Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

29 June 2012*

(Competition — Agreements, decisions and concerted practices — German and French markets for natural gas — Decision finding an infringement of Article 81 EC — Market sharing — Duration of the infringement — Fines)

In Case T-360/09,

E.ON Ruhrgas AG, established in Essen (Germany),

E.ON AG, established in Düsseldorf (Germany),

represented by G. Wiedemann and T. Klose, lawyers,

applicants,

v

European Commission, represented by V. Di Bucci, A. Bouquet and R. Sauer, acting as Agents, assisted by M. Buntscheck, lawyer,

defendant,

APPLICATION for annulment of Commission Decision C(2009) 5355 final of 8 July 2009 relating to a proceeding under Article 81 [EC] (Case COMP/39.401 — E.ON/GDF), and, in the alternative, for a reduction in the amount of the fine imposed on the applicants,

THE GENERAL COURT (Fifth Chamber),

composed of S. Papasavvas (Rapporteur), President, V. Vadapalas and K. O'Higgins, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 23 September 2011,

gives the following

* Language of the case: German.

Judgment

Legal context

1. European Union law

1 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1) ('the first gas directive') established common rules for the transmission, distribution, supply and storage of natural gas. It laid down the rules relating to the organisation and functioning of the natural gas sector, including liquefied natural gas (LNG), access to the market, the operation of systems, and the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas.

2 The first gas directive required Member States to gradually open the market for the supply of natural gas to large consumers to competition and to give third parties access to the existing transmission system.

3 Under Article 29(1) and Article 30 of the first gas directive, Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the directive no later than 10 August 2000.

4 The first gas directive was repealed and replaced, as of 1 July 2004, by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30 (OJ 2003 L 176, p. 57).

2. National laws

German law

5 The Energiewirtschaftsgesetz (Law on the energy industry) ('the 1935 EnWG') of 13 December 1935 (RGBl. I p. 1451) provided for a State system for the authorisation and monitoring of the activities of German gas companies.

6 Under Paragraph 103 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition) ('the GWB') of 27 July 1957 (BGBl. I p. 1081), certain agreements between energy distribution companies as well as between those companies and local authorities were exempt from the prohibition of concluding agreements which restrict competition. That exemption covered, in particular, agreements known as demarcation agreements, by which undertakings agreed not to supply electricity or gas in each other's territories, and agreements known as exclusive concession agreements, by which a local authority granted an exclusive concession to a company, allowing it to use public terrain to construct and operate electricity and gas distribution networks. In order to be valid those agreements had to be notified to the competent competition authority, which had the power to prohibit them if it took the view that they constituted a misuse of the legal exemption.

7 The Gesetz zur Neuregelung des Energiewirtschaftsrechts (Law on the reform of energy industry law) of 24 April 1998 (BGBl. 1998 I, p. 730) abolished, with immediate effect, the exemption applicable to demarcation and exclusive concession agreements laid down in Paragraph 103 of the GWB. That law also replaced the 1935 EnWG by the Gesetz über die Elektrizitäts — und Gasversorgung — Energiewirtschaftsgesetz (Law on electricity and gas supply — Law on the energy industry) ('the 1998 EnWG').

8 The Erstes Gesetz zur Änderung des Gesetzes zur Neuregelung des Energiewirtschaftsrechts (First Law amending the Law on the reform of energy industry law) of 20 May 2003 (BGBl. 2003 I, p. 685) amended the 1998 EnWG for the purpose of implementing the first gas directive.

French law

9 Article 1 of Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas (JORF of 9 April 1946, p. 2651) ('the 1946 Law') provided, before its repeal by Regulation 2011-504 of 9 May 2011 codifying the legislative part of the Energy Code (JORF of 10 May 2011, p. 7954):

'As from the enactment of this Law,

…

(2) the production, transport, distribution, import and export of combustible gas,

shall be nationalised.

…'

10 Before amendment by Law 2004-803 of 9 August 2004 on the public electricity and gas service and on electricity and gas undertakings (JORF of 11 August 2004, p. 14256), the first paragraph of Article 3 of the 1946 Law stated:

'The management of the nationalised gas undertakings shall be entrusted to a public undertaking of an industrial and commercial nature called Gaz de France (GDF), Service National'.

11 Until the entry into force of Law 2003-8 of 3 January 2003 on the gas and electricity markets and on the public energy service (JORF of 4 January 2003, p. 265) ('the 2003 Law'), the 1946 Law conferred a monopoly on imports and exports of gas on Gaz de France.

12 The 2003 Law, which sought to transpose the first gas directive, opened the French gas market to competition. Inter alia, that law gave eligible customers access to natural gas networks and to the supply of natural gas and abolished the monopoly on imports and exports of gas.

13 Gaz de France was turned into a public limited company by Law 2004-803.

Background to the dispute

1. The undertakings in question

14 The first applicant, E.ON Ruhrgas AG, which derives from the merger between E.ON AG and Ruhrgas AG and has been wholly owned by the second applicant, E.ON, since 31 January 2003, is the largest natural gas supplier in Germany and one of the main players on the European market. By a decision of 18 September 2002 authorising that merger, the German authorities required E.ON Ruhrgas to implement a gas release programme ('the GRP') relating to a total quantity of 200 TWh.

15 E.ON is a German undertaking which produces, transports, distributes and supplies energy, mainly natural gas and electricity.

16 GDF Suez SA derives from the merger between Gaz de France ('GDF') and Suez on 22 July 2008. It is a French undertaking which is present across the entire energy chain, in electricity and in natural gas, upstream to downstream. It is the incumbent operator and the leading natural gas supplier in France. It is also one of the leading natural gas suppliers in Europe.

2. The MEGAL agreement

17 By an agreement of 18 July 1975 ('the MEGAL agreement'), GDF and Ruhrgas decided to construct and operate the gas pipeline MEGAL together. The MEGAL gas pipeline, which has been fully operational since 1 January 1980, is one of the main gas pipelines for importing gas into Germany and France. It crosses Southern Germany and links, across a distance of 461 km, the German-Czech border to the Franco-German border between Waidhaus (Germany) and Medelsheim (Germany).

18 The inlet and outlet points for the gas bought by GDF and Ruhrgas were defined in Appendix 2 to the MEGAL agreement. A certain number of outlet points from the gas pipeline MEGAL were established in respect of Ruhrgas and additional outlet points could be added if required. As regards GDF, it was stated that the outlet point from the gas pipeline for all the quantities of gas to be transported for that company was to be a point on the border between Germany and France near Habkirchen (Germany), unless the parties to the MEGAL agreement agreed otherwise.

19 Under the MEGAL agreement, GDF and Ruhrgas set up the joint undertaking MEGAL GmbH Mittel-Europäische Gasleitungsgesellschaft, now MEGAL Mittel-Europäische Gasleitungsgesellschaft mbH & Co. KG ('MEGAL'), which was to be responsible for the construction and operation of the MEGAL gas pipeline and the transport of gas by that pipeline. The ownership of that gas pipeline was also conferred on MEGAL.

20 Pursuant to the MEGAL agreement, GDF and Ruhrgas also set up the joint undertaking MEGAL Finance Co. Ltd ('MEGAL Finco'), which was responsible for securing and managing the capital necessary for the construction of the MEGAL gas pipeline.

21 On 18 July 1975, Ruhrgas and GDF also signed 13 letters ('the side letters'), which served to explain certain technical, financial and operational aspects of the management of the MEGAL gas pipeline. Those letters include the letter known as 'Direktion I' and the letter known as 'Direktion G'.

22 The Direktion G letter reads as follows:

'…

The Carrying Capacities Contracted or to be Contracted by [GDF] for the transportation of gas shall concern gas which has been or will be purchased by [GDF] and will be delivered to [MEGAL] and/or [MEGAL Finco] for transit for [GDF] to and destined for consumption in France.

The Carrying Capacities Contracted or to be Contracted by Ruhrgas for the transportation of gas shall concern the transportation for any other transit purposes and the transportation of gas through the Pipeline and taken from the Pipeline in the Federal Republic of Germany destined for consumption in the Federal Republic of Germany, or purchased by Ruhrgas and destined for transit through the Federal Republic of Germany.

…'

23 The Direktion I letter provides:

'…

[GDF] undertakes not to deliver or supply directly and indirectly any Gas in connection with the [MEGAL] Agreement to any customer in the Federal Republic of Germany.

…'

24 On 22 June 1976, Ruhrgas and GDF notified the Bundeskartellamt (German Federal Cartel Office) of the setting-up of MEGAL and MEGAL Finco.

25 By an agreement of 13 August 2004 ('the 2004 agreement'), GDF and E.ON Ruhrgas confirmed that they had long regarded the Direktion G and Direktion I letters as 'null and void' and that agreement deleted those letters with retroactive effect.

26 On 5 September 2005, GDF and E.ON Ruhrgas signed a consortium agreement ('the 2005 agreement'), which entered into force on 13 October 2005, by which they reformulated their contractual relationship regarding MEGAL. The consortium agreement provided that each of the partners in MEGAL had 'Beneficial Use Agreements' in relation to its share of the capacity in the MEGAL gas pipeline. That agreement was supplemented by an interim agreement of 9 September 2005.

27 On 23 March 2006, GDF and E.ON concluded an agreement annulling all the other agreements relating to MEGAL concluded between them prior to the 2005 agreement.

3. Administrative procedure

28 On 5 May 2006, the Commission adopted decisions ordering GDF and E.ON, as well as all their subsidiaries, to submit to an inspection under Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81[EC] and 82 [EC] (OJ 2003 L 1, p. 1). The inspections took place on 16 and 17 May 2006.

29 Pursuant to Article 18 of Regulation No 1/2003, the Commission sent a number of requests for information to GDF, E.ON and E.ON Ruhrgas (collectively, 'the undertakings in question').

30 On 18 July 2007, the Commission initiated proceedings within the meaning of Article 11(6) of Regulation No 1/2003.

31 On 9 June 2008 the Commission sent a statement of objections to the undertakings in question. In response, those undertakings submitted written observations and were heard at a hearing which was held on 14 October 2008.

32 On 27 March 2009, the Commission informed the undertakings in question of additional facts which had been taken into account since the statement of objections and requested them to respond in writing. The Commission also allowed them access to the non-confidential versions of their respective responses to the statement of objections and to the documents gathered since its adoption. The undertakings in question sent their observations on 4 May 2009 (as regards GDF) and 6 May 2009 (as regards the applicants).

The contested decision

33 On 8 July 2009, the Commission adopted Decision C(2009) 5355 final relating to a proceeding under Article 81 [EC] (Case COMP/39.401 — E.ON/GDF) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 16 October 2009 (OJ 2009 C 248, p. 5).

34 In the contested decision, the Commission stated that the conduct concerned was the agreement and/or concerted practice, within the meaning of Article 81 EC, between the undertakings in question, not to penetrate — or to penetrate only in a limited manner — each other's home market and thus to protect their home markets by not selling on the other's home market the gas transported by the MEGAL gas pipeline.

35 The Commission found inter alia that the MEGAL agreement, Appendix 2 to that agreement and the Direktion G and Direktion I letters constituted agreements within the meaning of Article 81(1) EC, since the undertakings in question had expressed their common intention to behave on the market in a particular manner. According to the Commission, those agreements limited the commercial conduct of those undertakings by restricting their use of the gas transported by the MEGAL gas pipeline.

36 The Commission also observed that the undertakings in question had met on numerous occasions to discuss their reciprocal strategies for the sale in Germany and France of gas transported by the MEGAL gas pipeline and to find out about their respective strategies. According to the Commission, those contacts and the exchange of sensitive commercial information were intended to influence the commercial conduct of those undertakings, to implement the Direktion G and Direktion I letters and to adapt their content to the new market conditions following the liberalisation of the European gas markets ('the liberalisation'), without however removing the restrictions which those letters contained.

37 Consequently, the Commission found that the conduct of the undertakings in question, which consisted of an initial market-sharing agreement and of concerted practices in the form of periodic meetings designed to reach agreement and to implement that initial agreement for a period of more than 25 years, constituted a single and continuous infringement and a 'restriction of competition by object'.

38 As regards the beginning of the infringement, the Commission found that, in Germany, it began on the date on which the MEGAL gas pipeline became operational, namely 1 January 1980. It found that, in France, the infringement began on the date on which the first gas directive should have been transposed, namely 10 August 2000. As a result of the legal monopoly, deriving from the 1946 law, which existed on the importation and supply of gas, the Commission found that the conduct at issue could not have restricted competition before the liberalisation of the gas market. In that regard, although the first gas directive was transposed in France in 2003, the Commission stated that competition could have been restricted as from 10 August 2000, inasmuch as, as of that date, GDF's competitors could have supplied eligible customers in France.

39 As regards the end of the infringement, the Commission stated that, although the undertakings in question had officially annulled the Direktion G and Direktion I letters on 13 August 2004, they ceased to apply the restrictions preventing GDF from using the outlet points of the MEGAL gas pipeline in Germany, with the exception of the volumes purchased under the GRP, only at the end of September 2005. Furthermore, the Commission took the view that the fact that, as of 2004, GDF had purchased from E.ON Ruhrgas volumes of gas from the MEGAL gas pipeline for delivery in Germany did not mark the end of the infringement, given that, until October 2005, the sales of gas from the MEGAL gas pipeline made in Germany by GDF corresponded to the volumes purchased by that undertaking under the GRP.

40 In those circumstances, the Commission found that the infringement for which GDF and E.ON Ruhrgas were liable had therefore lasted at least from 1 January 1980 until 30 September 2005 as regards the infringement committed in Germany and at least from 10 August 2000 until 30 September 2005 as regards the infringement committed in France. Having taken control of E.ON Ruhrgas on 31 January 2003, E.ON was, according to the Commission, 'jointly and severally liable' with E.ON Ruhrgas for an infringement which lasted from 31 January 2003 to 30 September 2005.

41 The Commission imposed fines on the undertakings in question pursuant to Article 23(2) of Regulation No 1/2003. To that end, it applied the methodology set out in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines').

42 In doing so, the Commission took the view that the sales concerned by the infringement were sales of gas transported by the undertakings in question via the MEGAL gas pipeline to customers in Germany and to eligible customers in France, with the exception of those made under the GRP.

43 In view of the gravity of the infringement, the Commission applied an initial percentage of 15% of the sales concerned.

44 As regards the duration of the infringement taken into account for the purposes of the fine, the Commission used, as regards France, the period from 10 August 2000 to 30 September 2005, that is to say 5 years, 1 month and 20 days. It found that, as regards Germany, it was necessary to limit the period in respect of which the fine had to be imposed to that of 24 April 1998 — the date on which the German legislature abolished the de facto monopoly which existed in that country on account of the exemption for demarcation agreements — to 30 September 2005, that is to say 7 years and 5 months.

45 Having regard to the nature of the infringement in question, the Commission applied to the cartel an additional amount of 15% of the sales concerned.

46 The Commission found that, in view of the special circumstances of the present case, it was appropriate to establish, by way of exception, an identical basic amount for the two undertakings in question. So as not to disadvantage one of them, the Commission took as the basic amount of the fine the amount corresponding to the lowest value of sales. It therefore fixed the same basic amount of fine in respect of all the undertakings in question, namely EUR 553 million.

47 As it did not find that there were any aggravating or mitigating circumstances, the Commission did not adjust that basic amount.

48 The Commission therefore imposed a fine of EUR 553 million on E.ON and E.ON Ruhrgas ('jointly and severally liable') and a fine in the same amount on GDF.

49 Articles 1 and 2 of the operative part of the contested decision read as follows:

'Article 1

[The undertakings in question] have infringed the provisions of Article 81(1) [EC] by participating in an agreement and in concerted practices in the natural gas sector.

The duration of the infringement, was for [GDF] and E.ON Ruhrgas … at least from 1 January 1980 until 30 September 2005, as far as the infringement committed in Germany is concerned, and at least from 10 August 2000 to 30 September 2005 as far as the infringement committed in France is concerned. The duration of the infringement for E.ON … was from 31 January 2003 to 30 September 2005.

Article 2

As regards the infringement(s) referred to in Article 1, the following fines are imposed:

(a) E.ON Ruhrgas … and E.ON …, jointly and severally liable: EUR 553 000 000

(b) GDF …: EUR 553 000 000

…'

Procedure and forms of order sought

50 By application lodged at the Registry of the General Court on 18 September 2009, the applicants brought the present action.

51 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the General Court, requested that the parties reply to a question and lodge certain documents. The parties complied with that request within the prescribed period.

52 At the hearing on 23 September 2011, the parties presented oral argument and answered the questions put to them by the Court.

53 By letter of 18 November 2011, the applicants requested that the oral procedure be reopened on the ground that they had just been informed of a new fact. By letter of 12 December 2011, the Commission submitted its observations on that request and stated that it was not justified to reopen the oral procedure.

54 By decision of 20 January 2012, the Court rejected the request to reopen the oral procedure.

55 The applicants claim that the Court should:

— annul the contested decision;

— in the alternative, reduce in an appropriate manner the amount of the fine imposed on the applicants in the contested decision;

— order the Commission to pay the costs.

56 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

57 The applicants' heads of claim seek the annulment of the contested decision and, in the alternative, the reduction of the fine imposed on the applicants.

1. The head of claim seeking the annulment of the contested decision

58 In support of their head of claim seeking the annulment of the contested decision, the applicants put forward five pleas in law alleging, first, infringement of Article 81(1) EC; secondly, an error of law in the assessment of the duration of the alleged infringement; thirdly, infringement of the principle of equal treatment; fourthly, that the alleged infringements are time-barred; and, fifthly, infringement of the principles governing the attribution of liability for infringements of competition law.

The first plea, alleging infringement of Article 81(1) EC

59 This plea is composed of six parts alleging, first, infringement of Article 81(1) EC inasmuch as the restrictions set out in the Direktion G and Direktion I letters and in Appendix 2 to the MEGAL agreement are lawful ancillary restrictions; secondly, an error of law resulting from the categorisation of GDF and E.ON Ruhrgas as potential competitors prior to the liberalisation which took place in April 1998 (in Germany) and at the beginning of 2002 (in France); thirdly, an error in the analysis of the Direktion G letter; fourthly, that the Direktion G and Direktion I letters and Appendix 2 to the MEGAL agreement did not have an anti-competitive object; fifthly, infringement of Article 81(1) EC in so far as the ancillary restrictions did not have the effect of restricting competition; and, sixthly, an error of law in the categorisation of 'contacts' as agreements or concerted practices.

– The first part

60 In this part of the plea, the applicants submit that the Commission infringed Article 81(1) EC on the ground that the Direktion G and Direktion I letters as well as Appendix 2 to the MEGAL agreement constituted lawful ancillary restrictions which were necessary for the proper functioning of the contractual framework relating to the MEGAL gas pipeline and were proportionate to the objectives

pursued. At the hearing, they stated that they did not consider the Direktion G letter to contain restrictions on competition, but that the argument relating to the ancillary restrictions also applied to that letter inasmuch as it referred to the Direktion I letter.

61 The Court will examine the arguments relating to the Direktion G letter in the context of the third part of the present plea.

62 It must be borne in mind that the concept of an 'ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation (Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, paragraph 104).

63 A restriction 'directly related' to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (*M6 and Others* v *Commission*, paragraph 62 above, paragraph 105).

64 The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it (*M6 and Others* v *Commission*, paragraph 62 above, paragraph 106 and the case-law cited).

65 As regards the objective necessity of a restriction, it must be observed that inasmuch as the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement (see, to that effect, *M6 and Others* v *Commission*, paragraph 62 above, paragraph 107).

66 That approach is justified not merely so as to preserve the effectiveness of Article 81(3) EC, but also on grounds of consistency. As Article 81(1) EC does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions (see, to that effect, *M6 and Others* v *Commission*, paragraph 62 above, paragraph 108).

67 Consequently, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult, or even impossible, to implement, the restriction may be regarded as objectively necessary for its implementation (*M6 and Others* v *Commission*, paragraph 62 above, paragraph 109).

68 Where a restriction is objectively necessary to implement a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceeds what is necessary in order to implement the operation, it must be assessed separately under Article 81(3) EC (see *M6 and Others* v *Commission*, paragraph 62 above, paragraph 113 and the case-law cited).

69 It must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers (*M6 and Others* v *Commission*, paragraph 62 above, paragraph 114 and the case-law cited).

70 If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation. Thus, if the main operation does not fall within the scope of the prohibition laid down in

Article 81(1) EC, the same holds for the restrictions directly related and necessary for that operation. If, on the other hand, the main operation is a restriction within the meaning of Article 81(1) EC but benefits from an exemption under Article 81(3) EC, that exemption also covers those ancillary restrictions (*M6 and Others* v *Commission*, paragraph 62 above, paragraphs 115 and 116).

71 In the present case, it must be pointed out that the Commission found that the side letters could not be lawful ancillary restrictions inasmuch as they provided for market sharing. It also found, in recital 255 of the contested decision, that the side letters did not appear to be either necessary or proportionate to the achievement of the objective of concluding a joint undertaking agreement for the construction and operation in common of the MEGAL gas pipeline. According to the Commission, the undertakings in question had not proved that it would have been impossible to construct the MEGAL gas pipeline without the restrictions imposed on Ruhrgas and GDF. That is apparent in particular from Ruhrgas' statements that, if GDF had not accepted the restrictions on its sales of gas in Germany, Ruhrgas would have constructed the gas pipeline on its own and offered GDF carrying capacities for the transport of gas to France. According to the Commission, the arguments relating to the protection of Ruhrgas' investments do not show that the restrictions in question were necessary and proportionate. It added, in recital 256 of the contested decision, that the attitude of the undertakings in question when notifying their merger to the Bundeskartellamt showed that they did not think that the side letters were indissolubly linked to the overall agreement.

72 It is necessary to examine, first, the applicants' arguments seeking to show that the restrictions provided for by the side letters were necessary for the construction and functioning of the MEGAL gas pipeline. The applicants state that the contractual framework relating to that gas pipeline pursued a lawful objective which was the construction of a gas pipeline which made it possible to improve the supply to and further the opening of the markets for natural gas in Germany and France. According to the applicants, that objective necessitated the setting-up of a joint undertaking which conferred property rights in that gas pipeline to GDF, thus ensuring the security of the supply. They also submit that GDF, as co-proprietor, could have competed with Ruhrgas in Germany, thus jeopardising the latter's investment in the new gas pipeline, which therefore made the ancillary restrictions provided for by the side letters necessary.

73 It is clear, as the applicants themselves admitted in their response to the statement of objections and at the hearing, that, if it had not been for the restrictions set out in the side letters, Ruhrgas would have constructed the gas pipeline on its own and offered GDF carrying capacities for the transport of gas to France.

74 Consequently, it is apparent from the applicants' statements that the contractual framework relating to the MEGAL gas pipeline at issue was not necessary for the construction of a gas pipeline which would make it possible to improve the supply to and further the opening of the markets.

75 As regards the applicants' argument that the construction of a gas pipeline by Ruhrgas and the conclusion of a transit contract with GDF would not have made it possible to ensure the security of the supply to French territory, it must be pointed out that they do not show that a transit contract would not have enabled GDF to establish a supply compatible with its public service obligations. In that regard, the problems between the Ukraine and the Russian Federation referred to by the applicants do not seem to be capable of being applied to the situation in the present case which concerns two companies.

76 Furthermore, the applicants' claims that, if Ruhrgas had constructed a gas pipeline on its own, it would without doubt have been different from the MEGAL gas pipeline and GDF would not have benefited from a comparable security of supply, are not substantiated by any evidence. Moreover, even if those claims were well founded, that would not in itself serve to establish that the side letters were directly related and necessary to the implementation of the operation.

77 It follows that the setting-up of a joint undertaking between Ruhrgas and GDF was not necessary for the pursuit of the objective referred to in paragraph 72 above. Consequently, the restrictions set out in the side letters were not necessary as Ruhrgas could have been the sole proprietor of the gas pipeline.

78 Even if the setting-up of a joint undertaking were to be regarded as necessary for the construction and operation of the MEGAL gas pipeline, it must be pointed out that the applicants have not established that, if it were not for the restrictions provided for by the side letters, the main operation would have been difficult to implement. They have not adduced evidence which permits the inference that possible competition from GDF on the German market would have gone beyond a mere commercial risk and have presented such a danger to Ruhrgas' investments that the entire operation would have been called into question, even though they concede that the possibility of acquiring customers in Germany was secondary for GDF at the time when that gas pipeline was built.

79 Furthermore, contrary to the applicants' claims, the prohibitions on supply concluded between GDF and Ruhrgas did not make it possible to protect the joint undertaking MEGAL, inasmuch as it is apparent from the wording of the side letters that the prohibitions on supply related to the activity of the parent companies and not to the activity of the subsidiary.

80 It follows from all of the foregoing that the applicants have not established that the restrictions set out in the side letters were objectively necessary for the implementation of the main operation, namely the construction and operation of the MEGAL gas pipeline.

81 Consequently, it must be held that the Commission was right to find that those letters could not constitute lawful ancillary restrictions, and there is no need to examine the applicants' arguments relating to the misinterpretation of the judgment in Case 161/84 *Pronuptia de Paris* [1986] ECR 353, the duration and the material and geographical scopes of the restriction, and the failure to submit the documents to the Bundeskartellamt.

82 The first part of the first plea must therefore be rejected.

– The second part

83 In this part, which was put forward in the alternative, the applicants submit that the undertakings in question were not potential competitors in Germany before the beginning of 2000 and in France before the beginning of 2002. Consequently, the side letters and Appendix 2 to the MEGAL agreement are not contrary to Article 81(1) EC.

84 In that regard, it must be borne in mind that, having regard to the requirements set out in Article 81(1) EC regarding effect on trade between Member States and repercussions on competition, that provision applies only to sectors open to competition (see, by analogy, as regards the similar conditions of Article 87(1) EC, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 143).

85 The examination of conditions of competition must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal contexts within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter the relevant market and compete with established undertakings (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 21; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 137; and Case T-461/07 *Visa Europe and Visa International Service* v *Commission* [2011] ECR II-1729, paragraph 68).

86 In order to determine whether an undertaking is a potential competitor in a market, the Commission is required to determine whether, if the agreement at issue had not applied, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings. Such a demonstration must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy (see, to that effect, *Visa Europe and Visa International Service* v *Commission*, paragraph 85 above, paragraphs 166 and 167).

87 It necessarily follows that, while the intention of an undertaking to enter a market may be of relevance in order to determine whether it can be considered to be a potential competitor in that market, none the less the essential factor on which such a description must be based is whether it has the ability to enter that market (*Visa Europe and Visa International Service* v *Commission*, paragraph 85 above, paragraph 168).

88 In the present case, the situation in respect of the French market for gas must be distinguished from that of the German market for gas.

89 First, as regards the French market, it is common ground that the monopoly on the import and supply of gas which GDF had enjoyed since 1946 was abolished only on 1 January 2003, although the deadline for the transposition, into national law, of the first gas directive expired on 10 August 2000. Consequently, at least until the latter date, there was no competition, even potential, on the French market for gas and the conduct in question could not, as regards that market, be covered by Article 81 EC.

90 As regards the period after 10 August 2000, it is apparent from recital 290 of the contested decision that, as from that date, some customers were declared eligible and gas suppliers were able to penetrate the French market. That is moreover not disputed by the applicants, neither in their written pleadings before the Court nor in their response to the statement of objections.

91 It must be pointed out that that possibility of changing suppliers resulted from the adoption of the first gas directive two years previously. The applicants were therefore in a position to prepare their entry into the French market as of June 1998.

92 Ruhrgas was therefore able to penetrate the French market as of August 2000. The fact that such penetration concerned only a limited group of customers, as is apparent from recital 12 of the contested decision, is not sufficient to consider that the applicants were deprived of a real concrete possibility of entering the market.

93 Consequently, the Commission was right to find that Ruhrgas and GDF were potential competitors in the French market as from 10 August 2000.

94 Secondly, as regards the German market, the Commission refuted, in recital 30 of the contested decision, the claim that GDF had never been a potential competitor of Ruhrgas before the liberalisation. It stated in that regard that German law had never prohibited the entry into the market of new suppliers, but had simply permitted incumbent suppliers to erect significant barriers to entry by concluding agreements which were exempt from the application of the legislation on competition. Furthermore, the Commission stated that the exemption which those agreements enjoyed was not absolute, but subject to certain conditions. Agreements which were to be subject to an exemption had to be notified to the competent competition authority, which could prohibit an agreement if it took the view that it constituted a misuse of the legal exemption. Lastly, relying on the cases of Wingas and of Mobil, the Commission pointed out that the possibility of competition despite the very significant barriers to entry was not theoretical. It concluded that it was possible for GDF to sell gas in the territory traditionally supplied by Ruhrgas, despite considerable barriers to entry, with the result that it could be regarded as a potential competitor of Ruhrgas throughout the period in question.

95 The Commission further pointed out, in recital 294 of the contested decision, that neither the 1935 EnWG nor Paragraph 103 of the GWB provided for a legal monopoly for Ruhrgas or any other incumbent operator in German territory. That has not, moreover, been disputed by the applicants.

96 The applicants however submit that there was no actual, concrete and realistic possibility of access to the market and that, consequently, GDF was not a potential competitor of Ruhrgas. They submit that any competition was precluded before the liberalisation of April 1998, and that, in practice, GDF was able to become a competitor of Ruhrgas in Germany only in 2000.

97 It is necessary to draw a distinction between the period from 1980 to 1998, on the one hand, and the period from 1998 to 2000, on the other.

98 As regards, first, the period from 1980 to 1998, it must be stated that it is common ground between the parties that, until 24 April 1998, demarcation agreements, namely those by which public service companies agreed among themselves not to supply gas in a particular territory, and exclusive concession agreements, namely those by which a local authority granted an exclusive concession to a public service company allowing it to use public land to construct and operate gas distribution networks, were exempt under Paragraph 103(1) of the GWB from the provisions of that law prohibiting anti-competitive agreements.

99 It is true that it is apparent from recital 23 of the contested decision that, in order to be valid, those agreements had to be notified to the Bundeskartellamt, which had the power to prohibit them if it took the view that the agreements in question constituted a misuse of rights. That possibility has however almost never been used, as is apparent from footnote No 27 of the contested decision.

100 Furthermore, it is apparent from recital 24 of the contested decision that the simultaneous use of demarcation agreements and exclusive concession agreements had the effect of establishing de facto a system of areas of exclusive supply within which a single gas undertaking could supply customers with gas, although there was no legal prohibition against other companies supplying gas.

101 The Commission also admits, in recital 371 of the contested decision, that the incumbent German suppliers had a de facto monopoly in their respective areas of supply.

102 In those circumstances, it must be held that, at least until 24 April 1998, the German market for gas was characterised by the existence of de facto territorial monopolies.

103 It is clear that that situation, which existed on the German market for gas until 24 April 1998, was likely to result in the absence of any competition, not only actual, but also potential, on that market. In that regard, it must be pointed out that it has been held that a geographical monopoly which local gas distribution undertakings enjoyed precluded any competition between them (see, to that effect, Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 117).

104 Neither the contested decision nor the case file contains evidence capable of proving to the requisite legal standard that, if the agreement at issue had not applied and notwithstanding the characteristics of the German market for gas described in paragraphs 95 to 102 above, there would have been, up until 24 April 1998, a real, concrete possibility for GDF to enter the German gas market and to compete with the applicants as required by the case-law referred to in paragraphs 85 and 86 above.

105 Consequently, the fact referred to in recital 294 of the contested decision that there was, in Germany, no legal monopoly is irrelevant. In order to ascertain whether there is potential competition in a market, the Commission must examine the real concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter that market and compete with established undertakings. That examination on the part of the Commission must be made on the objective basis of those possibilities, with the result that the fact that they are precluded on account of a monopoly which derives directly from national legislation or, indirectly, from the factual situation arising from the implementation of that legislation is irrelevant.

106 Furthermore, the statement, in recital 30 of the contested decision, that GDF had not only the legal right to sell gas in the territory traditionally supplied by Ruhrgas, but that that was factually possible (despite significant barriers to entry), cannot, as such, constitute a sufficient demonstration of the existence of potential competition. The purely theoretical possibility of GDF's entry into the market is not sufficient to establish the existence of such competition. Furthermore, such a statement is based on a mere hypothesis and does not constitute a demonstration supported by factual evidence or an analysis of the structures of the relevant market, in accordance with the case-law referred to in paragraph 86 above, and the examples referred to in support of it are moreover irrelevant, as is apparent from paragraphs 108 to 112 below.

107 The same is true of the circumstances referred to in recital 240 of the contested decision that the undertakings in question were important players in the European gas sector and each had to be regarded as a natural new competitor on the other's market, or well-placed competitors which had in principle every chance of succeeding in entering the neighbouring market, or that Germany and France were neighbouring and closely connected markets, which increased the chances of success. Such general and abstract information does not serve to show that, despite the competitive situation existing in the German market for gas, GDF would have been in a position, if the agreement at issue had not applied, to enter that market.

108 The same is therefore true, for the same reasons, of the information, referred to in recital 240 of the contested decision, that the undertakings in question had the necessary strength, resources and infrastructure to enable them to enter the market and that GDF's subsidiaries EEG and PEG and its minority share in GASAG and VNG constituted strong advantages for strengthening its position on that market.

109 Furthermore, the examples of Wingas and Mobil, which were referred to in recitals 30 and 243 of the contested decision in order to illustrate the statement that the possibilities of entry were not purely theoretical, do not appear to be relevant.

110 As regards Wingas, it must be pointed out that it is a joint undertaking owned by BASF and Gazprom which succeeded in entering the German market for gas in the 1990s as a result of Gazprom's gas supplies and the construction of a vast network of new pipelines which ran parallel to those of Ruhrgas and of other incumbent suppliers (recital 30 of the contested decision). The position of Wingas was atypical, according to the Commission, which, in recital 100 to its decision of 29 September 1999 in Case IV/M.1383 — Exxon/Mobil ('the Exxon/Mobil decision'), stated that Wingas' experience was not likely to be repeated as that undertaking was a lucky combination between a very big (probably even the largest) German industrial gas consumer and a very big Russian producer.

111 As regards Mobil, it must be borne in mind that it also entered the German market for gas in the 1990s by negotiating access to the networks of the incumbent operators of transmission networks. It is clear that the Commission itself stated that Mobil was in a somewhat atypical situation in Germany (see recital 251 to the Exxon/Mobil decision). It pointed out inter alia that that undertaking produced a substantial part of German gas and was a part of the German gas establishment and that that was probably, according to the Commission, the reason why Mobil had been able to import gas to Germany without having its own high-pressure pipeline network by means of a third party access to the network. The Commission also stated that Mobil was in a unique position (see recital 219 to the Exxon/Mobil decision).

112 Furthermore, the Commission's argument that Wingas and Mobil are two undertakings that are very different from each other, which shows that entry to the market was possible, is not convincing inasmuch as it is established that their respective situations are atypical and are not likely to be repeated.

113 In those circumstances, having regard to their specific natures, the examples of Wingas and Mobil are not capable of showing that there was a real concrete possibility, for a new entrant, to penetrate the German market for gas and compete with the established undertakings.

114 In any event, the contested decision does not contain any evidence, even that of a general nature, to show that, during the period from 1 January 1980 to 24 April 1998, notwithstanding the circumstances implying the existence of regional monopolies on the German market for gas, the construction of throughput pipelines or the conclusion of agreements on access to the network with an incumbent operator on the route taken by the MEGAL gas pipeline was not an economically viable strategy, within the meaning of the case-law cited in paragraph 86 above, and represented a real concrete possibility, for an operator such as GDF, the co-owner of the MEGAL gas pipeline, to enter that market and compete with undertakings established on that market. In particular, there is no evidence which permits the inference that GDF's entry to the market could have taken place, by those means, sufficiently quickly for the threat of a potential entry to influence the conduct of the participants in the market, or on the basis of costs which would have been economically viable. It should be pointed out that the contested decision does not contain any information permitting the inference that the Commission carried out an examination of the existence of potential competition in accordance with the requirements of the case-law cited in paragraph 86 above.

115 As regards the Commission's argument that there was necessarily potential competition on the German market, otherwise there would have been no need for the Direktion I letter, it must be stated that, in the light of the barriers to entry described previously and the specific nature of the entrants, that circumstance cannot suffice to show that GDF was objectively a potential competitor. That makes it possible, at most, to establish that Ruhrgas feared that such competition might occur in the future. Furthermore, it must be pointed out that the Direktion G letter, which provided for a prohibition of supply in France was concluded as far back as 1975 despite the legal monopoly. The existence of a prohibition of supply does not therefore necessarily imply the existence of potential competition at the date of signature of the Direktion I letter, contrary to what the Commission suggests.

116 In the light of the foregoing, it must be held that the Commission has not established that there was potential competition on the German market for gas from 1 January 1980 to 24 April 1998.

117 Moreover, by stating, in recital 372 of the contested decision, that, by repealing the exemption from competition law applicable to demarcation agreements on 24 April 1998, the German legislature clearly determined that the gas sector should be opened to competition after that date, the Commission tends to admit, at least implicitly, that, before that date, the German legislature itself took the view that the gas sector was not open to competition and, consequently, that there was no potential competition.

118 As regards the period from 24 April 1998 to 10 August 2000, it must be borne in mind that the exemption applicable to demarcation agreements and exclusive concession agreements no longer existed during that period on account of the legislative amendments which had taken place.

119 The applicants however submit that there was no potential competition on the German market before the beginning of 2000.

120 The applicants do not adduce any evidence in the application in support of their claim and merely refer to recital 207 of the contested decision and to GDF's response to the statement of objections, which is not annexed to the application, but to the reply.

121 According to the case-law, whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which must appear in the application (Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17, and order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49).

122 The reference to the arguments expanded in GDF's response to the statement of objections, which is not even annexed to the application, cannot therefore be accepted.

123 As regards the structure of the German market, whilst it was also capable of constituting a barrier to entry during the period from 24 April 1998 to 10 August 2000, the fact remains that there is no evidence to permit the inference that, during that period, it was on its own capable of totally precluding any potential competition on the German market.

124 In those circumstances, it is clear that there is no evidence to show that the Commission was wrong to find that there was potential competition on the German market for gas from 24 April 1998 to 10 August 2000.

125 In the light of all of the foregoing, the second part of the plea must be upheld in so far as it relates to the German market during the period from 1 January 1980 to 24 April 1998. It must be rejected as to the remainder.

– The third part

126 In the present part, the applicants claim that no infringement of Article 81 EC could be identified in so far as concerns the French market on the basis of the Direktion G letter. In that regard, they submit that the wording of the letter did not provide for a prohibition of supply, that such a prohibition would have been meaningless and that the entry of E.ON Ruhrgas to the French market as from 2003 militates against the existence of such a prohibition.

127 In the first place, as regards the wording of the Direktion G letter, it must be pointed out that the fact that that letter is not drafted in an identical or symmetrical manner to the Direktion I letter does not, as such, affect the possibility that the Commission might consider that those letters have a similar purpose, namely that of providing for a sharing of the national markets for gas and of restricting access to the respective national market of the undertakings in question.

128 It must therefore be ascertained whether, having regard to the content of the Direktion G letter, the Commission was entitled to take the view that that letter sought to prohibit Ruhrgas from marketing gas passing in transit through the MEGAL gas pipeline in France. In that regard, it must be borne in mind that the Direktion G letter is drafted as follows:

'…

The Carrying Capacities Contracted or to be Contracted by [GDF] for the transportation of gas shall concern gas which has been or will be purchased by [GDF] and will be delivered to [MEGAL] and/or [MEGAL Finco] for transit for [GDF] to and destined for consumption in France.

The Carrying Capacities Contracted or to be Contracted by Ruhrgas for the transportation of gas shall concern the transportation for any other transit purposes and the transportation of gas through the Pipeline and taken from the Pipeline in the Federal Republic of Germany destined for consumption in the Federal Republic of Germany, or purchased by Ruhrgas and destined for transit through the Federal Republic of Germany.

…'

129 It is true that it must be pointed out that, in the light of its wording, the Direktion G letter does not expressly prohibit Ruhrgas from delivering or supplying gas passing in transit through the MEGAL gas pipeline in France.

130 However, as the Commission stated in recital 198 of the contested decision, it may be deduced from the Direktion G letter that, whereas the gas which GDF transports through the MEGAL gas pipeline must be conveyed to France, the gas which Ruhrgas transports through that gas pipeline must be

either taken from the pipeline in Germany or transported for any other transit purposes, which means that Ruhrgas is not to be authorised to convey gas transported by that gas pipeline to France. The expression 'transportation for any other transit purposes' must be read in the light of the preceding paragraph, which attributes to GDF carrying capacities for gas delivered 'for transit for [it] to … France'. That expression therefore means that Ruhrgas is entitled to carrying capacities to deliver gas in transit to countries other than France. According to that letter, therefore, the gas which Ruhrgas could transport through the MEGAL gas pipeline had to be destined either for consumption in Germany or for transit to countries other than France.

131 Consequently, even although the Direktion G letter does not expressly prohibit Ruhrgas from selling gas in France, it nevertheless limits its possibilities of transporting gas to that country via the MEGAL gas pipeline and, as a result, of selling gas from that gas pipeline there.

132 That interpretation is borne out by a reading of the Direktion G letter in conjunction with Appendix 2 to the MEGAL agreement. That agreement provides, in Article 5(13)(a), inter alia, that the inlet and outlet points are shown in Appendix 2 and that Ruhrgas has the right to take gas from the pipeline at any outlet point. Point 2.2 of Appendix 2 to that agreement, which defines the outlet points from that gas pipeline for the gas transported for Ruhrgas, grants it outlet points only in Germany. No outlet point is provided for Ruhrgas in Medelsheim, where the gas pipeline in question is connected to the French network. The gas transported for Ruhrgas could not therefore use an outlet in France and, consequently, be sold in that country. As will be shown in paragraphs 194 to 195 below, the content of the letter of 21 May 2002 cited by the applicants is not capable of calling that conclusion into question.

133 The Commission did not therefore err in finding, in recital 222 of the contested decision, that the Direktion G letter had the aim of preventing Ruhrgas from supplying French customers with gas transported by the MEGAL gas pipeline.

134 Furthermore, none of the applicants' arguments that the evidence put forward by the Commission in the contested decision does not support its interpretation appears to be valid.

135 First, the applicants' argument to the effect that a prohibition of supply as regards France would have been meaningless having regard to GDF's monopoly on imports to France cannot succeed since, as the Commission states, such a prohibition had the aim of circumventing possible legal and factual changes during the lifespan of the gas pipeline. That is moreover perfectly consistent with the applicants' line of argument relating to the necessity for the Direktion I letter despite the absence of potential competition on the German market prior to 1998 (see paragraph 147 below).

136 Secondly, the applicants' argument that they entered the French market as from 2003 is not capable of calling into question the Commission's finding in the contested decision concerning the restrictive nature of the Direktion G letter as evidenced by the wording of that letter read in conjunction with Appendix 2 to the MEGAL agreement.

137 It follows from all of the foregoing that the third part of the plea must be rejected.

– The fourth part

138 In this part of the plea, the applicants claim that the Direktion G and Direktion I letters could not have the object of restricting competition inasmuch as they constitute lawful ancillary restrictions. In the alternative, they submit that the purpose of the side letters was neutral having regard to the economic context which existed at the time.

139 First, the applicants' argument relating to the existence of lawful ancillary restrictions must be rejected, because, as is apparent from paragraphs 60 to 82 above, the Direktion G and Direktion I letters cannot be categorised as such.

140 Secondly, it must be borne in mind that, Article 81(1) EC prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

141 The anti-competitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article 81(1) EC. According to settled case-law, the alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise object of the agreement, in the economic context in which it is to be applied. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent. It is also apparent from the case-law that it is not necessary to examine the effects of an agreement once its anti-competitive object has been established (see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 55 and the case-law cited).

142 In order to assess the anti-competitive nature of an agreement, regard must be had in particular to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Courts of the European Union from taking that aspect into account (see *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 141 above, paragraph 58 and the case-law cited).

143 Furthermore, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (see Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 64 and the case-law cited).

144 Lastly, it must be pointed out that, on a number of occasions, the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of Article 81 EC (see, to that effect, *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 141 above, paragraph 61 and the case-law cited).

145 In the present case, it must be pointed out, as did the Commission, that the construction of a gas pipeline such as the MEGAL gas pipeline constitutes an investment for very long-term use, Ruhrgas having stated that the time taken to amortise the investments in that gas pipeline would be 25 years and the Commission having stated, without being contradicted by the applicants, that a gas pipeline generally has an operational lifespan of 45 to 65 years.

146 Furthermore it must be stated that, having regard to Articles 2 EC and 3 EC, in their version in force at the time when the Direktion G and Direktion I letters were signed, the Community already, at that time, had the objective of establishing a common market, which implied, inter alia, the elimination, between Member States, of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect. Moreover, also at that time, the Court of Justice had already had occasion to state that the isolation of national markets is contrary to one of the essential objects of the Treaty, which is to unite national markets in a single market (see, to that effect, Case 192/73 *Van Zuylen* [1974] ECR 731, paragraph 13).

147 In those circumstances, it must be held that, at the time when the side letters were signed, the liberalisation could not be precluded in the long term and was one of the prospects which could reasonably be envisaged. That has, moreover, in essence, been confirmed by E.ON, which stated in its

response to the statement of objections, as is apparent from recital 245 of the contested decision, that the Direktion I letter was adopted 'as a precautionary measure … to "prevent even such purely theoretical risks, due to changes in the legal and economic conditions which could not be completely precluded"' from compromising the project. That was also conceded by the applicants in their written pleadings.

148 The object of the Direktion G and Direktion I letters cannot therefore be categorised as neutral, inasmuch as they aimed to share the markets between the undertakings in question in the event of changes in legal or factual circumstances and in particular in the event of the liberalisation of the French and German markets. The Commission was therefore right to find, in recital 227 of the contested decision, that those letters had an anti-competitive object.

149 Consequently, the fourth part of the plea must be rejected.

– The fifth part

150 In this part of the plea, the applicants submit that the Direktion G and Direktion I letters and Appendix 2 to the MEGAL agreement were not capable of affecting trade between Member States.

151 In that regard, it must be borne in mind that Article 81(1) EC applies only to agreements which may affect trade between Member States. According to settled case-law, for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States (see Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited).

152 Thus, an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess whether an arrangement has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (see *Asnef-Equifax and Administración del Estado*, paragraph 151 above, paragraph 35 and the case-law cited). It is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable. A restriction of competition is liable to affect trade between Member States when it is likely to divert trade patterns from the course which they would otherwise have followed (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 172).

153 Furthermore, the capability of a cartel to affect trade between Member States, that is to say, its potential effect, is sufficient for it to fall within the scope of Article 81 EC and it is not necessary to demonstrate an actual effect on trade (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 48, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 166). It is none the less necessary for the potential effect of the cartel on inter-State trade to be appreciable, or, in other words, that it be not insignificant (see, to that effect, Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 and 17).

154 A cartel extending over the whole of the territory of a Member State, moreover, has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (*Asnef-Equifax and Administración del Estado*, paragraph 151 above, paragraph 37).

155 In the present case, it must be stated that, since it has not been established that there was potential competition on the German market for gas from 1 January 1980 to 24 April 1998 (see paragraph 116 above) and since it is common ground that the French market was closed to competition until at least August 2000, the Commission erred in finding that the agreement and practices at issue were capable of having an appreciable effect on trade between Member States prior to 24 April 1998.

156 That is particularly the case given that the Commission based its finding in that regard, as is apparent from recital 263 of the contested decision, inter alia on the fact that that agreement and those practices prevented cross-border competition on the German and French markets for gas. Since there was no competition on those two markets, that competition could not be prevented and consequently trade between Member States could not be affected.

157 As regards the period from 24 April 1998 to 10 August 2000, the applicants' arguments relating to the effect on trade between Member States must, by contrast, be rejected, since the existence of potential competition on the German market for gas has not been reasonably called into question (see paragraph 124 above), and the restriction thereof was therefore capable of having an appreciable effect on trade between Member States.

158 The fifth part of the first plea must therefore be upheld in part.

– The sixth part

159 The applicants submit that the Commission infringed Article 81(1) EC if it intended to claim, in the contested decision, by means of contradictory statements, that the contacts between the undertakings in question from 1999 to 2005 constituted concerted practices or agreements which were independent of the side letters.

160 In the present case, it is apparent from the contested decision that the Commission did not take the view that the contacts from 1999 to 2005 constituted infringements which were independent of that arising out of the Direktion G and Direktion I letters (see inter alia recitals 162 and 163 of the contested decision). That is moreover confirmed by the Commission in its written pleadings.

161 Furthermore, as regards the applicants' argument alleging contradictions in the contested decision, it must be pointed out that recitals 177, 199 and 223 of the contested decision must be read with the recitals which follow or precede them and that, in those recitals, it is stated that the agreements and concerted practices identified arose out of the MEGAL agreement and the Direktion G and Direktion I letters (see in particular recitals 178, 181, 197 and 198 of the contested decision).

162 The sixth part of the plea put forward by the applicants must therefore be rejected.

163 In any event, the applicants' arguments are not well-founded, inasmuch as the Commission established, in the contested decision, that the undertakings in question had exchanged information on the strategies which they intended to adopt on each other's respective markets (see inter alia the documents cited in recitals 84, 87, 120, 121 or 180 of the contested decision).

164 Contrary to the applicants' claims, the undertakings in question did indeed exchange relevant information as far as concerns competition. Those exchanges were part of an overall plan and were the subject of systematic meetings inasmuch as, first, they related to the competition which the undertakings in question were engaged in in France and in Germany, and, secondly, they were the subject of regular meetings as evidenced by the existence of the 'Tour d'horizon' (general survey) meetings referred to in recitals 63, 97, 114, 116, 121, 122, 131 and 132 of the contested decision. The applicants' argument that those exchanges did not take place between those in charge or experts, but between various colleagues, is not relevant inasmuch as it does not make it possible to call into question the anti-competitive content of those exchanges. Furthermore, even though a large number of those meetings sought to broach legitimate subjects of discussion, the fact remains that that cannot justify meetings which also gave rise to a concerted practice prohibited by Article 81(1) EC.

165 Consequently, the sixth part of the plea must be rejected as irrelevant and, in any event, unfounded.

166 It follows from the foregoing that the second and fifth parts of the present plea must be upheld in part and that the plea must be rejected as to the remainder.

167 Consequently, Article 1 of the contested decision must be annulled inasmuch as it found that an infringement was committed in Germany from 1 January 1980 to 24 April 1998.

The second plea, alleging an error of law in the assessment of the duration of the infringement

168 This plea, by which the applicants call into question, in the alternative, the Commission's assessment relating to the duration of the infringement in question, seeks to argue, first, that the undertakings in question revoked the agreements which had given rise to that infringement as from December 2001 or January 2002, if not even before, and at the latest on 13 August 2004 and, secondly, that the subsequent actions of those undertakings were not due to a continuation of those agreements.

– The cessation of the infringement in question

169 It must be borne in mind that it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (see Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 173 and the case-law cited).

170 In that regard, it is apparent from settled case-law that it is incumbent on the Commission to prove not only the existence of an agreement but also its duration (see Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 36 and the case-law cited).

171 Moreover, in proceedings for annulment brought under Article 230 EC, all that is required of the Community judicature is to verify the legality of the contested measure (*JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 174).

172 Thus, the role of a Court hearing an application for annulment brought against a Commission decision finding the existence of an infringement of the competition rules and imposing fines on the addressees consists in assessing whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement (see *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 175 and the case-law cited).

173 It must be borne in mind that where there is doubt on the part of the Court, the benefit of that doubt must be given to the undertakings accused of the infringement. The Court cannot therefore conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of a decision imposing a fine (see *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 177 and the case-law cited).

174 Consequently, the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 179 and the case-law cited).

175 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 180 and the case-law cited).

176 Moreover, in accordance with settled case-law, to prove to the requisite standard that an undertaking participated in a cartel, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded,

without manifestly opposing them. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Case C-510/06 *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 119 and the case-law cited).

177 Consequently, it is the understanding which the other participants in a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement (*Archer Daniels Midland* v *Commission*, paragraph 176 above, paragraph 120).

178 The applicants' arguments relating to the cessation of the infringement in question must be examined in the light of those considerations.

179 First, as regards the alleged cessation of the infringement in question before the end of 2001, it must be stated that the applicants concede that there is no direct evidence proving that one of the parties distanced itself from the agreements in question, but put forward a note relating to the meeting of 4 February 1999 from which it is apparent that, during the meeting of a working group on MEGAL tariffs, some persons within GDF expressed the wish that a separate marketing of gas via the MEGAL gas pipeline in Germany should be considered. GDF then stated that its aim was to optimise its position as transporter and shareholder and that, in the event of amendments to the rules on third party access, it would have to defend its interests whilst taking into account the historic links with Ruhrgas.

180 The fact remains that the statements contained in the note relating to the meeting of 4 February 1999 which concern the optimisation of GDF's position are insufficient to show that Ruhrgas or GDF distanced themselves unequivocally from the agreements in question.

181 Furthermore, there are other items of evidence, as pointed out by the Commission, which show that, in 2000, the agreements in question were not regarded as obsolete or without effect. In that regard, two of GDF's internal emails of 9 and 17 February 2000, which are referred to in recital 65 of the contested decision, refer expressly to the Direktion G and Direktion I letters, stating that the first of those letters is akin to a 'vast sharing of the market' between the undertakings in question, 'which raises the issue of the legal value of such a document (void!)' and that, by the second of those letters, described as 'superb', those undertakings agree that GDF is not to deliver gas (directly or indirectly) to customers in Germany.

182 The applicants' argument that GDF's internal emails of 9 and 17 February 2000 relate to GDF and are, therefore, irrelevant in respect of Ruhrgas must be rejected. No provision or any general principle of law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Article 81 EC and Article 82 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted it by the EC Treaty (see *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 192 and the case-law cited, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 57 and the case-law cited). The same is true as regards the internal documents of another incriminated undertaking. Internal reports found during an inspection of offices belonging to one incriminated undertaking may be used as evidence against another incriminated undertaking (see, to that effect, Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraphs 31 to 38, and Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraph 91). What is more, having regard to the very nature of the practices in question and to the associated difficulties concerning the taking of evidence, the Commission cannot be required to rely on documents exchanged by or common to the undertakings in question. It may therefore rely on internal documents of the undertakings in question, as long as they make it possible to establish the existence of an infringement.

183 Furthermore, as will be shown in paragraphs 184 to 240 below, a number of other subsequent items of documentary evidence, some of which were drawn up by the first applicant, contradict the applicants' argument that the undertakings in question distanced themselves from the agreements in question as from 2001.

184 In addition, the submission of a competing offer by GDF as early as 2000 is not sufficient, having regard to the evidence referred to above, to show an unequivocal and public distancing from the agreements in question, particularly because it is not uncommon, in cartels, for certain participants to break the agreement from time to time in order to use it to their advantage (see, to that effect, *Lafarge* v *Commission*, paragraph 182 above, paragraph 773 and the case-law cited). Furthermore, that offer must be seen in context since, as is apparent from recitals 73 and 74 of the contested decision, GDF began to sell gas on the German market only in 2001. Sales were very low from 2001 to 2005 and GDF did not sell any significant quantities in the south of Germany (the area concerned by the MEGAL gas pipeline) until October 2005.

185 It is apparent from the foregoing that the applicants' arguments contending that the cartel in question ceased prior to December 2001 must be rejected.

186 Secondly, in order to show that the infringement in question had ceased as from the end of 2001 or at the beginning of 2002, the applicants rely principally on a fax send by Ruhrgas to GDF on 7 January 2002 which states that the Direktion G and Direktion I letters must be regarded as 'obsolete', thus terminating the infringement.

187 In that regard, it must first of all be pointed out that the fax sent by Ruhrgas to GDF on 7 January 2002 followed a meeting between the undertakings in question which took place on 14 December 2001. The flyleaf of that fax states that a draft list of existing agreements between the undertakings in question and the treatment to be given to the respective provisions within the 'beneficial use' concept is annexed to it. A list of the provisions of the MEGAL agreement, the appendices to it and the side letters, including the Direktion G and Direktion I letters, is annexed to the fax concerned. That annex bears the words 'New structure MEGAL; transformation of the basic agreement and all relating contracts into a new consortium agreement' at the top of each page. The Direktion G letter is described in that annex as having as its subject-matter 'the capacity commitments' of the undertakings in question, and the question is raised of whether or not there may be transportation agreements by MEGAL with third parties. The Direktion I letter is described in that annex as having as its subject-matter the fact that there will be no delivery or supply by GDF in Germany. Concerning the treatment to be given to those letters, the fax has the word 'obsolete' opposite the names of the letters.

188 Read as a whole and having regard to its context, it must be held that, far from stating that the undertakings in question regarded the Direktion G and Direktion I letters as already obsolete, the fax that Ruhrgas sent to GDF on 7 January 2002 merely states that those undertakings envisaged that those letters would be obsolete in the context of a new agreement which was being negotiated. In fact, the word 'obsolete' indicates that the undertakings in question took the view that it was not necessary to insert such clauses in that new agreement. That is borne out by the fact that, in respect of those provisions for which the treatment mentioned is not 'obsolete', it is expressly stated that they must be inserted in the new agreement or in the appendices to it, if necessary by altering them. In addition, the flyleaf of that fax states that the fax concerns 'existing agreements'. The Commission was therefore right to find, in recital 80 of the contested decision, that that fax referred to the role that those side letters were to play in the future in the context of the new MEGAL agreement and of the 'beneficial use' concept. It cannot therefore be deduced from the fax in question that the undertakings in question regarded the Direktion G and Direktion I letters as obsolete at the time at which the fax was sent.

189 The fact that the Commission stated, in recital 80 of the contested decision, that the interpretation of the fax sent by Ruhrgas to GDF on 7 January 2002 '[was] not quite clear' cannot call that finding into question and give rise to a doubt that should benefit the applicants. Those words must be read in conjunction with the rest of that recital from which it is unambiguously apparent that that fax did not prove that the undertakings in question regarded the side letters as obsolete at the time.

190 For the sake of completeness, it must be pointed out that point 2.1 of Appendix 2 to the MEGAL agreement, which defines the outlet points for the gas transported by GDF, confers on GDF only an outlet point from the MEGAL gas pipeline on the Franco-German border and does not confer on it an outlet point in Germany. That contractual provision thus confirmed the impossibility of GDF's taking gas from the MEGAL gas pipeline by virtue of the Direktion I letter. The fax sent by Ruhrgas to GDF on 7 January 2002 does not state that it will be regarded as 'obsolete', but that it will have to be 'integrate[d] in [the] pipeline description'.

191 Secondly, as regards the applicants' line of argument relating to the insufficient evidential value of Ruhrgas' internal 'briefing' note with a view to the 'Tour d'horizon' meeting of 20 December 2001 and of GDF's internal note of 24 September 2002, which are cited by the Commission in recitals 115 and 116 of the contested decision, it must be pointed out that, although those documents do not refer explicitly to the Direktion G and Direktion I letters, they show that Ruhrgas and GDF did not have the intention of entering into aggressive competition with each other. Consequently the preparatory note for the meeting of 20 December 2001 states that Ruhrgas wished to inform GDF, at that meeting, that a sales office, the role of which was to show its presence in France and not to burst aggressively onto the French market, had been opened in Paris. Likewise, the note of 24 September 2002 states that, according to GDF, the large German operators need alibis in Germany to show that the market is open and that the undertakings in question may have a common interest in concluding a 'deal with a strong strategic content' which will enable them to exchange positions in Europe.

192 The Commission was therefore right to find, in recital 114 of the contested decision, that the evidence in the case-file shows that the undertakings in question regarded their competition with each other as a subject of common concern, even when it did not concern the gas transported through the MEGAL gas pipeline.

193 Lastly, the applicants' argument that there was an incorrect assessment of evidence subsequent to the fax sent by E.ON Ruhrgas to GDF on 7 January 2002 must be rejected.

194 As regards the exchange of letters between the undertakings in question on 13 and 21 May 2002, the Commission found, in recital 81 of the contested decision, that it confirmed that Ruhrgas considered the Direktion G letter to be binding and that none of the undertakings in question had suggested that that letter and the Direktion I letter were obsolete. There is no evidence to call that assessment into question. The letter sent by Ruhrgas to GDF on 21 May 2002, in reply to its letter of 13 May 2002, refers expressly to the Direktion G letter, stating that the transport carried out for another undertaking through the MEGAL gas pipeline is in full accordance with that letter. If that letter had been regarded as obsolete and as not binding the undertakings in question, Ruhrgas would not have stated that the transport in question was in accordance with it.

195 The applicants' argument that Ruhrgas referred to the Direktion G letter only in the alternative and only as regards point 3 of that letter is in no way substantiated by the content of the letter of 21 May 2002 which expressly quotes part of point 1 of the Direktion G letter without stating that it is referring to that letter in the alternative. In any event, even if Ruhrgas had referred to the Direktion G letter only in the alternative and only as regards point 3 of that letter, that does not serve to show that the first applicant regarded that letter as obsolete and tends on the contrary to confirm that it regarded the letter in question as applicable in its dealings with GDF.

196 Furthermore, as regards Ruhrgas' minutes of a meeting of 23 May 2002, it is apparent from them that GDF assured Ruhrgas that it did not, at that time, intend to sell gas taken from the MEGAL gas pipeline in the south of Germany. The applicants' claim that that statement by GDF was only a negotiating tactic is not supported by the content of those minutes. By contrast, it is apparent from that content that such a statement was made in the context of a discussion between the undertakings in question and cannot therefore be regarded as purely unilateral. Lastly, contrary to what the applicants claim, the fact that the first applicant did not ask a question in that regard or accept the statement in question does not show that there was no agreement or concerted practice, inasmuch as that does not constitute manifest opposition for the purposes of the case-law cited in paragraph 176 above.

197 As regards the fax of 24 May 2002, it confirms that the meeting of 23 May 2002 took place. Furthermore, it states not only that GDF refused to sell its long-term capacities on the 'Waidhaus/Medelsheim' transportation system, but also that there was a possibility that exceptions could be made on a case by case basis if the restructuring of the contractual framework of the MEGAL gas pipeline were carried out. As the applicants state, it does not however contain an exchange of business secrets.

198 In its written pleadings, the Commission explained that recital 86 of the contested decision referred to that fax of 24 May 2002 only as additional evidence of the fact that the meeting had indeed taken place. It stated that the views relating to the exchange of business secrets in the same recital related to GDF's statements as set out in the minutes of the meeting of 23 May 2002. That interpretation is not consistent with the wording of that recital. However, that is not capable of calling into question the Commission's overall finding that that meeting of 23 May 2002 shows GDF's willingness to continue to adhere to the framework provided for by the side letters, as is apparent from paragraph 196 above.

199 It follows that the applicants' arguments submitting that the cartel in question ceased as from the end of 2001 or at the beginning of 2002 must be rejected.

200 Thirdly, as regards the alleged cessation of the infringement as from the beginning of 2003, the applicants submit that the Commission took insufficient account of the statement made under oath by one of their employees according to which it had been accepted as from 2003 and on a number of other occasions before the 2004 agreement that GDF could take gas from all the outlet points of the MEGAL gas pipeline. That is confirmed by an exchange of emails from 8 September 2003 referring to a meeting of 6 August 2003 and to a draft interim agreement stipulating that GDF and E.ON Ruhrgas could use the inlet and outlet points along the whole of the 'system'.

201 In that regard, it must be pointed out that the statement by E.ON Ruhrgas' employee was made in 2008 and remains vague as to the occasions on which it was stated that GDF had the right to take gas from the MEGAL gas pipeline. Although that employee refers specifically only to one meeting which took place in Essen (Germany) at the beginning of 2003, the applicants do not adduce any evidence which makes it possible to corroborate the holding of that meeting and do not specify either the dates of or the participants in the other discussions in the course of which E.ON Ruhrgas assured GDF that it could take gas from all the outlet points of the MEGAL gas pipeline in Germany. In those circumstances, the Commission cannot be criticised for giving more credence to other items of evidence in the case file which were not compiled *in tempore suspecto* (see, to that effect, Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 272) and which, moreover, are more specific. In addition, as the Commission points out, the statement by E.ON Ruhrgas' employee does not concern Appendix 2 to the MEGAL agreement.

202 Furthermore, the draft agreement referred to in paragraph 200 above provides that GDF and E.ON Ruhrgas have the right to use the inlet and outlet points along the whole of the MEGAL gas pipeline, provided that that does not affect the use of the relevant point by the party for which the point has been installed and provided that there is a reasonable capacity charge based on the relevant costs and that operational procedures for its common use have been agreed upon. That draft agreement was therefore to supersede the existing agreements concerning MEGAL entered into by the undertakings in question solely as regards that which was expressly provided for therein. In respect of anything which was not expressly provided for in the draft agreement, the existing agreements were to continue to apply. The proposed agreement was to enter into effect on 1 October 2003 and remain in force until the date on which the agreements implementing the restructuring became effective or until 30 September 2004.

203 The email exchange of 8 September 2003 states that that document is only a draft resulting from discussions at the meeting of 6 August 2003. Furthermore, the applicants admit that the draft interim agreement in question was never signed.

204 Read as a whole, it must be held that, far from stating that the undertakings in question took the view that GDF and E.ON Ruhrgas could already use all the outlet points from the MEGAL gas pipeline, those documents state only that the undertakings in question envisaged putting an end to the sharing of the outlet points from that gas pipeline between GDF and E.ON Ruhrgas. That is borne out by the fact that the draft agreement refers to the previous agreements as 'existing agreements' and provides that the provisions in those agreements which have not been expressly referred to by the draft agreement will continue to apply until a final agreement on the restructuring has been entered into or until September 2004. It cannot therefore be deduced from those documents that the undertakings in question took the view that the Direktion G and Direktion I letters were no longer in force.

205 Secondly, as regards the applicants' contention that the contact between the undertakings in question referred to by the Commission in recitals 87, 94, 115, 118, 121, 122 and 180 of the contested decision cannot prove that the agreement continued inasmuch as it has no connection with MEGAL, with the exception of two emails (see paragraphs 210 and 213 below), it must first of all be pointed out that that contention is not correct. GDF's 'briefing' note of 29 August 2003 states that GDF is concentrating on the areas of Germany which are capable of constituting an outlet for the gas which it produces in 'the Dutch [part of the] North Sea', but has not contemplated taking gas from the MEGAL gas pipeline in order to market it in the south of Germany, Ruhrgas' most developed market. Likewise, GDF Deutschland's business plan for Germany of 30 April 2004 refers to MEGAL a number of times. It contains a statement that the strengthening of GDF's presence in Germany will be achieved by the creation of a new plan with Ruhrgas which will allow GDF to use its interests in MEGAL to become a real transport operator in Germany and states that the success of the scenario is dependent on the possibility of having part of the quantities passed in transit through the MEGAL gas pipeline at its disposal in Germany before long.

206 Furthermore, even though the MEGAL agreement is not expressly referred to in the other documents mentioned in paragraph 205 above, it must be pointed out that they show that the undertakings in question had contact in the course of which they discussed strategic or sensitive issues and did not compete with the other undertaking on its national market or, at the very least, entered those markets in a voluntarily limited manner.

207 The Commission was therefore right to state that the undertakings in question had repeated contact in the course of which the competition between them was discussed, that they undertook not to adopt 'aggressive' conduct and that, in some circumstances, they were deeply concerned about cases in which such conduct was adopted (recital 114 of the contested decision).

208 In that regard, the applicants' argument that some of the documents contain only GDF's own reflections and relate to unilateral complaints or to disagreements between the undertakings in question cannot be upheld, inasmuch as it is not substantiated by the content of the documents. A number of documents, even though they were formulated unilaterally, are in actual fact minutes of meetings between the undertakings in question and do therefore show that there was contact between the undertakings regarding the conditions of competition. Furthermore, the existence of complaints or of disagreements does indeed show that the two undertakings entered into contact regarding each other's sales of gas.

209 Likewise, the fact that some of the information contained in the documents relating to merger and acquisitions activities was already known to specialist circles — even if it were established — is not relevant and is not therefore capable of casting doubt on the Commission's findings in the contested decision. In any event, it is apparent from the content of those documents that the Commission did not err in taking the view that they showed that the contact between the undertakings in question had given rise to exchanges regarding competition on the national markets.

210 As regards the email of 16 March 2004, it must be pointed out that, by that email, E.ON Ruhrgas' head of sales in France informed two of E.ON Ruhrgas' employees in Germany of a meeting which he had had with one of GDF's employees (who is one of his former classmates) on the gas release issue in

France and the possible interest of E.ON Ruhrgas and GDF's looking into solutions to enable 'reasoned competition'. It is apparent from that email that, although GDF did not want to seem to be afraid of the pressure from the national energy regulatory authority, it was not ignoring it and did not like to be too openly the subject of criticism and that therefore, if something could be done to show that new entrants could have access to the south of France, it would view it positively. It is also apparent from that email that, as GDF wished to satisfy that authority, its employee suggested a swap whereby GDF would make gas available to E.ON Ruhrgas in the south of France zone in return for something. In that regard, the employee contemplated tackling, according to the email, above all the issues concerning MEGAL. It is also apparent from that email that GDF's employee stated that, according to his knowledge of the MEGAL agreement, all of the existing MEGAL gas pipeline's capacity at Medelsheim was booked by GDF, with the result that in fact even the volumes which E.ON Ruhrgas was, at that time, importing were illegal.

211 The email of 16 March 2004, which was drafted *in tempore non suspecto*, unlike the statement made under oath by E.ON Ruhrgas' employee on which the applicants rely (see paragraph 201 above), thus unequivocally bears out the Commission's finding that there was a market-sharing agreement between the undertakings in question in March 2004.

212 None of the arguments put forward by the applicants appears to be capable of calling that finding into question. First, the argument that the employee of GDF referred to in the email of 16 March 2004 was not responsible either for the purchase or the sale of gas is not relevant in view of the explicit and detailed information which was exchanged at the meeting. Secondly, the alternative explanations provided by the applicants are not substantiated and do not correspond with the content of that email. The fact that the word 'illegal' is followed by three question marks and is preceded by the words 'according to his knowledge' is not sufficient for the view to be taken that there was a doubt as regards the fact of the market sharing.

213 As regards the minutes of the 'Tour d'horizon' meeting of 29 March 2004, it must be pointed out that, by those minutes, an employee of E.ON Ruhrgas gave an account of a meeting with representatives of GDF in the course of which they stated that GDF intended to participate in the GRP out of fear that Russian gas could fall 'into the wrong hands' and that additional competition could develop along the MEGAL gas pipeline. Although it is true, as the applicants point out, that those statements seem to relate more to competition by third parties than to competition between the undertakings in question, the fact none the less remains that it is apparent from that document that GDF and E.ON Ruhrgas wanted to control the quantities of gas sold 'along the MEGAL gas pipeline'.

214 In any event, even if that document had to be interpreted differently, that is not capable of calling the Commission's findings in that decision into question, inasmuch as a number of other items of documentary evidence state that the market-sharing agreement was still being implemented at the beginning of 2004, as is apparent from paragraphs 200 to 212 above.

215 It follows from all of the foregoing that the applicants' arguments claiming that the cartel in question ceased as from the beginning of 2003 must be rejected.

216 Fourthly, as regards the applicants' arguments that the alleged cartel ceased, at the very least, in August 2004, it must first of all be stated that the undertakings in question signed, on 13 August 2004, an agreement according to which they 'confirm … that they have long regarded' the Dirketion G and Direktion I letters as 'null and void' (see recital 104 of the contested decision).

217 The Commission nevertheless considered that that termination was fictitious, inasmuch as GDF continued to regard itself as bound by the Direktion G and Direktion I letters and Appendix 2 to the MEGAL agreement. Consequently, the Commission found, in recital 300 of the contested decision, that the contractual restriction in question ended, at the earliest, only at the end of September 2005. It took account of the fact that the interim agreement of 9 September 2005 allowed GDF to market carrying

capacities in the MEGAL gas pipeline as from 1 October 2005 and that the 2005 agreement entered into force on 13 October 2005. Furthermore, it stated, in the same recital, that, at the same time, GDF's sales of gas from that gas pipeline to customers established in Germany noticeably exceeded the amounts which it had purchased in the context of the GRP only as from October 2005. It therefore found that Article 81 EC applied given that the concerted practice continued beyond the termination of the earlier agreement and continued to produce its effects until the MEGAL agreement was replaced.

218 In that regard, it is necessary to distinguish the German market from the French market.

219 As regards the German market, it must be pointed out that the Commission refers, in recital 108 of the contested decision, to an article of 23 August 2004 from a specialist journal, which relates the remarks of GDF's sales manager in Germany and contains very specific information regarding the limits to GDF's possibilities of taking gas from the MEGAL gas pipeline. In that article, it is inter alia stated that GDF has not yet reached a definitive arrangement with E.ON Ruhrgas on the possibility of withdrawing gas from the MEGAL gas pipeline in Germany and that, at the time when that article was drafted, the possibilities for withdrawing gas were limited.

220 The evidence cited by the applicants, namely the minutes of the meeting of 23 June 2004 and the letter of 26 August 2004, which was formulated in reaction to the article of 23 August 2004, are not capable of casting doubt on the evidential value of that article, inasmuch as they are contradicted by other subsequent documents and by GDF's conduct on the market (see paragraphs 221 to 235 below). Moreover, although it is apparent from the letter of 26 August 2004 that E.ON Ruhrgas confirmed, on several occasions, that GDF could take gas from the MEGAL gas pipeline, it is also apparent from that letter that the precondition for that was the availability of capacity at the metering stations and that, at GDF's request, possibilities of expansion at the stations were examined, which shows that, in practice, GDF's possibilities for taking gas in Germany were still, at that time, to say the least limited. Lastly, as the Commission has stated, it is apparent from that document that E.ON Ruhrgas pointed out to GDF that a public depiction or discussion concerning the possibilities of taking gas from the MEGAL gas pipeline was not constructive, which shows that the objective pursued by E.ON Ruhrgas was above all to make GDF realise that it was preferable not to make public statements on the subject.

221 A number of documents subsequent to August 2004 thus show that the infringement on the German market continued.

222 First, in recital 111 of the contested decision, the Commission relied on an internal note of GDF's of January 2005 which stated that, for around three years, GDF's commercial activity had been focussed on the north-west regions of Germany and that, subsequently, the acquisition of lots at the auction of E.ON Ruhrgas in May 2004 had legitimised the active start of canvassing for business and marketing in the south in respect of the MEGAL gas pipeline. The Commission also referred to GDF's plan for development in Germany of 2 September 2005, from which it is apparent that, for contractual reasons, GDF could not take gas from the various outlet points of the MEGAL gas pipeline or directly market the carrying capacities which it possessed. The expected conclusion of a new contract with E.ON Ruhrgas in respect of the operation of the pipeline could change that situation.

223 As regards GDF's internal note of January 2005, the alternative interpretations provided by the applicants must be rejected inasmuch as they are in no way substantiated. On the contrary, the taking into account of the context, and in particular the earlier documents referred to in recital 102 of the contested decision, as well as GDF's plan for development in Germany of 2 September 2005, tends to confirm the Commission's interpretation that the legitimation referred to by GDF relates to the MEGAL agreement.

224 Nor can the applicants' arguments as regards GDF's plan for development in Germany of 2 September 2005 be upheld. The claims that the passage referred to was schematically copied from an earlier version and that the reference to 1 January 2004 has no meaning are not capable of calling the

evidential value of that document into question. On the contrary, the fact that the passage in question was used again even though other parts of the document had been updated shows that the position relating to the sale of gas in Germany through the MEGAL gas pipeline remained unchanged. Furthermore, it must be noted that the document is dated 2 September 2005, which does not therefore conflict with the date of cessation of the infringement in question used by the Commission.

225 It is also necessary to reject the applicants' argument that the fact that GDF continued to regard itself as bound by those agreements, as is apparent from the internal documents referred to in recital 111 of the contested decision, has no bearing on the first applicant which legitimately distanced itself from the cartel. As is apparent from the case-law cited in paragraph 182 above, GDF's internal documents may be used as evidence against the first applicant. In the present case, it is apparent from those documents and from GDF's conduct on the market that the cessation of the cartel was not genuine on the German market.

226 Secondly, the Commission referred, in recitals 123, 124 and 131 to 133 of the contested decision, to contact between the undertakings in question subsequent to August 2004. It refers in that regard to a number of documents which, even though they do not expressly mention the MEGAL gas pipeline, prove that the undertakings in question had contact regarding GDF's entry to the German market and E.ON Ruhrgas' complaints in that regard.

227 It is apparent inter alia from a note of GDF's of 9 February 2005 that E.ON Ruhrgas accused GDF of 'destroying' the value of gas in Germany and of benefiting from a price differential between the manufacturers' segment and the state-owned companies' segment in order to win new customers and that GDF took the view that it was necessary 'to work on that issue'. In a normal competitive context, an undertaking would not contemplate 'working' on the accusations of its competitor regarding its pricing practice. That therefore shows that GDF intended to address E.ON Ruhrgas' concerns.

228 In that regard, if an economic operator accepts another operator's complaints in connection with the competition to which the first operator's products expose the complainant, the conduct of the operators concerned amounts to a concerted practice (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 283). It must therefore be held that, by stating that it was going 'to work on that issue' relating to E.ON Ruhrgas' complaints concerning the prices it practised in Germany and by drawing up, following complaints by E.ON Ruhrgas concerning its pricing positioning in the context of sales to State-owned companies, a note in April 2005, GDF accepted those complaints within the meaning of that case-law, even though it took the view, as is apparent in particular from that note of April 2005, that it was necessary to place E.ON Ruhrgas' perception in context.

229 Likewise, GDF's preparatory note of 5 September 2005 concerning a meeting taking place the next day refers to E.ON Ruhrgas' complaints in respect of the prices proposed by GDF, which wonders how E.ON Ruhrgas obtained those prices, thus showing that GDF took E.ON Ruhrgas' complaints into account and reacted accordingly.

230 Consequently, having regard to the content of the documents referred to in paragraphs 227 to 229 above, the applicants' arguments that they concerned unilateral communications and complaints on the part of E.ON Ruhrgas to which GDF did not react cannot be upheld.

231 Lastly, as regards the documents relating to the meeting of 21 September 2005, in this case a 'briefing' note of 20 September 2005 prepared with a view to that meeting and an email of 22 September 2005 summarising the meeting, which are referred to in recitals 132 and 133 of the contested decision, it must admittedly be pointed out, as the applicants note, that they indicate that there were negotiations between a purchaser (E.ON Ruhrgas) and a supplier (GDF Deutschland). However, the fact remains that, as is apparent from the minutes of that meeting and as the Commission pointed out in recital 135 of the contested decision, GDF referred, at that meeting, to its own strategy and its success on the German market.

232 The Commission did not therefore err by taking into account the documents relating to the meeting of 21 September 2005 in finding that the exchange between the undertakings in question related more to the concerted practice than to competition.

233 Furthermore, the continuation of the infringement in Germany after August 2004 is borne out, as is apparent from recital 112 of the contested decision, by GDF's conduct on the market, inasmuch as it did not supply volumes of gas in excess of those provided for by the GRP to customers situated in the south of Germany.

234 The alternative explanations provided by the applicants as regards GDF's conduct on the market cannot call that finding into question. It is apparent from the case-law that proof of the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another, plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the Community competition rules had been infringed is relevant only if the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 186 and the case-law cited). That is not the case here, given that the Commission relies on numerous items of documentary evidence which the applicants have not, as is apparent from the foregoing, been able to prove devoid of evidential value.

235 In addition, the evidence referred to by the applicants conflicts with the contractual provisions of Appendix 2 to the MEGAL agreement which does not confer on GDF the right to take gas from the MEGAL gas pipeline in Germany unless the undertakings in question agree otherwise and there is nothing to permit the inference that, at that time, those provisions had been revoked or that those undertakings had formally agreed to amend them.

236 As the Commission stated in recital 107 of the contested decision, the 2004 agreement does not mention Appendix 2 to the MEGAL agreement, which the applicants concede. It is in fact clear from the wording of the 2004 agreement that it related to only some of the side letters and not to the other provisions of the MEGAL agreement.

237 Nor can the 2004 agreement be regarded as an agreement 'otherwise' within the meaning of point 2.1 of Appendix 2 to the MEGAL agreement. That it is to be regarded as such is not apparent from the wording of the 2004 agreement, and, what is more, it would have implied that new outlet points from the MEGAL gas pipeline which GDF could use would be defined in that agreement, which does not refer to any.

238 The possibility of orally revoking Appendix 2 to the MEGAL agreement conflicts with the necessity of defining new outlet points from the MEGAL gas pipeline referred to in paragraph 237 above. Likewise, the applicants' line of argument that that appendix was necessarily revoked given the statements in the documents of 23 June and 26 August 2004 cannot be upheld, inasmuch as, as is apparent from paragraphs 220 to 234 above, those documents did not serve to show that the infringement in question had ceased.

239 The applicants' line of argument relating to Appendix 2 to the MEGAL agreement must therefore be rejected.

240 In the light of all of the foregoing, the Commission was right to find that the infringement in question continued on the German market until 30 September 2005.

241 As regards the French market, it must be stated, as did the applicants, that, in the section of the contested decision dedicated to the examination of the date on which the infringement in question ended, namely recitals 299 to 309, the Commission did not adduce any evidence to support the conclusion that the infringement on that market continued following the 2004 agreement.

242 It must be stated, first of all, that there is no documentary evidence to attest to the continuation of the infringement in question after 13 August 2004, whether in the form of an agreement or of a concerted practice. The last document concerning the French market is E.ON Ruhrgas' internal 'briefing' note of 26 June 2004, relating to the 'Tour d'horizon' meeting of 2 July 2004, which is prior to 13 August 2004, the date of the 2004 agreement. As regards, more specifically, the meetings and exchanges during which, according to recital 307 of the contested decision, the undertakings in question discussed their respective strategies on each other's national markets after August 2004, it must be pointed out that the Commission does not refer, in that recital, to any specific item of documentary evidence relating to a meeting which concerned the French market. Furthermore, the documents relating to the meetings after 13 August 2004 referred to in recitals 123, 124 and 130 to 136 to that decision relate only to the German market for gas and not to the French market.

243 That lack of documentary evidence is moreover implicitly conceded by the Commission in its written pleadings since it states that the continuation of the infringement in France is to be inferred from the reciprocity of the market sharing and the absence of any sign of a cessation applicable exclusively to the French market.

244 Furthermore, the restrictions relating to the outlet points from the MEGAL gas pipeline which may apply to Ruhrgas in France, in particular those which may stem from Appendix 2 to the MEGAL agreement are not even referred to by the Commission. The Commission refers, in recitals 299, 300 and 307 of the contested decision, only to the contractual restrictions preventing GDF from using the outlet points from that gas pipeline in Germany to supply clients. In any event, the fact remains that, notwithstanding the provisions of Appendix 2 to the MEGAL agreement concerning E.ON Ruhrgas, that undertaking could take gas from the MEGAL gas pipeline to sell in France, even though those sales represented only a small share of the market and concerned only a small number of customers, as is apparent from recitals 73 and 101 of the contested decision.

245 Lastly, it must be pointed out that the Commission's statement, in recital 304 of the contested decision, that the fact that the undertakings in question negotiated a new agreement shows that they still felt bound by the existing agreement, or the Commission's statement that, in the absence of a new agreement, the old one was still in force, cannot be regarded as substantiating to the requisite legal standard its findings concerning the French market. Such statements cannot be regarded as sufficiently precise and consistent evidence that the infringement continued, in France, after the 2004 agreement.

246 It must therefore be held that, in the contested decision, the Commission did not adduce any evidence to support the conclusion that the infringement in question continued on the French market following the 2004 agreement.

247 Since Article 1 of the contested decision makes a distinction between the duration of the infringement on the German market and that on the French market, the Commission also had to substantiate its finding regarding the latter market. In other words, having differentiated, in Article 1, between the separate durations of the infringement on the German market and on the French market, the Commission had to provide the necessary evidence capable of proving to the requisite legal standard that the infringement existed on both of those markets and for both of the periods put forward. The burden of proof concerning the existence of the infringement and, therefore, its duration, falls upon it (see *JFE Engineering and Others* v *Commission*, paragraph 169 above, paragraph 341 and the case-law cited).

248 Those considerations are not called into question by the fact that the infringement constitutes a single and continuous infringement. That nature of the infraction found to exist has no bearing on the fact that, since the Commission deliberately referred, in the operative part of the contested decision, to separate durations of the infringement on the French market and on the German market, it was obliged to prove the durations thus established to the requisite legal standard.

249 Likewise, the Commission's argument that the prohibitions of deliveries were based on a reciprocal agreement must be rejected since, even if the prohibitions of deliveries had been based on a reciprocal agreement, such a factor is not, on its own, capable of proving that the infringement in question did not end, in spite of the 2004 agreement.

250 In the light of all of the foregoing, it must be held that the Commission has not provided documentary evidence of the infringement in question on the French market subsequent to the 2004 agreement.

– The conduct of the undertakings in question after the liberalisation of the markets for gas

251 It must be borne in mind that, according to settled case-law, the system of competition established by Articles 81 EC and 82 EC is concerned with the economic consequences of agreements, or of any comparable form of concertation or coordination, rather than with their legal form. Consequently, in the case of agreements which have ceased to be in force, it is sufficient, in order for Article 81 EC to apply, that they produce their effects beyond the date on which they formally come to an end. It follows that the duration of an infringement must be appraised not by reference to the period during which an agreement is in force, but by reference to the period during which the undertakings concerned adopted conduct prohibited by Article 81 EC (see Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 187 and the case-law cited).

252 As has been shown in paragraphs 169 to 245 above, the applicants' arguments seeking to show that the agreement in question ended prior to August 2004 in respect of the French market and September 2005 in respect of the German market cannot be upheld. In so far as the existence of the infringement and, as regards the German market, the continuation of the agreement in spite of its formal revocation are established by documentary evidence, it is not necessary to examine the conduct of the undertakings in question in respect of the abovementioned periods and markets. According to settled case-law, even if those undertakings had not implemented the agreement in question but had behaved autonomously after the liberalisation of the markets for gas, that would be irrelevant, because there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition within the common market (see Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 47 and the case-law cited). Furthermore, as was stated in paragraph 234 above, it is apparent from the case-law that proof of the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another, plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the Community competition rules had been infringed is relevant only if the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed.

253 By contrast, as regards the French market for gas after 10 August 2004, it is apparent from paragraphs 241 to 245 above that the Commission did not adduce, in the contested decision, any evidence capable of showing that the termination of the agreement was fictitious. Consequently, having regard to the case-law cited in paragraph 252 above, it is essential to ascertain whether, after the formal termination of the agreement, the Commission established that the effects on the French market continued.

254 In the contested decision, the Commission does not refer to E.ON's conduct on the French market to show that the cartel on that market continued. In particular, it did not refer to E.ON Ruhrgas' sales in France, although it did refer, in recital 300 of the contested decision, to GDF's sales in Germany.

255 Furthermore, it is apparent from the evidence provided by the applicants that E.ON Ruhrgas greatly increased its sales of gas in France in 2004/2005 (see in particular recital 73 of the contested decision). Consequently, even though the level of sales by E.ON Ruhrgas in France remained low in 2004 and 2005 and concerned a limited number of customers, it confirms the cessation of the infringement in question on the French market after August 2004.

256 It follows from the foregoing that the Commission has not proved to the requisite legal standard that the infringement in question continued after 10 August 2004 until 30 September 2005 in so far as it concerns the French market for gas.

257 The second plea must therefore be upheld in part and Article 1 of the contested decision must be annulled in so far as it finds that an infringement was committed in France from 13 August 2004 to 30 September 2005.

The third plea, alleging infringement of the principle of equal treatment

258 By the present plea, the applicants submit, in essence, that, by imposing a fine on them although it had not imposed a fine in previous similar cases (GDF/ENI and GDF/ENEL), the Commission infringed the principle of equal treatment.

259 In that regard, it must be pointed out that the purpose of Article 23(2) of Regulation No 1/2003 is to give the Commission the power to impose fines so as to enable it to carry out the task of supervision entrusted to it by European Union law (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 105, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 105). That task includes the duty to investigate and punish individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that the Commission must ensure that fines have a deterrent effect (Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 79).

260 Furthermore, it must be borne in mind that, according to settled case-law, the Commission's previous decision-making practice does not in itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 1/2003 and in the Guidelines (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 254 and the case-law cited). Consequently, decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see, to that effect, Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60).

261 Nevertheless, observance of the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified, is incumbent on the Commission when it imposes a fine on an undertaking for infringement of the competition rules, as it is on any institution in carrying out all its activities (see Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 187 and the case-law cited).

262 However, previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case (see, to that effect, *Archer Daniels Midland* v *Commission*, paragraph 201 above, paragraph 316 and the case-law cited).

263 In the present case, the facts of the case in the previous decisions relied on by the applicants are not comparable to those of the present case, with the result that those decisions are not relevant from the point of view of observance of the principle of equal treatment, in accordance with the case-law cited in paragraph 262 above.

264 First of all, the fact that the conduct concerned took place in the gas sector contemporaneously, in a period characterised by liberalisation and therefore by a profound change in the sector, is not capable, as such, of establishing that the circumstances of the cases GDF/ENI and GDF/ENEL are comparable to those of the present case.

265 Secondly, in GDF/ENI and GDF/ENEL, the Commission took into account the fact that it was the first decision concerning territorial restrictions in the gas sector. That is not the case here.

266 Furthermore, the restrictions concerned differ in nature. Those at issue in GDF/ENI and GDF/ENEL were vertical, in so far as they stemmed, first, from a transit contract and, secondly, from a contract which could be regarded as a transportation contract or as a contract of sale. Furthermore, it is apparent from the examination which the Commission carried out in those cases regarding the applicability of Article 81(3) EC that it itself viewed the restrictions as vertical restrictions. That is not the situation in the present case in which the restriction is horizontal, given that it concerns an agreement between two suppliers relating the use of a gas pipeline and relates to their respective possibilities of selling gas on each other's markets. In addition, GDF/ENI and GDF/ENEL differ from the present case, as the Commission pointed out, given that those cases related to a contractual clause unilaterally restricting the territory in which ENI and ENEL could use the gas which was the subject-matter of the contract, whereas that is not the situation in the present case, in which the restriction relates to the respective territories of the undertakings in question.

267 Lastly, contrary to the applicants' claims, it is apparent from the evidence in the documents before the Court (see in particular paragraph 191 above) that the parties to the agreement in question knew that their conduct was unlawful, at least as from the beginning of 2000. The applicants cannot therefore invoke their good faith in order to be treated like the undertakings concerned in GDF/ENI and GDF/ENEL, which did not know their conduct infringed competition law.

268 In view of the differences referred to above, the fact that the infringements concerned undertakings of a comparable size and identical or comparable Member States does not permit the inference that the situations were comparable.

269 In those circumstances, it must be held that, contrary to what the applicants claim, the conduct at issue in the present case and in GDF/ENI and GDF/ENEL are not comparable and do not have the same characteristics, with the result that that the plea alleging infringement of the principle of equal treatment must be rejected.

The fourth plea, alleging that the alleged infringements stemming from the 1975 agreements are time-barred

270 The applicants submit that, inasmuch as the Commission's power to impose fines is subject to a limitation period of five years and as that period was interrupted by the inspections carried out on 16 and 17 May 2006, only the facts subsequent to 16 May 2001 could be taken into account for the purpose of imposing a fine. They take the view that they have shown in connection with the second plea that the alleged infringements ceased just after the liberalisation of the markets for gas in April 1998 as regards Germany and in August 2000 as regards France.

271 As is apparent from the explanations relating to the second plea put forward by the applicants, the infringements in question came to an end in September 2005 as regards that committed in Germany and in August 2004 as regards that committed in France. The facts taken into account for the purposes of imposing a fine were not therefore time-barred at the time when the Commission carried out its inspections.

272 Consequently, the fourth plea put forward by the applicants must be rejected.

The fifth plea, alleging that the second applicant is not liable for the actions of the first applicant

273 The applicants submit that liability for the infringement in question cannot be attributed to the second applicant, inasmuch as, first, that applicant did not participate directly in the infringement and, secondly, the presumption that the parent company exercised a decisive influence over the conduct of its wholly-owned subsidiary has been rebutted.

274 The Court considers it expedient to examine the second head of claim.

275 In that regard, it must be borne in mind that, according to settled case-law, the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 58 and the case-law cited).

276 That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (*Akzo Nobel and Others* v *Commission*, paragraph 275 above, paragraph 59 and the case-law cited).

277 In the specific case where a parent company has a 100% shareholding in a subsidiary which has infringed the Community competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 275 above, paragraph 60 and the case-law cited).

278 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see *Akzo Nobel and Others* v *Commission*, paragraph 275 above, paragraph 61 and the case-law cited).

279 In that regard, account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case (see *Akzo Nobel and Others* v *Commission*, paragraph 275 above, paragraph 74).

280 That assessment should not be confined to matters relating solely to the subsidiary's commercial policy *stricto sensu*, such as the distribution or pricing strategy. In particular, merely showing that it is the subsidiary that manages those specific aspects of its commercial policy without receiving instructions is not sufficient to conclude that the subsidiary is independent. Nor, *a fortiori*, can it depend on whether the parent company has interfered in the day-to-day business of its subsidiary (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 275 above, paragraph 73 and the Opinion of the Advocate-General in that case, ECR I-8241, points 87 to 94).

281 In the present case, in recitals 280 and 281 of the contested decision, the Commission took the view that E.ON should be regarded as having exercised a decisive influence and effective control over E.ON Ruhrgas, since E.ON Ruhrgas was wholly owned by E.ON and E.ON had not rebutted the presumption provided for by the case-law cited in paragraph 277 above.

282 In that regard, it must be pointed out that it is common ground that E.ON has held all the capital in E.ON Ruhrgas since 2003. The applicants submit that they have rebutted the presumption, inasmuch as E.ON is merely a holding company and does not have any operational activity of its own.

Furthermore, they submit that the fact that, at the meeting of 27 May 2004, the chairman of E.ON's Board of Directors admitted that he did not know about the restructuring of the contractual framework relating to the MEGAL gas pipeline shows the lack of influence of the parent company on the commercial policy of the subsidiary.

283 As regards the applicants' claim that E.ON is a holding company which does not interfere in E.ON Ruhrgas' operational activity, it must be pointed out that that fact alone is not sufficient to rule out the possibility that it exercised a decisive influence over that subsidiary. In the context of a group of companies, a holding company is a company which holds shareholdings in various companies and whose function is to ensure that they are run as one (see, to that effect, Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 63).

284 According to the applicants, E.ON's Board of Directors is responsible for 'the management of E.ON as an integrated energy undertaking' and '[that] includes strategic development, financing policy and measures, the general management of the entire business on the market, risk management and the regular optimisation of the portfolio'. Those statements therefore confirm that E.ON's function was to ensure the undertakings were run as one and coordinated in such a way as to have an influence over E.ON Ruhrgas' conduct in the market.

285 Furthermore, in view of the applicants' statements referred to in paragraph 284 above, in particular the statement that E.ON is responsible for the general management of the entire business on the market, the fact that the chairman of the E.ON's Board of Directors did not know the details of the restructuring of the contractual framework relating to the MEGAL gas pipeline is not sufficient to establish Ruhrgas' independence on the market, inasmuch as it is only a one-off and particularly technical factor.

286 Furthermore, it is apparent from the minutes of the meeting of 27 May 2004 that, although the chairman of the Board of Directors did not know the details of the restructuring, he nevertheless knew of the fact that GDF wanted to sell gas from the MEGAL gas pipeline in Germany. That constitutes additional evidence of the parent company's interest in the commercial issues relating to the activity of its subsidiary.

287 It follows that the applicants' second head of claim, relating to a rebuttal of the presumption that the parent company exercised a decisive influence over the conduct of its wholly-owned subsidiary, must be rejected inasmuch as it has not been established that the subsidiary decided independently on its conduct on the market. There is no need to examine the Commission's argument that those documents are inadmissible because they were produced for the first time before the General Court.

288 Inasmuch as liability for the infringement could be attributed to E.ON on account of its position as the parent company owning all the shares in E.ON Ruhrgas, the first head of claim must be rejected as ineffective since, even if it were to be allowed, it would not call into question the liability for the infringement.

289 In any event, as regards the first head of claim put forward by the applicants, it must be pointed out that, in recital 280 of the contested decision, the Commission stated that E.ON had participated directly in the infringement as from 2003, the time at which it took over E.ON Ruhrgas and was directly involved in the activities of that undertaking. In support of that statement, it refers to a meeting of 27 May 2004 between GDF and the chairman of the Board of Directors of E.ON in the course of which the latter complained of the aggressive conduct of GDF in Germany and assured GDF that E.ON did not wish to penetrate the French market in an aggressive manner.

290 The applicants claim that that meeting does not show that E.ON participated directly in the infringement, inasmuch as, first, that meeting cannot constitute an independent infringement of Article 81 EC and, secondly, the Commission erred in its assessment of the content of the meeting, in so far as it did not concern the MEGAL gas pipeline, but E.ON's acquisition strategies.

291 Although it is true that the Commission did not claim that the meeting of 27 May 2007 was an independent infringement of Article 81 EC, it is however apparent from the minutes of that meeting that the chairman of E.ON's Board of Directors stated that 'the western boundary to E.ON's intervention in continental Europe [was] the western border of Germany: no marked interest in France or Spain', but that '[b]y contrast, there [was] interest in Italy and Switzerland'. Nothing in the content of those minutes or in the context thereof permits the inference, made by the applicants, that those statements related to mergers or acquisitions activities.

292 On the contrary, the preceding information referred to in the minutes of the meeting of 27 May 2004 relates to the commercial strategy of the undertakings, in particular to that of GDF, the conduct of which on the German market continued to be perceived as aggressive and dangerous, as is apparent from recital 121 of the contested decision.

293 Consequently, the applicants' arguments cannot be accepted.

294 In the light of all of the foregoing, the Commission was right to find that the conduct of E.ON Ruhrgas could be attributed to its parent company, E.ON. Consequently, the fifth plea put forward by the applicants must be rejected.

2. The heads of claim seeking a reduction in the amount of the fine

295 In support of their head of claim seeking a reduction in the amount of the fine, the applicants put forward a single plea alleging that the calculation of the amount of the fine is incorrect.

296 The applicants claim that the Commission erred in the calculation of the fine inasmuch as the infringement in question on the French market had ceased in August 2004 and not in September 2005. The fine which was imposed on them should therefore be reduced as a result. In the reply, they state that, in any event, the Commission should not, in calculating the amount of the fine, have taken account of the first applicant's turnover after 2004.

297 As is apparent from the examination of the second plea, the Commission has not established to the requisite legal standard that the infringement in question continued after 13 August 2004 until 30 September 2005 in so far as it relates to the French market for gas.

298 The contested decision must therefore be varied to take account, in ascertaining the final amount of the fine to impose on the applicants, of the duration of the infringement committed on the French market, in this case from 10 August 2000 (see paragraph 93 above) to 13 August 2004 (see paragraph 257 above). The Court further takes the view that there is in this case no public policy ground which it is required to raise of its own motion (see, to that effect, Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 131) to justify a reduction in the amount of the fine imposed on the applicants.

299 In that regard, if the method used by the Commission in setting the amount of the fine, as stated in recitals 339 and 358 to 391 of the contested decision, is applied, namely (initial percentage applied to the average annual sales in France x duration of the infringement in France) + (percentage of the additional amount applied to the average annual sales in France) + (initial percentage applied to the average annual sales in Germany x duration of the infringement in Germany) + (percentage of the additional amount applied to the average annual sales in Germany), using the corrected figure for the duration of the infringement in France (4 years instead of 5.5) and the average sales in relation to the infringement on the French market in order to take account of the partial annulment of the contested decision by the Court, the amount of the applicants' fine should be EUR 267 million.

300 However, it must be borne in mind that the unlimited jurisdiction conferred on the Court by Article 31 of Regulation No 1/2003, in application of Article 229 EC, empowers the Court not only to carry out a simple review of the lawfulness of the penalty - which allows the Court only to dismiss the action for annulment or to annul the contested measure - but also to substitute its own appraisal for the Commission's and, consequently, to vary the contested measure - even without annulling it - in light of all the factual circumstances, by amending the fine imposed where the question of the amount of the fine is before it (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 61 and 62, and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 86 and the case-law cited).

301 In that regard, it should be observed that the Court is not bound by the Commission's calculations or by its Guidelines when it adjudicates in the exercise of its unlimited jurisdiction (see, to that effect, *BASF and UCB* v *Commission*, paragraph 251 above, paragraph 213 and the case-law cited), but must make its own appraisal, taking account of all the circumstances of the case.

302 In the present case, the Court takes the view that the application of the method followed by the Commission in setting the fine, as set out in paragraph 299 above, does not take into account all the relevant circumstances.

303 The consequence of the application of that method to the corrected figures concerning the duration of the infringement in France and the average sales in connection with the infringement on the French market during that period would entail a reduction in the applicants' fine which is greatly disproportionate to the relative importance of the error which has been found to exist. Although the Commission's error relates only to the French market and only to 12 and a half months of the five years and one month initially established by the Commission for the infringement committed on that market, the application of the Commission's method would result in a reduction in the fine of more than 50%.

304 What is more, the application of the Commission's method would, in setting the amount of the fine, underestimate the relative importance of the infringement committed on the German market in comparison with that committed on the French market.

305 Consequently, having heard the parties at the hearing on the possible consequences, as regards the amount of the fine, of a partial annulment of the contested decision so far as concerns the determination of that amount in the light of the duration of the infringement, and in view of all the foregoing considerations, in particular paragraphs 303 and 304 above, the final amount of the fine imposed on the applicants must, in the light of all the circumstances of the case, in particular the duration and the gravity of the infringement, be set at EUR 320 million.

Costs

306 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the General Court may order that the costs be shared or that each party bear its own costs.

307 In view of the fact that each party has been partially unsuccessful, it must be held that each party shall bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **annuls Article 1 of Commission Decision C(2009) 5355 final of 8 July 2009 relating to a proceeding under Article 81 [EC] (Case COMP/39.401 — E.ON/GDF), first, inasmuch as it found that the duration of the infringement was from 1 January 1980 until at least 24 April 1998 as regards the infringement committed in Germany and, secondly, inasmuch as it found that an infringement was committed in France from 13 August 2004 to 30 September 2005;**

2. **sets the amount of the fine imposed on E.ON Ruhrgas AG and E.ON AG in Article 2(a) of Decision C(2009) 5355 final at EUR 320 million;**

3. **dismisses the action as to the remainder;**

4. **orders each party to bear its own costs.**

Papasavvas Vadapalas O'Higgins

Delivered in open court in Luxembourg on 29 June 2012.

[Signatures]

Table of contents