasons — Principle of good administration — Rights of the defence — Equal treatment — Proportionality — Erroneous application — Starting amount — Extent of contribution to the infringement — Deterrence multiplier)

In Case T-409/12,

Mitsubishi Electric Corp., established in Tokyo (Japan), represented by R. Denton, J. Vyavaharkar, R. Browne, L. Philippou, M. Roald, and J. Robinson, Solicitors, and K. Haegeman, lawyer,

applicant,

v

European Commission, represented by N. Khan and P. Van Nuffel, acting as Agents,

defendant,

APPLICATION, principally, for the annulment of Commission Decision C(2012) 4381 of 27 June 2012 amending Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 [EC] (now Article 101 TFEU) and Article 53 of the EEA Agreement to the extent that it was addressed to Mitsubishi Electric Corp. and Toshiba Corp. (Case COMP/39.966 — Gas Insulated Switchgear — Fines) in so far as it concerns the applicant and, in the alternative, for the amendment of Article 1 of that decision with a view to the annulment or, failing that, a reduction of the fine imposed on the applicant,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, I. Pelikánová (Rapporteur) and E. Buttigieg, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 21 April 2015,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1 The applicant, Mitsubishi Electric Corp., is a Japanese company active in various sectors, in particular the sector for gas insulated switchgear ('GIS'). Between October 2002 and April 2005, its GIS business was carried on within a joint venture, TM T&D Corp., jointly owned in equal shares with Toshiba Corp. and dissolved in 2005.

2 On 24 January 2007, the Commission of the European Communities adopted Decision C(2006) 6762 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear) ('the 2007 decision').

3 In the 2007 decision, the Commission found there to have been a single and continuous infringement of Article 81 EC and Article 53 of the Agreement on the European Economic Area ('EEA Agreement') on the GIS products market between 15 April 1988 and 11 May 2004 and imposed on the addressees of that decision, which were European and Japanese GIS producers, fines calculated in accordance with the methods set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) ('the Guidelines on the method of setting fines') and in the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

4 The infringement at issue in the 2007 decision comprised three essential components:

— an agreement signed in Vienna on 15 April 1988 ('the GQ Agreement'), which established rules allowing the allocation of worldwide GIS projects according to agreed rules in order to maintain quotas largely reflecting estimated historic market shares; the agreement, which was applicable worldwide, except in the United States, Canada, Japan and 17 western European countries, was based on the allocation of 'a joint Japanese quota' to Japanese producers and a 'joint European quota' to European producers;

— a parallel agreement ('the common understanding'), under which, first, GIS projects in Japan and in the countries of the European members of the cartel ('the home countries') were reserved to the Japanese members and the European members of the cartel respectively and, second, GIS projects located in the other European countries were also reserved for the European group, since the Japanese producers had undertaken not to submit bids for GIS projects in Europe; however, in exchange for that commitment, such projects had to be notified to the Japanese group and charged to the 'joint European quota' set under the GQ Agreement ('notification' and 'project loading');

— an agreement signed in Vienna on 15 April 1988, entitled 'E-Group Operation Agreement for GQ Agreement' ('the EQ Agreement'), signed by the members of the European group of producers and aimed at distribution of GIS projects allocated to that group under the GQ Agreement.

5 In Article 1 of the 2007 decision, the Commission found that the applicant had participated in the infringement from 15 April 1988 to 11 May 2004.

6 For the infringement found in Article 1 of the 2007 decision the applicant was fined, in Article 2 of that decision, EUR 118 575 000, of which EUR 4 650 000, which corresponded to the infringement committed by TM T&D, was to be paid jointly and severally with Toshiba.

7 On 18 April 2007, the applicant brought an action against the 2007 decision.

8 By judgment of 12 July 2011 in *Mitsubishi Electric* v *Commission* (T-133/07, ECR, EU:T:2011:345), the Court, first, dismissed the applicant's action in so far as it sought the annulment of Article 1 of the 2007 decision. Second, it annulled Article 2(g) and (h) of the 2007 decision in so far as it concerned the applicant, on the ground that the Commission had infringed the principle of equal treatment by choosing, when calculating the fine, a reference year for the applicant which was different from that chosen for the European participants in the infringement.

9 On 22 September 2011, the applicant lodged an appeal before the Court of Justice against the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345).

10 On 15 February 2012, the Commission sent the applicant a letter of facts, in which it stated that it intended to adopt a new decision imposing a fine on the applicant ('the letter of facts'). The Commission set out the facts which, in its view, were relevant for the calculation of that fine, account being taken of the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345).

11 On 16 March 2012, the applicant submitted its comments on the letter of facts.

12 On 8 June 2012, a meeting was held between the applicant's representatives and the Commission team responsible for the case.

13 By Commission Decision C(2012) 4381 of 27 June 2012 amending the 2007 decision to the extent that it was addressed to the applicant and Toshiba (Case COMP/39.966 — Gas Insulated Switchgear — Fines) ('the contested decision'), Article 2 of the 2007 decision was amended by the addition of two new points, (g) and (h). Under Article 2(g), a fine of EUR 74 817 000, for which it was solely liable. Under Article 2(h), a fine of EUR 4 650 000 was imposed on the applicant, to be paid jointly and severally with Toshiba.

14 In order to remedy the unequal treatment criticised by the Court in its judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), the Commission used, in the contested decision, the worldwide turnover for GIS products in 2003. In so far as, in that year, the GIS activities of the applicant and of Toshiba were carried out by TM T&D, the Commission took into consideration that company's turnover in 2003 (recitals 59 and 60 of the contested decision).

15 Thus, first, in the context of the differential treatment aimed at reflecting the respective contributions of the various participants in the cartel, the Commission calculated TM T&D's GIS market share in 2003 (15%-20%) and placed it in the second group in accordance with the categorisation established in recitals 482 to 488 of the 2007 decision. Consequently, a hypothetical starting amount of EUR 31 000 000 was allocated to TM T&D (recital 61 of the contested decision).

16 Second, in order to reflect the applicant's and Toshiba's unequal capacity to contribute to the infringement during the period prior to the creation of TM T&D, the starting amount determined for the latter was divided between its shareholders in accordance with their respective GIS sales in 2001, which was the last full year prior to the creation of TM T&D. Consequently, starting amounts of EUR 20 136 801 and EUR 10 863 199 were allocated to the applicant and Toshiba respectively (recitals 62 and 63 of the contested decision).

17 Third, in order to ensure the deterrent effect of the fine, the Commission applied a deterrence multiplier of 1.5 to the applicant, on the basis of its turnover in 2005 (recitals 69 to 71 of the contested decision).

18 Fourth, with a view to reflecting the duration of the infringement during the period prior to the creation of TM T&D, the starting amount attributed to the applicant was increased by 140% (recitals 73 to 76 of the contested decision).

19 Fifth, in order to reflect the duration of the infringement during TM T&D's period of operation, a sum corresponding to 15% of the hypothetical starting amount of TM T&D was imposed on the applicant and Toshiba jointly and severally (recital 77 of the contested decision).

20 Sixth and finally, the fine imposed jointly and severally was multiplied by the applicant's deterrence multiplier and the amount resulting from that multiplication, minus the amount of the fine imposed jointly and severally, was imposed on the applicant on an individual basis (recital 78 of the contested decision).

Procedure and forms of order sought by the parties

21 By application lodged at the Court Registry on 12 September 2012, the applicant brought the present action.

22 By letter of 8 January 2013, the applicant renounced its right to lodge a reply.

23 By order of the President of the Fourth Chamber of the General Court of 21 February 2013, proceedings were stayed until the judgment in Case C-489/11 P *Mitsubishi Electric Corp.* v *Commission* had been delivered.

24 Following changes to the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the First Chamber, to which the present case has therefore been allocated.

25 By judgment of 19 December 2013 in *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866), the Court of Justice dismissed the appeal brought by the applicant against the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345). The proceedings in the present case were thus resumed.

26 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided, on 3 February 2015, to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of the Rules of Procedure of the General Court of 2 May 1991, requested the parties to lodge a document and put written questions to them. The parties complied with the Court's requests within the time limit prescribed.

27 The applicant claims that the Court should:

— annul the contested decision, in so far as it applies to the applicant;

— in the alternative, amend Article 1 of the contested decision so as to annul or, failing that, reduce the fine imposed on it;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the action as, in part, manifestly inadmissible and, in part, manifestly lacking any foundation in law;

— order the applicant to pay the costs.

Law

The main application, seeking the annulment of the contested decision

29 The applicant relies on nine pleas in law in support of its main application. The first plea alleges an infringement of the obligation to state reasons, of the principle of good administration and of the applicant's rights of defence. The second plea alleges an infringement of the obligation to state reasons, of the principle of equal treatment and of the principle of proportionality as regards the calculation of the deterrence multiplier. The third plea alleges an infringement of the principle of proportionality in so far as the Commission calculated the applicant's fine in the same way as the fines of the European producers. The fourth plea alleges that the Commission erred in failing to take into account technical and economic evidence when assessing the impact of the applicant's behaviour and when calculating its fine. The fifth plea alleges an error in the determination of the duration of the infringement. The sixth plea alleges an infringement of the principle of equal treatment and of the principle of proportionality in determining the proportions of TM T&D's starting amount to be split between the applicant and Toshiba. The seventh plea alleges an infringement of the obligation to state reasons and of the applicant's rights of defence as regards the assessment of the proportions of TM T&D's starting amount to be split between the applicant and Toshiba. The eighth plea alleges an infringement of the principle of equal treatment and of the principle of proportionality as regards the methodology for assigning a starting amount to the applicant for the period prior to the formation of TM T&D. The ninth plea alleges an infringement of the obligation to state reasons and of the applicant's rights of defence as regards the methodology for assigning a starting amount to the applicant for the period prior to the formation of TM T&D.

30 In response to the written question put by the Court, the applicant stated that, following the delivery of the judgment in *Siemens and Others* v *Commission*, cited in paragraph 25 above (EU:C:2013:866), it was retracting its fifth plea in law. Consequently, the Court is required to examine only pleas one to four and six to nine. The Court considers it appropriate to examine, first, pleas one, seven and nine, regarding the procedure which led to the adoption of the contested decision and the grounds for that decision, second, pleas eight and six, which concern the determination of the applicant's starting amount by reference to TM T&D's hypothetical starting amount, third, pleas three and four, concerning the applicant's relative contribution to the infringement and, fourth, the second plea, concerning the determination of the applicant's deterrence multiplier.

The first plea, alleging an infringement of the obligation to state reasons, of the principle of good administration and of the applicant's rights of defence

31 By its first plea, the applicant submits that, in calculating the fine which has been imposed on it, the Commission infringed the obligation to state reasons, the principle of good administration and the applicant's rights of defence.

32 According to the applicant, it is clear from the Commission notice on best practices for the conduct of proceedings concerning Articles 101 [TFEU] and 102 [TFEU] (OJ 2011 C 308, p. 6) that, in order to increase transparency, the Commission should include in the statement of objections or, where appropriate, in the letter of facts, a number of elements relevant for the purposes of calculating the fine, such as relevant sales figures.

33 The applicant claims that, in the present case, the method for calculating the fine is not clearly explained in recitals 51 to 85 of the contested decision and cannot therefore be understood by it, since the Commission failed to explain either its reasoning or the essential steps which it followed. As a result, the Commission also infringed the principle of good administration.

34 More specifically, the applicant submits that the contested decision lacks sufficient grounds as regards, first, the size of the relevant geographical market, second, the differential treatment, third, the determination of the starting amount of TM T&D's fine and why it is appropriate and, fourth, the choice of deterrence multiplier applicable to it and why it is appropriate.

35 Furthermore, the applicant submits that the Commission failed to state, either in the statement of objections of 20 April 2006, sent during the proceedings which led to the 2007 decision ('the 2006 statement of objections'), or in the correspondence prior to the adoption of the contested decision, that it intended to apply the deterrence multiplier to the applicant even during TM T&D's period of operation.

36 The Commission contests the merits of the applicant's arguments.

37 The Court points out at the outset that, in its arguments, the applicant combines its complaints alleging an infringement of its rights of defence in the proceedings which led to the adoption of the contested decision with its complaints alleging flaws in the grounds for that decision. However, since those complaints are distinct, it is appropriate to examine them separately.

– The complaints alleging an infringement of the applicant's rights of defence

38 According to the case-law, respect for the rights of the defence requires that the person concerned must have been afforded the opportunity, during the administrative procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (judgment of 7 January 2004 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, ECR, EU:C:2004:6, paragraph 66).

39 In the present case, the Court notes as a preliminary point that, in so far as the contested decision provides explicitly that it constitutes a decision which amends the 2007 decision, its adoption procedure amounts to an extension of the procedure which led to the 2007 decision. Accordingly, in so far as it was not called into question in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), both the 2007 decision and the preparatory measures which preceded its adoption, including the 2006 statement of objections, may be taken into consideration in assessing whether the applicant's rights of defence were respected in the procedure which led to the adoption of the contested decision.

40 First, the applicant submits, as has been stated in paragraph 32 above, that the notice on best practices requires that the Commission communicate to the undertakings concerned a number of elements relevant for the purposes of calculating the fine, such as relevant sales figures.

41 Without it being necessary to examine, in that context, the Commission's argument disputing the mandatory nature of the notice on best practices, the Court points out that it is evident from the applicant's observations on the letter of facts that it was in a position to make known its point of view, in a detailed manner, on the various stages of the calculation of the fine which was to be imposed on it. As regards, more specifically, the relevant sales figures, that response refers specifically both to TM T&D's sales figures and those of the applicant and of Toshiba which were to be used in the calculation of the fine, which implies that the applicant was in a position to identify the relevant elements for that calculation and to submit its comments in that respect.

42 That finding is corroborated by the internal minutes drawn up by the Commission at the meeting of 8 June 2012, which show that detailed discussions were held between the applicant and the Commission regarding the various stages of the calculation of the fine which was to be imposed on it.

43 Accordingly, it must be concluded that the applicant has not established that the Commission infringed is rights of defence by not communicating to it the relevant elements for the purposes of calculating the fine and, in particular, sales figures.

44 Second, as has been stated in paragraph 35 above, the applicant essentially complains that the Commission failed to warn it of its intention to ensure the deterrent effect of the fine by imposing an additional amount of EUR 2 325 000, resulting from the application of the deterrence multiplier applicable to it for the period of operation of TM T&D, referred to in paragraph 20 above ('the additional amount').

45 In that regard, first, in point 9.2 of the 2006 statement of objections the Commission stated that it intended to impose fines on the addressees of that document and noted, among the essential factors for the determination of those fines, its wish to ensure that the fines had a deterrent effect.

46 Second, in recital 491 of the 2007 decision, the Commission determined the deterrence multiplier applicable to the applicant. In recital 503 of the same decision, the Commission explicitly stated that an additional amount, calculated on the basis of that same coefficient, would be imposed on the applicant for the period of operation of TM T&D. In the light of those recitals, the applicant was thus in a position to understand that the Commission intended to ensure the deterrent effect of the fine also in relation to the period of operation of TM T&D.

47 Third, there is nothing in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), which leads to the conclusion that the Commission's decision to ensure the deterrent effect of the fine imposed on the applicant also in relation to the period of operation of TM T&D was unlawful or inappropriate, since that judgment does not address that issue.

48 Fourth, it follows from the applicant's observations on the letter of facts that it assumed, on the basis of recitals 489 and 503 of the 2007 decision, that, at the very most, 15% of TM T&D's hypothetical starting amount was going to be imposed as a fine for the period of operation of that undertaking, it being understood that '[the applicant's own deterrence multiplier, if there was one, would then be applied]'. Accordingly, it follows explicitly from the applicant's own statements that it assumed that the Commission was going to apply to it the deterrence multiplier for the period of operation of TM T&D, imposing the additional amount on it for that purpose.

49 Fifth, the Commission's internal minutes of the meeting of 8 June 2012 mention explicitly that, in the Commission's view, there was no need to change the parameters used to calculate the fine in the 2007 decision — which were not criticised by the Court — and that the only change to be made to the methodology was, therefore, in relation to the reference year. As has been noted in paragraphs 46 and 47 above, the Commission applied the deterrence multiplier to the period of operation of TM T&D in the 2007 decision, without that element of the calculation of the fine having been subsequently criticised by the Court.

50 Accordingly, it must be found that the position expressed by the Commission at the meeting of 12 June 2012 corroborated the other relevant information from which it was apparent that it intended to apply the deterrence multiplier to the period of operation of TM T&D and, consequently, to impose the additional amount on the applicant.

51 In the light of the foregoing, it must be concluded that, from the time of the 2006 statement of objections, the applicant was aware that the Commission intended to ensure the deterrent effect of the fine imposed. At the very latest from the time of the 2007 decision, it was in a position to understand that that intention implied the imposition of an additional amount for the period of operation of TM T&D. That intention was not called into question in the judgment in *Mitsubishi*

Electric v *Commission*, cited in paragraph 8 above (EU:T:2011:345), and was reaffirmed in both the letter of facts, as is apparent from the applicant's observations on that letter, and at the meeting on 12 June 2012.

52 Accordingly, the applicant's arguments do not enable it to be established that its rights of defence were infringed in relation to the Commission's intention to impose the additional amount on it.

– The complaints regarding the statement of reasons for the contested decision

53 According to the case-law, the statement of reasons required by Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure in order to defend their rights and to enable the EU judicature to exercise its power of review (see, by analogy, judgment of 18 September 2003 in *Volkswagen* v *Commission*, C-338/00 P, ECR, EU:C:2003:473, paragraph 124 and the case-law cited). Although pursuant to Article 296 TFEU, the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure (see, by analogy, judgment in *Volkswagen* v *Commission*, EU:C:2003:473, paragraph 127 and the case-law cited). The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see judgment of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 63 and the case-law cited). That case-law is applicable, by analogy, to Commission decisions finding an infringement of Article 53(1) of the Agreement on the European Economic Area.

54 The Court points out, in that regard, that the contested decision provides explicitly that it constitutes a decision which amends the 2007 decision with regard to the fines imposed on the applicant and Toshiba. Accordingly, the grounds for the 2007 decision, in so far as they have not been affected by the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), and are not contradicted by the wording of the contested decision, may be taken into account in the examination of the present plea.

55 The Court points out, at the outset, that the applicant's introductory argument, set out in paragraph 32 above, that the method for calculating the fine is not clearly explained and cannot therefore be understood by it is too general to be able to be examined and is consequently inadmissible in accordance with Article 44(1)(c) of the Rules of Procedure of 2 May 1991, which is applicable so far as concerns the admissibility of the present action (see order of 7 September 2010 in *Norilsk Nickel Harjavalta and Umicore* v *Commission*, T-532/08, ECR, EU:T:2010:353, paragraph 70 and the case-law cited).

56 In any event, an overall examination of the grounds for the calculation of the fine in the contested decision does not show that decision to be insufficient or inconsistent, since the Commission explained the various factors taken into consideration and the various intermediary stages of the calculation.

57 First, so far as concerns the more concrete arguments, the applicant submits that, notwithstanding the statement in recital 55 of the contested decision that the size of the relevant geographical market is taken into account when assessing the gravity of the infringement, the section of that decision relating to the gravity of the infringement fails to explain how the size of the geographical market was determined or at what stage it was taken into account in the assessment of gravity; it merely states that the illegal activities covered the whole of the EEA is not sufficient in that respect.

58 The Court notes in that regard that, as the Commission submits, it is apparent from the introductory sentence of recital 56 of the contested decision that the findings relating to the gravity of the infringement were made 'in view of the facts established' in the 2007 decision. It is evident from recital 478 of the latter decision that the relevant geographical market is the EEA market and that the size of that market in 2003, determined on the basis of the figures communicated by the undertakings concerned, was approximately EUR 320 million, without those findings having been called into question by the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345). Moreover, it is clear from recital 483 of the 2007 decision that the size of the relevant geographical market was taken into consideration during the determination of the starting amounts applicable to the various undertakings.

59 Second, the applicant submits that the differential treatment is not based on a clear and precise explanation, given that the contested decision does not explain how the global sales figures were used to determine the groups decided on in the 2007 decision. Moreover, recital 61 of the contested decision makes reference to recital 484 of the 2007 decision, which refers to the relevance of the market value in the EEA. In the applicant's view, such a reference is vitiated by the lack of indications as to the size of the relevant geographical market, criticised in paragraph 57 above.

60 In that regard, first, it is evident from recitals 57 to 61 of the contested decision, read in conjunction with recitals 483 to 488 of the 2007 decision, that the global sales figures in 2003 of the various undertakings concerned, including those of TM T&D, were used to calculate their global market shares, in accordance with which they were classified in groups with different starting amounts. Such a statement of reasons is sufficient in the light of the case-law set out in paragraph 53 above.

61 Second, in so far as it has been found, in paragraph 58 above, that the Commission provided grounds to the requisite legal standard for the scope and size of the relevant geographical market, the argument concerning recital 61 of the contested decision and recital 484 of the 2007 decision is based on a false premiss and thus cannot be upheld.

62 Third, according to the applicant, neither the 2007 decision nor the contested decision provides any explanation as to how TM T&D's starting amount was calculated or why it is appropriate. Thus, in so far as no information has been given as to the choice of that exact amount, the latter appears to be arbitrary. Moreover, the applicant submits that the reference to the value of the EEA market in recital 484 of the 2007 decision is unfounded for the reasons given in paragraph 57 above.

63 In recitals 57 to 61 of the contested decision, the Commission considered that, since the infringement concerned was very serious, it was necessary to apply differential treatment to the various undertakings in order to take account of differences in their capacity to cause significant damage to competition. As has been found in paragraph 61 above, it considered that that differential treatment should take the form of a categorisation of the starting amounts on the basis of the worldwide turnovers for GIS products in 2003. Referring to the categorisation established in recitals 484 to 488 of the 2007 decision, the Commission stated, in recital 61 of the contested decision, that TM T&D's worldwide turnover for GIS products placed it in the second group, resulting in a hypothetical starting amount of EUR 31 000 000.

64 Moreover, it is stated in recital 483 of the 2007 decision that the groups were established in such a way that the differences between the GIS market shares of the undertakings in the same group were less significant than the differences between the market shares of undertakings placed in different groups.

65 It is further apparent from point 1A of the Guidelines on the method of setting fines that, in relation to very serious infringements, the starting amount was likely to be above EUR 20 000 000.

66 Those elements are such as to enable the applicant to understand the factors which made it possible for the Commission to measure the gravity of the infringement committed by it, which means that the Commission fulfilled its obligation to state reasons and that it was not required, inter alia, to set out a more detailed account or to provide figures relating to the precise calculation of TM T&D's starting amount (see, to that effect, judgment of 29 April 2004 in *Tokai Carbon and Others* v *Commission*, T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, ECR, EU:T:2004:118, paragraph 252).

67 Furthermore, even if the Commission does not state in the contested decision its reasons for choosing the precise figure of EUR 31 000 000 for the undertakings in the second group, including TM T&D, that choice on the Commission's part cannot be described as arbitrary and does not exceed the discretion which it enjoys in that regard (see, by analogy, judgment in *Tokai Carbon and Others* v *Commission*, cited in paragraph 66 above, EU:T:2004:118, paragraph 224), since it was made on the basis of the elements set out in paragraphs 63 to 65 above.

68 As for the argument concerning the reference, made in recital 484 of the 2007 decision, to the market value in the EEA it is sufficient to refer to paragraphs 58 and 61 above.

69 Fourth, the applicant submits that the Commission neither gave reasons for its choice of the applicant's deterrence multiplier nor reasons why it considered it appropriate to apply that multiplier to it even for the period of operation of TM T&D, which resulted in the imposition of the additional amount on the applicant.

70 In that regard, it follows, first, from paragraphs 310 to 317 of the judgment of 3 March 2011 in *Siemens* v *Commission* (T-110/07, ECR, EU:T:2011:68), that, in recital 491 of the 2007 decision, the Commission set out, to the requisite legal standard, the elements of law taken into account for increasing the starting amounts of the fines so as to ensure their deterrent effect. Since that finding is applicable to the deterrence multiplier imposed on the applicant in the contested decision, it must be concluded that the applicant was in a position to be able to understand the justification for that increase to the starting amount of its fine and to be able to exercise its rights, and that the Court is in a position to carry out its review.

71 Second, the Commission was not required to provide specific reasons for its decision to apply the deterrence multiplier to the applicant for the period of operation of TM T&D. Since the Commission imputed the culpability for TM T&D's activities to the applicant, its intention to ensure the deterrent effect of the fine imposed on the latter, expressed in recitals 69 to 71 of the contested decision, read in conjunction with recital 491 of the 2007 decision, meant that the application of the deterrence multiplier had to be applied also in relation to that same period and, consequently, that the additional amount had to be imposed.

72 In the light of the foregoing, the Court must reject the complaints alleging an infringement of the obligation to state reasons, made in the context of the first plea, and the complaint, made in the context of that same plea, alleging an infringement of the principle of good administration, which is not substantiated by any autonomous arguments.

73 Consequently, the first plea in law must be rejected in its entirety.

The seventh plea, alleging an infringement of the obligation to state reasons and of the applicant's rights of defence as regards the setting of the proportions of TM T&D's starting amount to be split between the applicant and Toshiba

74 The applicant submits that the Commission infringed the obligation to state reasons by failing to explain why it was necessary to split TM T&D's starting amount between the applicant and Toshiba on the basis of the proportion of sales of GIS products made by each of them in 2001. Although the contested decision states that it is not necessary to split TM T&D's starting amount on the basis of the shareholdings of its two shareholders, it does not explain why it is necessary to reflect the respective positions of those shareholders in 2001 or at an earlier date. That approach does not correspond to the general methodology of the 2007 decision and of the contested decision and was also not applied in the case of Schneider Electric SA ('Schneider') with regard to its shareholding in VAS, a joint venture with VA Tech. It submits that the Commission did not provide any explanation to justify the difference in treatment between the applicant and Schneider, which means that its rights of defence were also infringed.

75 The Commission contests the merits of the applicant's arguments.

76 First, in that regard, the Court notes that it is stated in recitals 52 and 57 of the contested decision that, in determining the fine, the Commission must take account of the gravity of the infringement and may, in the case of a very serious infringement, apply differential treatment based on the economic capacity of the various undertakings to cause significant damage to competition.

77 Second, it was found in the 2007 decision and reiterated in recitals 1 to 3 of the contested decision that, although the applicant's and Toshiba's activities in the GIS sector were transferred to TM T&D in 2002, they participated in the infringement on an individual basis for the vast majority of the period of infringement.

78 Third, it follows from recitals 62 and 67 of the contested decision that, accordingly, the taking into account of the unequal position in terms of competition of TM T&D's two shareholders at the time that TM T&D was created enabled the Commission better to assess their respective capacities to cause significant damage to competition than their respective shareholdings in TM T&D.

79 Fourth, according to recital 67 of the contested decision, that was all the more the case since the proportion of the applicant's and Toshiba's GIS sales in 2001 differed significantly from the proportions of their shareholdings in TM T&D, which means that the latter proportions did not reliably reflect the reality of the market.

80 Fifth, in response to a question put by the Court, the applicant stated that, in the proceedings which led to the adoption of the contested decision, and in particular in its comments on the letter of facts, it did not rely on the method envisaged in that letter differing from that followed in the 2007 decision in respect of Schneider. Accordingly, the Commission was not required to provide specific reasons in that regard going beyond the explanation given in recital 67 of the contested decision and summarised in paragraph 79 above.

81 Moreover and in any event, the specific reason why Schneider's situation differed from that of the applicant, namely the lack of relevant turnover figures in relation to Schneider in 2001 or 2003, was given in the passage in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), concerning the Commission's wish to reflect the unequal capacity of the applicant and Toshiba to contribute to the infringement, to which recitals 62 and 67 of the contested decision refer.

82 Thus, it is sufficiently clear from the statement of reasons for the contested decision, read — in so far as necessary — in conjunction with the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), first, that the reason behind the Commission's decision to split TM T&D's starting amount between the applicant and Toshiba in accordance with the proportion of GIS sales made by each of them in 2001 was its wish to reflect their respective capacities to cause significant damage to competition; next, that the applicant's and Toshiba's cases differed from those of the European undertakings other than Schneider by the fact that they had participated in the infringement on an individual basis for the vast majority of the period of infringement, but had transferred their activities to TM T&D in 2012, and, finally, that Schneider's situation differed from that of the applicant and Toshiba in that the relevant figures of Schneider's turnover in 2001 or 2003 were not available. Accordingly, it must be concluded that, in that respect, the statement of reasons for the contested decision satisfied the requirements laid down in the case-law cited in paragraph 53 above.

83 Moreover, in so far as the applicant was, necessarily, aware of the findings made in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), it cannot claim that the Commission infringed its rights of defence by failing to provide it with precise information prior to the adoption of the contested decision regarding the difference in treatment between itself and Schneider. That is all the more the case since, as has been stated in paragraph 80 above, the applicant did not rely on the method to be applied to it differing from the one applied to Schneider.

84 Consequently, the seventh plea in law must be rejected in its entirety.

The ninth plea, alleging an infringement of the obligation to state reasons and of the applicant's rights of defence with regard to the method for assigning a starting amount to the applicant for the period prior to the creation of TM T&D

85 The applicant submits that the Commission failed to state, to the requisite legal standard, the reasons for its decision to divide TM T&D's starting amount between its two shareholders, rather than its turnover in 2003, when calculating their fine for the period prior to the creation of TM T&D. The applicant claims that that infringement also constitutes an infringement of its rights of defence.

86 First, the applicant explains that the argument in recital 66 of the contested decision — that the element of comparison with the other participants in the infringement would be lost if TM T&D's turnover were divided between its two shareholders on the basis of their sales of GIS products in 2001, since such an approach would essentially amount to comparing their virtual 2001 turnovers with the actual 2003 turnovers of the other producers — emphasises, first and foremost, that the Commission should have split TM T&D's turnover between its shareholders according to their shareholdings in TM T&D. There is no point in referring back to 2001 in the context of a comparison of the various producers' respective positions in 2003.

87 Similarly, it claims that the Commission wrongly submits that sharing TM T&D's 2003 turnover would lead to virtual turnovers. The share of the turnover attributed to the applicant would still represent a share of TM T&D's 2003 turnover entirely unrelated to the applicant's turnover in 2001.

88 Thus, the Commission's argument set out in recital 66 of the contested decision is 'erroneous and illogical', as the Commission fails to provide any rational explanation as to why TM T&D's turnover could not be split between its shareholders.

89 Second, while recital 59 of the contested decision refers to the value of the sales made by the applicant and Toshiba, recital 60 thereof assigns a starting amount to TM T&D and divides it between its shareholders. Thus, the applicant claims that the methodology followed by the Commission is

inconsistent with the stated aim and is not supported by any valid justification. The Commission thus infringed the obligation to state reasons and the applicant's rights of defence, which means that the fine imposed on the latter must be annulled or reduced.

90 The Commission contests the merits of the applicant's arguments and states, inter alia, that this plea does not indicate an infringement of the obligation to state reasons, in that the applicant merely explains that it disagrees with the reasons set out in the contested decision.

91 The Court points out, in that regard, that the applicant's first complaint, set out in paragraphs 86 to 88 above, does indeed not concern either the grounds for the contested decision or the respect of its rights of defence in the procedure which led to the adoption of that decision, but the substance of the Commission's arguments. Consequently, the first complaint is ineffective in the context of the first plea and the arguments supporting it will be examined in the context of the sixth and eight pleas below.

92 As regards the second complaint, the arguments set out in paragraph 89 above relate to an alleged inconsistency in the grounds for the contested decision and not the issue as to whether the applicant's rights of defence were respected. Consequently, the second complaint must be rejected as ineffective in so far as it alleges an infringement of those rights.

93 So far as concerns the alleged inconsistent grounds, the following is stated in recital 59 of the contested decision:

'For the purpose of differential treatment, the Commission used the year 2003 as a reference year for the determination of the value of sales of [the applicant] and Toshiba. This approach is in line with the findings of the General Court in the judgments [of 12 July 2011 in *Toshiba* v *Commission*, T-113/07, ECR, EU:T:2011:343, and *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above, EU:T:2011:345].'

94 According to recital 60 of the contested decision:

'Given that in 2003, as established in the [2007 decision], [the applicant] and Toshiba participated in the cartel via their joint venture TM T&D, the Commission used the world-wide turnover [for sales of GIS products] of TM T&D in 2003 to establish a starting amount, which was used for the purpose of calculating the fine to be imposed on [the applicant] and Toshiba for the period between 1 October 2002 and 11 May 2004 … The Commission did not, however, impose [that] hypothetical … starting amount as a separate fine but merely uses it (i) as a basis for calculating the increase for duration in the period between 1 October 2002 and 11 May 2004, and (ii) as a basis for the determination of the individual starting amounts of Toshiba and [the applicant] for the period of their individual participation in the cartel …'

95 Those two passages are not inconsistent and, in particular, do not show that the Commission initially decided to determine the values of the individual sales of the applicant and Toshiba to then abandon that methodology in favour of sharing TM T&D's starting amount between its shareholders.

96 It follows rather from recitals 59 and 60 of the contested decision, essentially, that, in the applicant's case, the general rule followed in the 2007 decision and on which the Court insisted in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), namely the use of 2003 as the reference year for determining the value of sales, must be applied in accordance with specific detailed rules, given that, during that year, the applicant did not itself make any sales of GIS products, since it had transferred its activities in that sector to TM T&D. Such reasoning is consistent and satisfies the requirements of the case-law cited in paragraph 53 above.

97 Accordingly, the second complaint must be rejected as unfounded in so far as it alleges an infringement of the obligation to state reasons.

98 In the light of the foregoing, the ninth plea in law must be rejected as being in part ineffective and in part unfounded.

The eighth plea, alleging an infringement of the principle of equal treatment and of the principle of proportionality as regards the methodology for assigning a starting amount to the applicant for the period prior to the creation of TM T&D

99 By its eighth plea, the applicant alleges an infringement of the principle of equal treatment and of the principle of proportionality as regards the methodology for assigning a starting amount to the applicant for the period prior to the formation of TM T&D.

100 The applicant submits that, rather than determining a hypothetical starting amount for TM T&D and dividing it between the applicant and Toshiba, the Commission should have, first, divided between the two undertakings TM T&D's turnover in 2003, second, calculated their worldwide market shares in 2003 on the basis of their respective shares in TM T&D's turnover and, lastly, classed them in the appropriate group of starting amounts, determined in the 2007 decision in accordance with their worldwide market shares. The applicant submits that it would then have been treated in the same way as the European producers.

101 The applicant relies on three sets of arguments in support of its position.

102 First, the applicant relies on certain passages of the contested decision, from which it is apparent, in its view, that the fines should have been determined on the basis of the value of GIS sales in 2003.

103 Second, the applicant raises several arguments relating, in essence, to an alleged inconsistent between the decision to determine a starting amount for TM T&D and the fact that the fines were imposed on the applicant itself.

104 Third, the applicant criticises the Commission's finding in recital 66 of the contested decision that the method suggested by the applicant would result in the use of its 2001 virtual turnover.

105 The Commission contests the merits of the applicant's arguments.

106 The Court points out, at the outset, that the Commission has a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see judgment in *Tokai Carbon and Others* v *Commission*, cited in paragraph 66 above, EU:T:2004:118, paragraph 216 and the case-law cited).

107 The amount of the fine is set by the Commission according to the gravity of the infringement and, where appropriate, its duration. The gravity of an infringement has to be determined by reference to criteria such as the particular circumstances of the case, its context and the deterrent effect of the fines. Objective factors such as the content and duration of the anticompetitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order must be taken into account. The analysis must also take into consideration the relative importance and market share of the undertakings responsible and also any repeated infringements (judgment in *Aalborg Portland and Others* v *Commission*, cited in paragraph 38 above, EU:C:2004:6, paragraphs 89 to 91).

108 However, each time the Commission decides to impose fines pursuant to competition law, it must observe general principles of law, which include the principle of equal treatment as interpreted by the EU judicature (judgment of 27 September 2006 in *Archer Daniels Midland* v *Commission*, T-59/02, ECR, EU:T:2006:272, paragraph 315). The Court has consistently held that the principle of equal treatment requires that comparable situations must not be treated differently, and different situations

must not be treated in the same way unless such treatment is objectively justified (see judgment of 14 May 1998 in *BPB de Eendracht* v *Commission*, T-311/94, ECR, EU:T:1998:93, paragraph 309 and the case-law cited).

109 In the present case, it should be noted, at the outset, that the applicant does not dispute that, during the reference year, namely 2003, it did not itself make any GIS sales, since it transferred its operations in that sector to TM T&D in 2002.

110 That circumstance means that the applicant's fine could not be calculated in the exact same manner as that of the European addressees of the 2007 decision and that, in that respect, its situation was thus not comparable to that of the European undertakings.

111 Accordingly, the Commission was right to choose to determine a hypothetical starting amount for TM T&D and to divide it between its shareholders rather than to divide TM T&D's worldwide GIS sales between its shareholders and to determine their individual starting amounts on the basis of their respective shares in those sales.

112 As is apparent from recital 2 of the contested decision and recital 61 of the 2007 decision, TM T&D was a joint venture wholly responsible for the production and sale of GIS. Thus, TM T&D constituted a separate entity from its shareholders, albeit controlled by them jointly.

113 That circumstance also follows from point 7.2.7 of the 2007 decision, which concerns the determination of the addressees of the decision. In recitals 407 and 435 of that decision, the applicant and Toshiba were expressly held liable, as shareholders, for the 'infringement committed by TM T&D between 1 October 2002 and 11 May 2004'.

114 The arguments put forward by the applicant are not such as to call that conclusion into question.

115 By its first set of arguments, referred to in paragraph 102 above, the applicant submits that it is apparent from recitals 59 to 62 and 66 of the contested decision that the fines should have been determined on the basis of the value of its own GIS sales in 2003 and those of Toshiba in the same year, taken individually.

116 However, as has already been noted in paragraph 96 above, it follows, essentially, from recitals 59 and 60 of the contested decision that, in the applicant's case, the general rule followed in the 2007 decision and on which the Court insisted in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), namely the use of 2003 as the reference year to determine the value of sales, must be applied in accordance with detailed rules, given that, during that year, the applicant did not itself record any GIS sales, since it had transferred its operations in that sector to TM T&D.

117 That interpretation is confirmed both by recitals 62 and 66 of the contested decision and by the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), in which the Court explicitly referred to the method followed by the Commission in the contested decision as an appropriate example.

118 As regards the second set of arguments, referred to in paragraph 103 above, the applicant submits that, in so far as the purpose of assigning a starting amount to the applicant is to fine it individually, the Commission cannot rely on the fact that, in 2003, the applicant participated in the infringement through TM T&D. As regards the fine corresponding to the period prior to the creation of TM T&D, which is an individual fine imposed on the applicant, the applicable starting amount should have been calculated according to the same methodology as that used for the other participants in the infringement, that is to say on the basis of its turnover in 2003. TM T&D's starting amount is a separate figure, applicable in respect of its period of operation.

119 In that regard, it has already been noted in paragraphs 109 and 110 above that the applicant's fine could not be calculated in exactly the same way as that of the European addressees of the 2007 decision, given that it did not have an individual turnover in 2003 in relation to GIS products. The fact that the fines imposed in the contested decision were imposed only on the applicant and Toshiba, in light of the fact that TM T&D was wound up in 2005, cannot result in the Commission being required to divide up the latter's turnover artificially and to disregard the fact that it was active on the market during the reference year as a separate operator from its shareholders. Indeed, such an approach would essentially amount to departing from the Commission's intention to take the turnover generated during that year as a basis for determining the fines.

120 In the context of the third set of arguments, referred to in paragraph 104 above, the applicant disputes that the method which it suggested would result in the use of '2001 virtual turnovers'. It submits that the share of the turnover which would have been allocated to it in accordance with the method which it suggests would still represent a share of TM T&D's turnover in 2003, unrelated to its turnover in 2001.

121 Admittedly, the meaning of the fifth sentence of recital 66 of the contested decision, pursuant to which the method suggested by the applicant 'would be inappropriate in that it would involve comparing the 2001 virtual turnovers of [the applicant] and Toshiba with the 2003 turnovers of the other undertakings', is not entirely clear, given that the Commission did not, inter alia, define the notion of '2001 virtual turnover'.

122 That said, in the third and fourth sentences of recital 66 of the contested decision, the Commission explained that the method suggested by the applicant would not make it possible to properly reflect TM T&D's weight in the infringement as an undertaking which participated in that infringement in 2003. Thus, read in the context of the sentences which immediately precede it, the fifth sentence of recital 66 expresses that, in the Commission's view, the method suggested by the applicant would result in artificially dividing up TM T&D's turnover, notwithstanding the fact that it was a distinct entity from its shareholders, in order to determine the virtual turnover of its shareholders. As can be seen from paragraphs 111 to 113 and 119 above, that finding on the part of the Commission is founded.

123 In the light of all of the foregoing, the eighth plea in law must be rejected.

The sixth plea, alleging infringement of the principle of equal treatment and of the principle of proportionality in determining the proportions of TM T&D's starting amount to be split between the applicant and Toshiba

124 By its sixth plea, the applicant submits that, when calculating the fine, the Commission incorrectly split TM T&D's starting amount between the applicant and Toshiba in recital 62 of the contested decision. The method chosen by the Commission, which divided TM T&D's starting amount on the basis of the proportion of sales of GIS products made by the applicant and Toshiba in the year preceding the creation of TM T&D, namely 2001, resulted in the inflation of the share of TM T&D's starting amount attributable to the applicant.

125 The applicant submits that its choice to operate its GIS products business through TM T&D cannot be relevant to the calculation of the fine. In so far as TM T&D was a joint venture whose rights, obligations, decision-making powers and profits were divided equally between the two shareholders, the applicant considers that the Commission should have assigned to the applicant 50% of TM T&D's starting amount.

126 The applicant adds that the objective invoked by the Commission to justify the division of TM T&D's starting amount was not followed for the European producers. Their starting amounts were simply determined on the basis of their turnover in the last full year of infringement, that is to say 2003, and the Commission did not determine whether those turnovers were representative. In particular, the Commission set the starting amount for Schneider at 40% of VA Tech's starting amount, since that rate corresponded to the size of its shareholding in VAS, without establishing the precise proportion of Schneider's sales compared to those of VA Tech at the time of the formation of VAS.

127 Accordingly, the applicant considers that it was unjustifiably treated unequally by the Commission.

128 Finally, the applicant submits that the Commission should have divided TM T&D's starting amount between its shareholders on the basis of their shareholdings in that undertaking, so as to avoid using 2001 in the comparison of the respective positions of the various producers in 2003, as suggested in the Commission's argument set out in recital 66 of the contested decision.

129 The Commission contests the merits of the applicant's arguments. First, it states that the relevance of the objective pursued by it when dividing TM T&D's starting amount was acknowledged by the Court in the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345). Second, Schneider's situation was different from that of the applicant in several respects.

130 The Court recalls, at the outset, that the Commission decided, in recitals 62 and 67 of the contested decision, to split TM T&D's hypothetical starting amount between the applicant and Toshiba in accordance with the proportion of GIS sales made by each of them in 2001 so as to reflect the unequal capacity of the applicant and Toshiba to contribute to the infringement during the period prior to the creation of TM T&D. In so far as the applicant's market share in relation to GIS products was significantly larger than that of Toshiba, in recital 63 of the contested decision roughly two thirds of TM T&D's starting amount was attributed to the applicant, whereas only a third of that amount was attributed to Toshiba.

131 First, it is not disputed, in that regard, that the applicant and Toshiba each held 50% of the capital of TM T&D. However, that fact does not alter the fact that the GIS activities transferred by those undertakings to TM T&D once it had been created and the market shares corresponding to those activities were unequal as a result of the respective competitive positions of the applicant and Toshiba on the market for GIS products at the relevant time.

132 Accordingly, the applicant wrongly invokes the size of its shareholding and that of Toshiba in the capital of TM T&D — which could have been motivated or influenced by circumstances unrelated to the market for GIS products — in objecting to the taking into account of the actual situation on the market, as attested by the turnover figures for 2001, namely the last full year prior to the creation of TM T&D.

133 Second, as regards the complaint alleging an infringement of the principle of equal treatment, the Court points out that it is clear from the case-law cited in paragraph 108 above that, each time the Commission decides to impose fines pursuant to competition law, that principle requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.

134 In the present case, it is not disputed that the applicant's fine was calculated in accordance with rules which differed from those applied when calculating the fines of the European producers. That said, the applicant was in a different situation both in relation to those producers in general and in relation to Schneider in particular.

135 First, during the reference year, the activities in the GIS sector formerly carried out by the applicant and Toshiba were carried out by their joint venture, TM T&D. That circumstance distinguishes the applicant's case from that of the European undertakings, with the exception of Schneider and VA Tech, which regrouped their activities in the GIS sector within VAS.

136 Second, the applicant wrongly claims that the Commission did not intend to reflect the relative competitive positions of the two shareholders of VAS, namely Schneider and VA Tech, when determining their fines. As has been noted in paragraph 275 of the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), the Commission pursued the same objective in recital 489 of the 2007 decision, in which it referred explicitly to the 'contribution of Schneider to the joint venture expressed in sales' at the time of the creation of VAS. The Commission considered, nonetheless, that that contribution was adequately reflected in the size of Schneider's shareholding in VAS's capital.

137 In the present case, the Commission had explicit and clear information at its disposal, namely the applicant's and Toshiba's turnover in 2001, which suggest that their respective shareholdings in the capital of TM T&D were not representative of their individual positions on the market during the largest part of the period of infringement. In that regard, the applicant does not even claim that such information exists in relation to Schneider's position within VAS.

138 Accordingly, the Commission's decision to reject the applicant's and Toshiba's shareholdings in TM T&D's capital as a criterion for the division of the latter's starting amount, in favour of the sales of GIS products in 2001 of the applicant and of Toshiba, does not constitute an infringement of the principle of equal treatment.

139 In so far as the applicant further submits, in that context, that the Commission did not justify the unequal treatment to which it was made subject, it is appropriate to refer to paragraphs 80 to 82 above.

140 Third, as regards the applicant's argument set out in paragraph 128 above, it is true that using the applicant's and Toshiba's sales of GIS products in 2001 as a criterion for division results in the introduction into the calculation of data relating to a year other than the reference year, namely 2003.

141 However, first of all, it is not disputed that the fundamental data supporting the method of calculation followed by the Commission is TM T&D's turnover for the reference year, which means that that method enables an objective comparison to be made with the other undertakings which participated in the cartel. That circumstance is, moreover, referred to explicitly in recital 66 of the contested decision.

142 Next, as is apparent from paragraphs 131 and 132 above, the taking into consideration of the applicant's and Toshiba's sales of GIS products in 2001 makes it possible to reflect their actual positions on the market for GIS products for most of the period of infringement, positions which were not faithfully reflected by their respective shareholdings in the capital of TM T&D.

143 Finally, the taking into account of the applicant's and Toshiba's sales of GIS products in 2001 as a criterion for dividing TM T&D's starting amount was explicitly upheld, in paragraph 276 of the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), as a method to reconcile the principle of equal treatment — which requires that the same reference year be used for all of the participants in the infringement — with the Commission's wish to reflect the unequal competitive positions of the applicant and Toshiba at the time at which TM T&D was created.

144 Having regard to the foregoing, the sixth plea in law must be rejected.

The third plea, alleging infringement of the principle of proportionality in so far as the Commission calculated the applicant's fine in the same way as it calculated the fines of the European producers

145 By its third plea, the applicant submits that the Commission infringed the principle of proportionality since it calculated its fine in the same way as the European producers' fines. The applicant submits that it participated in the GQ Agreement, denies having participated in the common understanding and did not participate in the EQ Agreement, the existence of which it was unaware. Accordingly, even if the applicant is held to be liable with regard to the common understanding, the Commission's approach of penalising the applicant in the same way as the European producers, when the latter participated not only in the common understanding and the GQ Agreement, but also in the EQ Agreement, is contrary to the principles of equity and proportionality. As is clear from the case-law, participation in two very serious infringements must be penalised more severely than participation in a single serious infringement.

146 The applicant adds that the Commission accepted, in its response to the applicant's appeal against the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345), that ABB had increased the gravity of the infringement by admitting that that infringement involved not only European but also Japanese producers.

147 Similarly, the infringements in which the applicant participated are, in its view, of a different level of gravity. While the EQ Agreement had the effect of restricting competition between genuine competitors on the European market, and therefore had substantial repercussions on the European market, the GQ Agreement and the alleged common understanding, if proved, would, at most, have been able to restrict potential competitors. However, in reality, the GQ Agreement and the alleged common understanding produced no effect within the EEA, since the Japanese producers, and in particular the applicant, were not credible competitors in that territory, because of the existence of objective economic and technical barriers.

148 The Commission contests the merits of the applicant's arguments. It argues, in particular, that the infringement found in the 2007 decision was a single and continuous infringement and that the participation in that infringement of the Japanese undertakings, including the applicant, was not less serious than that of the European undertakings.

149 The Court points out, at the outset, that the applicant's finding, pursuant to which it disputes its participation in the common understanding, goes beyond the subject matter of the present case. The applicant's participation in the common understanding was found in the 2007 decision, which became final in that respect following the delivery of the judgment in *Siemens and Others* v *Commission*, cited in paragraph 25 above (EU:C:2013:866). By contrast, the contested decision does not concern the finding that the applicant participated in the infringement, but only the fine to be imposed on it as a result.

150 As regards the other complaints, according to the case-law, where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined (see judgment of 8 July 1999 in *Commission* v *Anic Partecipazioni*, C-49/92 P, ECR, EU:C:1999:356, paragraph 150 and the case-law cited). Thus, the fact that an undertaking has not taken part in all aspects of an anticompetitive scheme or that it played a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and when the fine is determined (judgment in *Commission* v *Anic Partecipazioni*, EU:C:1999:356, paragraph 90).

151 In the present case, first, it has already been noted in paragraphs 2 to 4 above that, in the 2007 decision, the Commission found there to have been a single and continuous infringement comprising the common understanding, the GQ Agreement and the EQ Agreement. Thus, the applicant wrongly claims that the European undertakings participated in two infringements, whereas the applicant itself participated in only one infringement.

152 Second, contrary to what the applicant claims, its contribution to the infringement was not less as a result of the fact that it did not participate in the allocation of GIS projects in the EEA, which was governed by the EQ Agreement.

153 Admittedly, it is true that the participation of the Japanese producers in the agreements and concerted practices found in the 2007 decision and concerning the EEA was not the same as that of the European producers. The Japanese undertakings, including the applicant, committed themselves, under the common understanding, not to enter the EEA market and their participation thus consisted of a failure to act. The European undertakings, for their part, distributed the various GIS projects on that same market through active collusion (see, to that effect, judgment of 12 July 2011 in *Toshiba* v *Commission*, T-113/07, ECR, EU:T:2011:343, paragraph 260).

154 However, the failure to act on the part of the Japanese undertakings, including the applicant, was a prerequisite for ensuring that the allocation of GIS projects in the EEA could be carried out among the European producers in accordance with the rules agreed to that effect (judgment in *Toshiba* v *Commission*, cited in paragraph 153 above, EU:T:2011:343, paragraph 261). Thus, by honouring their commitments under the common understanding, the Japanese undertakings made a necessary contribution to the functioning of the infringement as a whole.

155 Moreover, in paragraphs 220 and 226 of the judgment in *Toshiba* v *Commission*, cited in paragraph 153 above (EU:T:2011:343), the Court found that the participation of the Japanese undertakings in the common understanding, which included the notification and project loading mechanisms, indicated that they were aware of the fact that the GIS projects in the EEA were reserved for the European producers and that they could reasonably have envisaged that their allocation was the result of collusive activity. Thus, irrespective of the question whether the Japanese producers were aware of the EQ Agreement as such, they were aware of the unlawful conduct which governed it.

156 Consequently, it must be concluded that the applicant's contribution to the infringement is comparable to that of the European undertakings.

157 Third, the applicant's argument relating to the fact that ABB increased the gravity of the infringement by admitting that that infringement involved not only European but also Japanese producers cannot be upheld. It is indeed true that the more participants involved in an infringement the more serious that infringement is. However, that circumstance cannot enable valid conclusions to be drawn regarding the relative contribution of the participation of various groups of those same participants in the infringement in question.

158 Fourth, in so far as concerns the comparison of the gravity of the various types of anticompetitive conduct at issue, the applicant seeks artificially to dissociate the various components of the single infringement found in the 2007 decision.

159 Moreover, the applicant's argument is based on the factual premiss that it was not a credible competitor in the EEA. However, as is clear from paragraphs 161 to 182 below, that premiss has not been established by the applicant to the requisite legal standard, with the result that it cannot be taken into consideration in the context of the present plea.

160 Having regard to the foregoing, the third plea in law must be rejected.

The fourth plea, alleging that the Commission erred in failing to take into account technical and economic evidence when assessing the impact of the applicant's conduct and in calculating its fine

161 By its fourth plea, the applicant submits that the Commission erred in failing to take into account technical and economic evidence when assessing the impact of the applicant's conduct and in calculating its fine. It states that, after receiving the 2006 statement of objections, the applicant commissioned independent experts to prepare a technical report and an economic report, which establish, beyond any reasonable doubt, that a non-European supplier would have had no chance, except for limited and opportunistic sales, of penetrating the European GIS products market between 1988 and 2004, because of economic and technical barriers ('the external reports').

162 However, the Commission did not take the external reports into consideration when assessing the effects of the alleged infringements on the European market, without providing any specific arguments to rebut them. It merely described them as broad studies drafted in generic terms, despite the fact that they provided a credible explanation as to the lack of sales by the applicant in Europe, which is also relevant as regards the liability of an undertaking under Article 101 TFEU.

163 Thus, in the applicant's view, the Commission erred in assuming that the applicant could have sold GIS products in Europe, despite the unequivocal conclusions of the external reports according to which it could not sell those GIS products directly to European clients for most of the period of the infringement. As a result, the Commission infringed the requirement to examine the economic effect of any anticompetitive behaviour when setting a fine, thereby imposing a disproportionate fine on the applicant.

164 The Commission contests the substance of the applicant's arguments and, in particular, the relevance and probative value of the external reports.

165 It is clear from point 1A of the Guidelines on the method of setting fines that, when setting fines, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers.

166 The applicant's argument amounts, in principle, to claiming that its participation in the infringement was not such as to cause harm to competition in the EEA, contrary to what was found by the Commission in recitals 314 to 318 of the 2007 decision, recitals which may be taken into consideration in the present case, in so far as they are not affected by the judgment in *Mitsubishi Electric* v *Commission*, cited in paragraph 8 above (EU:T:2011:345).

167 First, as the Commission found in recital 317 of the 2007 decision, the existence of the common understanding and, in particular, the notification and project loading mechanism means that the Japanese producers were viewed as credible, potential competitors by the European producers, notwithstanding certain objective barriers to entry, the existence of which is, moreover, not contested by the Commission. If that had not been the case, the common understanding would not have been concluded and respected by the European producers, for whom that would mean a loss of a share of the GIS projects outside of the EEA. In so far as the European producers were particularly well placed to assess the situation in the EEA, as a result of their privileged position in Europe, their acceptance of the common understanding constitutes an argument which seriously calls into question the plausibility of the position defended by the applicant (see, by analogy, judgment of 12 July 2011 in *Hitachi and Others* v *Commission*, T-112/07, ECR, EU:T:2011:342, paragraph 319).

168 Second, it should be pointed out that the external reports submitted by the applicant were drawn up for the specific needs of its defence in the procedure which led to the adoption of the 2007 decision. As the Commission submits, in recital 318 of the 2007 decision, those reports were drafted in general terms and do not show that the feasibility or commercial opportunity in penetrating the EEA market was discussed by the applicant.

169 Moreover, in so far as concerns the economic report, the Court observes that some of the arguments raised are based on the differences which exist between national markets in Europe or on the preference for the supplier of the equipment already installed. At least in so far as concerns the countries other than the home countries, differences between the national markets would also have affected the European producers, which means that, a priori, the Japanese producers were not disadvantaged in that regard. Similarly, a pre-existing satisfactory relationship with a supplier tends to disadvantage all other suppliers, irrespective of whether they are European or Japanese (see, by analogy, judgment in *Hitachi and Others* v *Commission*, cited in paragraph 167 above, EU:T:2011:342, paragraph 323).

170 Furthermore, some of the arguments set out in the economic report are unconvincing.

171 Thus, in so far as concerns the institutional barriers, referred to in point 3 of that rapport, the authors themselves admit that they have been of less importance since 1996.

172 As regards the analysis of the relative manufacturing costs, set out in point 4.1 of the economic report, the authors rely, in so far as concerns labour costs, on an 'average difference' for the period 1980 to 2003. That excessively general approach includes in the calculation figures for years which are not relevant and, more importantly, obscures the fact that the difference was considerably less significant during certain periods, in particular between 1996 and 2003, as can be seen from Figure 4 on page 15 of the economic report. Similarly, as regards the cost of steel, the figures set out in Table 4 on page 16 of the economic report, pursuant to which the price in Japan was 3% lower between 1997 and 2004, contradicts the finding of the authors, set out on that same page, that 'Japan does not have a cost advantage or disadvantage in regards of steel'. Consequently, the difference in relative manufacturing costs of 22%, as stated in Table 5 of the economic report, is not reliable, in particular as regards the second half of the period of infringement.

173 In so far as concerns the technical report, the author of that report worked with the applicant on two projects in the past, which, to some degree, calls his independence into question. Similarly, the expert at issue appears to have detailed, direct knowledge only in relation to the UK market and his conclusions concerning the other countries of the EEA are based on information provided by other persons active in the sector, as is apparent from points 1, 20, 22 and 31 of the technical report. Moreover, some of those conclusions, set out in points 4, 5, 31 and 32 of the technical report, do not concern the technical field or are formulated rather vaguely or particularly cautiously.

174 Nonetheless, the technical report brings to light two difficulties of a technical nature which, a priori, are relevant: (i) the partial incompatibility of the applicant's GIS range with the voltage range sought by customers in Europe, referred to in points 29 and 30 of the technical report, and (ii) the need to carry out additional tests at an independent laboratory which is generally recognised by the European customers, referred to in point 28 of the technical report. However, the author of the technical report himself admits, in point 30 of that report, that the applicant could have produced products for the European market. His only criticism in that respect concerns the cost of such an operation, which is, however, a consideration which goes beyond the context of the technical report and, thus, the area of expertise of its author.

175 Moreover, in the judgment in *Hitachi and Others* v *Commission*, cited in paragraph 167 above (EU:T:2011:342), the Court has already held, in that respect, that a Japanese producer wishing to enter the EEA market was required to adapt the product concerned to the norms in place, resulting from the standards defined by the International Electrotechnical Commission, to carry out a certain number of conformity tests and to obtain the corresponding certificates. However, the applicant does not dispute that the Japanese producers were in a position to fulfil those formalities in the past when they made sporadic sales of GIS products in the EEA, and a larger number of sales in other territories in which

the standards defined by the International Electrotechnical Commission were also applicable (see, by analogy, judgment in *Hitachi and Others* v *Commission*, cited in paragraph 167 above, EU:T:2011:342, paragraph 321).

176 The technical report also refers to the additional technical requirements and usages which apply in certain countries in western Europe. At least in so far as concerns the countries other than the home countries, such requirements apply to all potential suppliers, whether European or Japanese (see, by analogy, judgment in *Hitachi and Others* v *Commission*, cited in paragraph 167 above, EU:T:2011:342, paragraph 322).

177 The same goes in relation to the alleged preference for national producers, referred to in points 26 and 29 of the technical report, since it is apparent from the contested decision that the EEA countries other than the home countries were precisely those in which there were no credible national suppliers. Such reasoning is applicable, *a fortiori*, to the alleged preference for the supplier of the equipment already installed, referred to in points 26, 28 and 31 of the technical report, for the reasons set out in paragraph 169 above.

178 Furthermore, it is clear from the technical report that, for the most part, the barriers to entry described therein have progressively diminished since the second half of the 1990s.

179 To conclude the examination of the two reports, the Court points out that their probative value is also called into question by the actual situation on the market. As has been noted in paragraph 175 above and as is apparent from recital 316 of the 2007 decision, the Japanese producers, including the applicant, were in a position, during the period of infringement, to make sporadic sales of GIS products in the EEA, as well as more frequent sales in the rest of Europe and the Mediterranean region. Consequently, they were in a position, during the relevant period, to overcome similar barriers to those invoked by the applicant in the present case.

180 Third, it should be noted that the prolonged existence of the common understanding and, consequently, the absence of the Japanese producers on the EEA market was likely to reinforce artificially some of the barriers to entry referred to by the applicant, in particular those related to the acceptance by European customers of Japanese suppliers. The applicant cannot be permitted to rely on the consequences of the functioning of the infringement in which it participated to seek a reduction of the fine imposed on it for that very infringement (see, by analogy, judgment in *Hitachi and Others* v *Commission*, cited in paragraph 167 above, EU:T:2011:342, paragraph 327).

181 In the light of all of the foregoing, it must be concluded that the applicant has not substantiated to the requisite legal standard its claim that its participation in the infringement was not capable of harming competition in the EEA. Accordingly, the Commission cannot be criticised for not having taken that claim into account when calculating the applicant's fine.

182 Consequently, the fourth plea in law must be rejected.

The second plea, alleging an infringement of the obligation to state reasons, of the principle of equal treatment and of the principle of proportionality as regards the calculation of the deterrence multiplier

183 The applicant submits that the Commission infringed the obligation to state reasons, the principle of equal treatment and the principle of proportionality in calculating the deterrence multiplier applied to it.

184 It points out, in that regard, that the thresholds used to divide the cartel participants into groups in order to set the deterrence multipliers must be determined in a coherent and objective manner. It considers that it should have been placed not alone in the third group with a deterrence multiplier of 1.5, but in the same group as ABB, with a multiplier of 1.25.

185 First, the difference between the applicant's turnover and that of ABB is comparable to the difference between the turnovers of Siemens and Hitachi, which are both in the first group with a deterrence multiplier of 2.5.

186 Second, the differences between turnovers of the undertakings belonging to the first and second groups and between those belonging to the second and third groups are considerably greater than the difference between the turnovers of the applicant and ABB.

187 It submits that the Commission has not provided any objective justification for its approach, thus infringing the principles of equal treatment and proportionality. Consequently, a deterrence multiplier of 1.25 should be applied by the Court to the applicant, as in the judgment in *Tokai Carbon and Others* v *Commission*, cited in paragraph 66 above (EU:T:2004:118).

188 The Commission contests the merits of the applicant's arguments.

189 In that regard, it follows from paragraph 320 of the judgment in *Siemens* v *Commission*, cited in paragraph 70 above (EU:T:2011:68), that the deterrence multipliers calculated in the 2007 decision, to which recitals 70 and 71 of the contested decision refer, are proportionate to the turnovers of all of the undertakings concerned, except for Siemens in respect of which the relationship is digressive in so far as the multiplier applied to it was the same as that applied to Hitachi, even though its worldwide turnover in 2005 was more than EUR 6 billion higher than that of Hitachi.

190 It is further apparent from paragraph 320 of the judgment in *Siemens* v *Commission*, cited in paragraph 70 above (EU:T:2011:68), that such a proportionate relationship suffices for the requirements laid down in paragraph 338 of the judgment of 5 April 2006 in *Degussa* v *Commission* (T-279/02, ECR, EU:T:2006:103), in which it is stated that the classification of undertakings by category, for the purposes of determining the deterrence multiplier in accordance with the principle of equal treatment, must be objectively justified.

191 Similarly, in paragraph 322 of the judgment in *Siemens* v *Commission*, cited in paragraph 70 above (EU:T:2011:68), the Court dismissed as ineffective the judgment in *Tokai Carbon and Others* v *Commission*, cited in paragraph 66 above (EU:T:2004:118), on which the applicant relied in that case, since that judgment was delivered in different factual circumstances.

192 Accordingly, it must be concluded that the applicant's deterrence multiplier was determined in accordance with an objectively justified method, in particular in relation to the Commission's decision to place the applicant in a different group, rather than to place it in the same group as ABB.

193 Accordingly, the complaint alleging an infringement of the principle of equal treatment and of the principle of proportionality must be rejected.

194 In so far as the applicant was not the victim of unequal treatment, the Commission was not required to provide any specific justification regarding the determination of its deterrence multiplier.

195 Moreover, as has been stated in paragraph 70 above, it follows from paragraphs 310 to 317 of the judgment in *Siemens* v *Commission*, cited in paragraph 70 above (EU:T:2011:68), that, in recital 491 of the 2007 decision, the Commission set out, to the requisite legal standard, the elements of law taken into account for increasing the starting amounts of the fines to ensure their deterrent effect. Since that finding is transposable to the deterrence multiplier imposed on the applicant in the contested

decision, it must be concluded that the applicant was in a position to know the justification for that increase to the starting amount of its fine and to exercise its rights, and placing the Court in a position to carry out its review.

196 Consequently, and in any event, the complaint alleging an infringement of the obligation to state reasons must be rejected, as must the second plea in its entirety.

197 Since all of the pleas raised in support of the main application have been rejected, the main application must be dismissed in its entirety.

The application, in the alternative, for the reduction of the fine

198 By its application in the alternative, the applicant requests the Court to amend Article 1 of the contested decision, with a view to annulling or, failing that, reducing the fine which was imposed on it.

199 The Court points out that the application in the alternative is not supported by any additional pleas or arguments to those raised in the context of the main application. Therefore, in the light of the foregoing considerations and in the absence of other factors in the case capable of leading to the annulment or, failing that, a reduction of the fine imposed on the applicant, there is no cause for the Court, in the exercise of its unlimited jurisdiction, to uphold the application made in the alternative.

200 Consequently, the action must be dismissed in its entirety.

Costs

201 Under Article 134(1) of the Rules of Procedure of the General Court, 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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. Dismisses the action;

2. Orders Mitsubishi Electric Corp. to pay the costs.

Kanninen Pelikánová Buttigieg

Delivered in open court in Luxembourg on 19 January 2016.

[Signatures]

Table of contents