

EN

38.899



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 24/01/2007
C(2006) 6762 final

COMMISSION DECISION

of

**relating to a proceeding under Article 81 of the EC Treaty
and Article 53 of the EEA Agreement**

Case COMP/F/38.899 – GAS INSULATED SWITCHGEAR

(ONLY THE ENGLISH, FRENCH, GERMAN AND ITALIAN TEXTS ARE AUTHENTIC)

(Text with EEA relevance)

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COMMISSION DECISION

of 24 January 2007

**relating to a proceeding under Article 81 of the EC Treaty
and Article 53 of the EEA Agreement**

Case COMP/F/38.899 – GAS INSULATED SWITCHGEAR

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7(1) and Article 23(2) thereof,

Having regard to the Commission decision of 20 April 2006 to initiate proceedings in this case,

Having given the undertakings and associations of undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions³,

Having regard to the final report of the Hearing Officer in this case⁴,

Whereas:

¹ OJ L 1, 4.1.2003, p.1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p.1).

² OJ L 123, 27.4.2004, p. 18.

³ OJ [...], [...], p. [...].

⁴ OJ [...], [...], p. [...].

A. Introduction

1. ADDRESSEES

(1) This Decision is addressed to the following companies:

- ABB Ltd.
- ALSTOM (Société Anonyme)
- AREVA SA
- AREVA T&D AG
- AREVA T&D Holding SA
- AREVA T&D SA
- Fuji Electric Holdings Co., Ltd
- Fuji Electric Systems Co., Ltd.
- Hitachi Ltd.
- Hitachi Europe Ltd.
- Japan AE Power Systems Corporation
- Mitsubishi Electric Corporation
- Nuova Magrini Galileo S.p.A.
- Schneider Electric SA
- Siemens AG
- Siemens Aktiengesellschaft Österreich
- Siemens Transmission & Distribution Ltd.
- Siemens Transmission & Distribution SA
- Toshiba Corporation
- VA TECH Transmission & Distribution GmbH & Co KEG

2. SUMMARY OF THE INFRINGEMENT

(2) The addressees of this Decision participated in a single and continuous infringement of Article 81 of the Treaty and, from 1 January 1994, Article 53 of the Agreement on the European Economic Area (hereinafter 'EEA Agreement'), covering the EEA territory, by which they agreed as regards the sale of Gas Insulated Switchgear ('GIS') projects on the following:

- (a) the sharing of markets;
- (b) the allocation of quotas and maintenance of the respective market shares;
- (c) the allocation of individual GIS projects to designated producers and manipulation of the bidding procedure for those projects (bid-rigging) in order to ensure that the assigned producers were awarded the contract in question;
- (d) the fixing of prices by means of complex price arrangements for projects which were not allocated;
- (e) the termination of license agreements with non cartel members;
- (f) the exchange of sensitive market information.

- (3) The cartel was worldwide in scope, although certain territories were excluded, and lasted from 15 April 1988 until 11 May 2004.

3. WORLDWIDE MARKET VALUES

- (4) The annual worldwide market value of the product concerned by this Decision was approximately EUR 1700-2300 million during the years 2001-2003. The EEA market value amounted to EUR 320 million in 2003.

B. The industry subject to the proceeding

4. THE INDUSTRY FOR GAS INSULATED SWITCHGEAR PROJECTS

4.1. The product

- (5) Gas-insulated Switchgear (GIS) is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power substations.
- (6) Substations are auxiliary power stations where electrical current is converted. A substation has the primary function of electricity transformation. In addition to the transformer, other essential components for substations are control systems, relays, batteries, chargers and switchgear. The function of switchgear is to protect the transformer from overload and/or insulate the circuit and the faulted transformer.
- (7) Insulation of switchgear may be through gas, air or some combination of the two ('hybrid switchgear'). Therefore, to a limited degree, GIS faces competition from air-insulated switchgear (AIS) and hybrid switchgear. AIS is technically much less sophisticated and significantly less expensive than GIS (AIS costs are at approximately 30% of the GIS cost). GIS is sold internationally, although in the USA, Canada and South America, the AIS solution is predominantly used, while in Europe, the Middle East and Asia, GIS is generally favoured.
- (8) GIS is sold both as forming already part of turnkey power substations or as loose equipment which has to be integrated into a turnkey power substation. This main component of a substation accounts for approximately 30 to 60% of the total price of a substation. No other components of the substation have such a substantial impact on the final price of the substation.
- (9) This procedure concerns GIS projects involving a voltage from 72,5 kV onwards. For the purposes of this Decision, the term 'GIS project' refers to both:
- (a) GIS as a stand-alone product, including all associated services (transport, erection, testing, insulation etc.), and

- (b) GIS based turnkey power substations, including GIS and other parts of the substation such as transformers⁵, and all associated services (transport, cabling, erection, insulation etc.).

4.2. The undertakings subject to the proceedings

4.2.1. ABB

- (10) ABB Ltd. is a publicly quoted Swiss company. The company was formed in January 1988 following the merger of ASEA AB, of Sweden and BBC Brown Boveri Ltd of Baden, Switzerland. ABB Ltd's main activities are in power and automation technologies.
- (11) ABB Ltd's business address is Affolternstrasse 44, PO Box 8131 CH-8050 Zurich Switzerland.
- (12) ABB Ltd's global annual turnover is EUR 18 038 million (2005) and it employs approximately 102 000 people.

ABB Ltd's structure

- (13) ABB Ltd's two main divisions are its Power Technologies division and its Automation Technologies division. The former is involved in producing transformers, medium-voltage products, high-voltage products (switchgear are in both medium and high-voltage), power systems and utility automation. The latter division is involved in the development and production of automation ('robot') technologies.
- (14) Within the ABB group, a division called BAPT-HV manufactures GIS and sells them on a stand alone basis. It also produces GIS for another division BAPT-PS which sells them as a part of turnkey stations.
- (15) The entities referred to in recitals (13) and (14) will hereinafter be jointly referred to as 'ABB'. [...]⁶

4.2.2. ALSTOM

- (16) ALSTOM (Société Anonyme) is a limited liability company ('société anonyme à conseil d'administration') which is the holding company of the ALSTOM Group. The ALSTOM Group is currently active in power generation and power services, power conversion, rail transport as well as shipbuilding and marine systems. On 8 January 2004, it divested its GIS business.
- (17) ALSTOM's business address is 3, Avenue André Malraux – 92309 Levallois-Perret Cédex, France.

⁵ Transformers and the other components of turnkey power substations are also sold separately.

⁶ Throughout the decision, '[...]' signifies a passage, which was removed for publication purposes by the Commission.

- (18) ALSTOM's global annual sales were EUR 13 413 million in 2005 (EUR 21 400 million in 2003, the last full financial year before its divestiture of the GIS business) and it employs approximately 77 000 people.
- (19) ALSTOM, then called Alsthom, was established in France in 1928. The company was involved in the production of all types of industrial, electrical equipment and the supply and distribution of electric power. In December 1989 GEC Alsthom NV was formed as result of a merger of the power and transportation businesses of Alcatel Alsthom of France and GEC of the United Kingdom. In 1996 GEC Alsthom NV acquired the transmission and distribution activities of AEG in Germany. In June 1998 GEC Alsthom became a publicly-quoted company after its flotation on the Paris, London and New York stock exchanges, and was renamed ALSTOM.

ALSTOM's structure

- (20) The ALSTOM group's GIS activities in France were carried out by Alsthom SA (France) until 1989 when its name was changed into GEC Alsthom SA, a 100% subsidiary of GEC Alsthom NV. On 16 November 1992 a 'société anonyme' was created, Kléber Eylau, to which the French GIS activities were transferred by an agreement of 7 December 1992 (retroactively approved on 5 February 1993). Kléber Eylau was owned by GEC Alsthom SA (99,76%) and Etoile Kléber (0,04%). In June 1993 Kléber Eylau's name was changed to GEC Alsthom T&D SA which became in June 1998 ALSTOM T&D SA. ALSTOM T&D SA was a 100% subsidiary of ALSTOM Holdings (France), which was in turn a 100% subsidiary of ALSTOM (Société Anonyme). On 8 January 2004 ALSTOM T&D SA was purchased by AREVA (AREVA T&D SA is now a 100% subsidiary of AREVA T&D Holding SA, which in turn is a 100% subsidiary of AREVA SA), thereby changing its name into AREVA T&D SA.
- (21) As from January 1986 ALSTOM's GIS activities in Switzerland were operated in parallel to those in France, when Sprecher Energie AG (an entity involved in the production and commercialisation of GIS) became Alsthom SA's wholly owned subsidiary. In November 1993 Sprecher Energie AG's name was changed to GEC Alsthom T&D AG, which became in July 1997 GEC Alsthom AG and in June 1998 ALSTOM AG. On 22 December 2000 ALSTOM AG was acquired by ALSTOM Power (Schweiz) AG. The new entity was called ALSTOM (Schweiz) AG. In November 2002 ALSTOM created a new legal entity called ALSTOM (Schweiz) Services AG in which the transmission and distribution (hereinafter 'T&D') activities were placed on 22 December 2003 and which was renamed ALSTOM T&D AG on that same day. On 9 January 2004 the name ALSTOM T&D AG was changed to AREVA T&D AG after it was purchased by AREVA SA. AREVA T&D AG is now a 100% subsidiary of AREVA T&D Holding SA, which in turn is a 100% subsidiary of AREVA SA.
- (22) The entities referred in recitals (20) and (21) that operated under the control of ALSTOM and its predecessors and these entities themselves will hereinafter be jointly referred to as 'ALSTOM' [...]

4.2.3. AREVA

- (23) AREVA T&D SA and AREVA T&D AG are subsidiaries of AREVA SA which bought the two entities on 8 January 2004 from ALSTOM. AREVA T&D SA is the former ALSTOM T&D SA and AREVA T&D AG is the former ALSTOM T&D AG.
- (24) AREVA SA's business address is 33, rue Lafayette, 75422 Paris Cédex 09, France.
- (25) AREVA SA's global annual sales were EUR 10 124 million (2005) and it employs approximately 70 000 people.
- (26) AREVA's energy business is organized into four divisions covering the nuclear power cycle (front end division, reactors and services division, back end division) and, finally, the electricity transmission and distribution division, which is involved in the GIS business. AREVA also has a connector division (design and manufacture of electrical, electronic and optical connectors, flexible microcircuits and interconnection systems).
- (27) The entities AREVA SA, AREVA T&D Holding SA, AREVA T&D SA and AREVA T&D AG will hereinafter be jointly referred to as 'AREVA' [...]

4.2.4. *Fuji*

- (28) Fuji Electric Holdings Co., Ltd. manufactures and markets a wide range of products including information control systems, substations, automation system components, electronic devices and machines.
- (29) Fuji Electric Holdings Co., Ltd.'s business address is Gate City Osaki, East Tower 11-2, Osaki 1-Chome, Shinagawa-Ku, Tokyo 141-0032, Japan.
- (30) Fuji Electric Holdings Co., Ltd.'s global annual sales were EUR 6 556 million (2005) and it employs about [...] people worldwide.

Fuji's structure

- (31) Fuji Electric Holdings Co., Ltd presides over four operating companies, Fuji Electric Systems, Fuji Electric FA Components & Systems, Fuji Electric Device Technology and Fuji Electric Retail Systems.
- (32) Fuji's GIS activities were carried out by, inter alia, Fuji Electric Holdings Co., Ltd and Fuji Electric Systems Co, Ltd. (now a 100% subsidiary of Fuji Electric Holdings Co., Ltd.). These entities will be referred to in this Decision as 'Fuji'.
- (33) In October 2002, Fuji moved its GIS business to Japan AE Power Systems Corporation, a joint venture in which it has a 30% stake (Hitachi Ltd (50%) and Meidensha Corporation (20%) have the remainder).
- (34) [...]

4.2.5. *Hitachi*

- (35) Hitachi Ltd. is the ultimate parent company of a group that consists of 18 publicly owned group companies. It was created in 1910. Hitachi Ltd. holds 100% of the shares

of Hitachi Europe Limited. These entities will be referred to together in this Decision as 'Hitachi'.

(36) Hitachi's Ltd.'s business address is 6-6, Marounichi 1 chrome, Chiyoda-ku, Tokyo, 100-8010 Tokyo, Japan.

(37) Hitachi's global sales were EUR 69 161 million (2005). It has approximately 326 000 employees.

Hitachi's structure

(38) Hitachi Europe Limited is a wholly owned subsidiary of Hitachi Ltd.

(39) In October 2002, Hitachi moved its GIS business to Japan AE Power Systems Corporation (see recital (41) below), a joint venture in which it has a 50% stake (with Fuji (30%) and Meidensha (20%) having the remainder).

(40) [...]

4.2.6. JAEPS

(41) Japan AE Power Systems Corporation (hereinafter JAEPS) exists since 2001. It is a joint venture between Hitachi Ltd. (50% owner), Fuji Electric System Co. Ltd (FES, a 100% subsidiary of Fuji Electric Holding Co. Ltd, 30% owner); and Meidensha Corporation (20% owner). On 1 October 2002 it acquired the transmission and distribution businesses (not the legal entities themselves involved in GIS) of Hitachi, Fuji Electric and Meidensha.

(42) JAEPS' business address is Landic Shimbashi building, 8-3, Nishi-Shimbashi 3-chome, Minato-ku, Tokyo, 105-0003, Japan.

(43) JAEPS' global sales were EUR 511 million in 2003 and it employed approximately 1400 people.

(44) [...]

4.2.7. Melco

(45) Mitsubishi Electric Corporation (hereinafter Melco) has been active on the GIS market from at least 1988. From October 2002, its T&D business was operated through its joint-venture with Toshiba, TM T&D. After the dissolution of TM T&D (30 April 2005), Melco continued its activities in the GIS business. Melco produces energy and electric systems, electronic devices, industrial automation systems, home appliances and information and communication systems.

(46) Melco's business address is 2-7-3, Marunouchi, Chiyoda-ku, Tokyo 100-8310, Japan.

(47) Melco's annual sales were EUR 26 336 million (2005) and it had approximately 100 000 employees.

(48) [...]

4.2.8. Schneider

- (49) Schneider Electric SA and its legal predecessor called Schneider SA, have been active in electricity and automation management since before 1988.
- (50) The Schneider group exists since 1836. At the time it was active in the field of armament, iron and steel industry, heavy machinery and ship building. It moved into electricity at the end of the 19th century. After the Second World War, Schneider progressively disposed of its armaments production and turned to construction, iron and steel works and electricity.
- (51) Schneider Electric SA's business address is 43-45, boulevard Franklin Roosevelt, 92500 Rueil-Malmaison – France.
- (52) Schneider Electric SA's global annual sales were EUR 11 679 million (2005). It employed approximately 84 866 people.

Schneider's structure

- (53) Before 13 March 2001, Schneider Electric SA owned 100% of the shares of Schneider Electric High Voltage SA (SEHV) and Nuova Magrini Galileo S.p.A., both active in the GIS business.
- (54) SEHV was created in 1999 and took over the high voltage business, including GIS, from former constellations of subsidiaries which were wholly owned by Schneider SA since 1992. Schneider SA was renamed Schneider Electric SA in 1999. In 1988, Schneider SA held a 51% share in Merlin Gerin, which operated the GIS activities and which owned a 100% share in Nuova Magrini Galileo S.p.A. The participation of Schneider SA in Merlin Gerin grew progressively to reach 100% in 1992, when the GIS activities and assets were absorbed by Schneider SA.
- (55) On 13 March 2001 a joint venture between VA Technologie AG and Schneider Electric SA was created. VA TECH Transmission Holding was renamed VA TECH Schneider High Voltage GmbH, (hereinafter VAS) and Schneider Electric SA became its 40% shareholder. VA TECH (see 4.2.12 VA Technologie) held a controlling share of 60% via a capital increase. Schneider contributed Schneider Electric High Voltage SA and Nuova Magrini Galileo S.p.A, which became VAS's wholly owned subsidiaries. In August 2004 VA TECH took over Schneider's participation in VA TECH Schneider High Voltage GmbH, after which it was renamed to VA TECH T&D GmbH.
- (56) [...]

4.2.9. Siemens

- (57) Siemens AG (hereinafter Siemens) is a publicly traded multinational company active in electrical engineering and electronics (information and communications, automation and control, power, transportation, medical, and lighting). Siemens was established in

1847 as a precision-engineering workshop. The company concentrated on electrical engineering through its steady growth. It acquired VA TECH in 2005⁷.

(58) Siemens' business address is Wittelsbacherplatz 2, D-80333 Munich, Germany.

(59) Siemens' annual global sales were EUR 75 445 million (2005). It has approximately 434 000 employees.

(60) [...]

4.2.10. TM T&D

(61) TM T&D Corporation (hereinafter TM T&D) was a 50/50 joint venture between Toshiba and Melco. It was responsible for the production and sales of GIS. It started operations on 1 October 2002. Its owners each assigned half of the board of directors.

(62) TM T&D was dissolved on 30 April 2005. Assets have been acquired by the parent companies.

(63) [...]

4.2.11. Toshiba

(64) Toshiba Corporation (hereinafter Toshiba) has been active on the GIS market at least since 1988. From October 2002, its T&D business was operated through its joint-venture with Melco, TM T&D. After the dissolution of TM T&D (30 April 2005), Toshiba continued its activities in the GIS business.

(65) Toshiba's address is: 1-1, Shibaura 1-chome, Minato-ku, Tokyo 105-8001, Japan

(66) Toshiba's annual turnover was EUR 46 353 million (2005). It has 165 000 employees.

(67) Toshiba was the product of a merger between electrical engineering businesses in 1939. The merged entity changed its name into Toshiba in 1984. Toshiba is primarily active in three key domains: digital products, electronic devices and components, and infrastructure systems. Other businesses include consumer products (digital home products and home appliances, etc.).

(68) [...]

4.2.12. VA Technologie

(69) VA Technologie AG was founded in 1993 following a merger between Austria Energy, VAI, ELIN Energieanwendung, ELIN Energieversorgung, EBG and VOEST-ALPINE MCE. VA Technologie AG was merged into Siemens Aktiengesellschaft Österreich with effect from 27 May 2006. VA Technologie AG thus ceased to exist as a legal entity.

(70) Siemens Aktiengesellschaft Österreich's business address is Siemensstrasse 92, 1210 Vienna, Austria.

⁷

See Commission Decision of 13 July 2005 in Case COMP/M.3653 – Siemens/VA Tech

- (71) Siemens Aktiengesellschaft Österreich's worldwide annual sales were EUR 4 073 million (2005). It employs approximately 16 500 employees.

VA Technologie's structure

- (72) VA Technologie AG (now Siemens Aktiengesellschaft Österreich) had four principal divisions: metallurgy (VAI), power generation (VA TECH Hydro), Transmission and Distribution (VA TECH T&D) and infrastructure (VA TECH Elin EBG, VA TECH WABAG and ai informatics).
- (73) VA Technologie AG was 100% owner of VA TECH Transmission & Distribution GmbH & Co KEG. This entity was in turn the 60% owner of VA TECH Schneider High Voltage GmbH (hereinafter 'VAS') which was established in March 2001. This share should be seen as a controlling share: VA Technologie AG's approval was required for VAS's annual business plan and budget; VAS's projects in 'risk countries' required the approval of VA TECH's management board; and changes in compensation of VAS's managing company officers required approval by VA Technologie AG's Supervisory Board and Management Board. In August 2004 VA TECH took over Schneider's participation in VAS, after which it was renamed VA TECH T&D GmbH. On 22 July 2006, VA TECH T&D GmbH ceased to exist as a legal entity when it was absorbed by Siemens Aktiengesellschaft Österreich (former VA Technologie AG).
- (74) VAS was a 100% parent company to among others:
- (a) VA TECH Transmission & Distribution Ltd. (now renamed Siemens Transmission & Distribution Ltd., this entity was originally called NEI Reyrolle Ltd.) which was acquired by Rolls Royce as Reyrolle Ltd. under which name VA TECH acquired it on 20 September 1998. After its acquisition, the entity's name became VA TECH Reyrolle Ltd until 2002 when it changed into its current name; this entity will be referred to as 'Reyrolle' in this Decision.
 - (b) VA TECH Schneider Transmission & Distribution SA (now renamed Siemens Transmission & Distribution SA., which used to be Schneider Electric High Voltage SA until 2002 and which was brought into the Joint Venture on 13 March 2001 by Schneider)
 - (c) Nuova Magrini Galileo S.p.A. (hereinafter 'Magrini') (this entity was brought into the Joint Venture on 13 March 2001 by Schneider).
- (75) The entities referred to in recitals (73)-(74) will be jointly referred to either as VA TECH or as VAS when appropriate.
- (76) [...]
- (77) In 2005, the VA Technologie group was acquired by Siemens⁸.

⁸

Commission Decision of 13 July 2005 in Case COMP/M.3653 – Siemens/VA Tech

4.3. Supply of GIS projects

- (78) In 2004, the major global producers of GIS projects were ABB, AREVA, Siemens, VA TECH, JAEPS and TM T&D⁹. These six suppliers are present in the EEA and in most parts of the world where gas technology is predominantly used for switchgear insulation (the Southeast Asia, the Middle East, and North Africa). The Commission concluded on 13 July 2005 in the Siemens/ VA TECH merger Decision, that the geographical scope of the GIS projects market is at least EEA wide¹⁰. In fact, the major GIS suppliers sell GIS not only in their own home markets but all over the world. European and Japanese suppliers sell GIS projects, inter alia, in South East Asia, the Middle East, North Africa and Latin America. Moreover, European suppliers sell GIS projects in most European countries.
- (79) Gas insulated switchgear is sold both as loose equipment and as part of turnkey power substation projects. The major GIS producers worldwide have the capacities to design, manufacture, supply, install, test, and commission substations and/or substation components in GIS technology for all voltages and power capacities. Minor players who do not have these capacities cannot be considered as significant competitors.
- (80) The GIS manufacturers characteristically undertake the implementation, but may also use other sub-contractors for the installation of the equipment.
- (81) Beside the GIS manufacturers, so-called ‘general contractors’, who do not produce (they source this equipment from the GIS manufacturers), act as distributors on the market.
- (82) The parties involved in the proceedings in this case are the main GIS producers worldwide and are active in the distribution and installation of GIS projects.

4.4. Demand for GIS projects

- (83) Turnkey power substations are highly specialised and, therefore, custom made products. Customers normally specify their needs and ask potential suppliers to make a bid. The main customers for GIS projects are state owned public utilities, municipalities and, to a minor extent (around 25%), also private companies. Since the majority of GIS projects’ customers are publicly owned, most of the trade in GIS is realised by means of public procurement.
- (84) The largest market for high voltage switchgear is that of the USA. This market concerns mostly air-insulated switchgear, AIS. Large markets for GIS projects are in the Middle East and Asia.
- (85) There are two international standards for GIS, of the International Electrotechnical Commission (‘IEC’) and of the American National Standards Institute (‘ANSI’). The ANSI standards apply only in the USA. The IEC standards apply in the rest of the world.

⁹ As mentioned above, the JV TM T&D has been dissolved recently; its owners Toshiba and Melco continue the GIS business.

¹⁰ Commission Decision of 13 July 2005 in Case COMP/M.3653 – Siemens/ VA Tech

- (86) In some European countries (particularly in France, Austria and Italy), there are additional standards that need to be complied with and are therefore reflected in the bids. They may be safety related, like the need to connect with an existing power grid that was constructed in compliance with old standards or require specific design and testing of some components. However, complying with those specific requirements does not constitute a significant entry barrier for providers (see also recital (316) below).

4.5. Interstate trade

- (87) The sales volumes of GIS projects providers shows that there is a considerable amount of trade between Member States. Customers can be found in all Member States and in Norway, Iceland and Liechtenstein while the main European producers have their factories in Germany (Siemens), Switzerland (ABB, AREVA), France (AREVA, VA TECH) and Austria (VA TECH).

C. Procedure

5. THE COMMISSION'S INVESTIGATION

- (88) On 3 March 2004 attorneys representing ABB met with Commission officials to report the existence of anti-competitive practices in the gas-insulated switchgear sector and to submit an oral application for immunity from fines pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (the 'Leniency Notice')¹¹. [...]
- (89) On 25 April 2004, conditional immunity was granted to ABB by Commission Decision.
- (90) On 11 and 12 May 2004, the Commission carried out unannounced inspections at the premises of AREVA (France), Siemens (Germany), VA TECH (Austria and France) and Hitachi [...] (United Kingdom) pursuant to Article 20(4) of Regulation (EC) No 1/2003.
- (91) On 14 May 2004 AREVA contacted the Commission announcing its willingness to cooperate. [...]
- (92) On 17 May 2004 Siemens contacted the Commission announcing its willingness to fully co-operate. [...]
- (93) [...]
- (94) [...]
- (95) [...]
- (96) [...]

¹¹ OJ C 45, 19.2.2002, p. 3.

- (97) [...]
- (98) [...]
- (99) [...]
- (100) On 20 April 2006 the Commission adopted a Statement of Objections which was notified to the parties on 24-27 April 2006. [...]
- (101) [...]
- (102) [...]
- (103) [...]
- (104) On 12 July 2006 Fuji made an application under the Leniency Notice.
- (105) [...]
- (106) With the exception of Melco, all of the above undertakings (ABB, ALSTOM, AREVA, Fuji, Hitachi together with JAEPS, Schneider, Siemens, Siemens Aktiengesellschaft Österreich and Toshiba) indicated their willingness to express their views orally at a hearing. An Oral Hearing was therefore held on 18-19 July 2006.
- (107) [...]
- (108) [...]
- (109) [...]
- (110) [...]
- (111) [...]

D. Description of events

6. THE ORGANISATION AND FUNCTIONING OF THE CARTEL

- (112) Before describing in detail the organisation and functioning of the cartel, the general principles contained in the explicit and implicit rules governing the cartel will be summarised. The mechanisms used to implement and monitor those rules will then be described.

6.1. Overview of the scope and basic content of the GIS cartel arrangements

- (113) The major Japanese and European providers of GIS coordinated the allocation of GIS projects¹² worldwide¹³ according to agreed rules, thereby respecting quotas largely

¹² See recital (9) above the definition of “GIS project” for the purpose of this Decision.

reflecting estimated historic market shares and fixing price levels, while reserving some territories to certain producers. The traditional stronghold of some companies or groups of them in certain territories had an impact on how the allocation took place and which implementing mechanisms were deployed.

- (114) Firstly, Japan on one side and the European domestic markets of the European members of the cartel on the other side (where some of them had their stronghold) were respectively allocated as a block (100%) to the Japanese group or to the European group. Those territories were known as ‘home markets’ or ‘home countries’. Thus, Japanese projects did not need to be discussed with the European members and European projects originating in ‘home countries’ did not need to be discussed with the Japanese counterparts. Consequently, none of those projects had to be accounted for.
- (115) Also amongst the European members of the cartel there was the understanding that projects in ‘home countries’ within Europe (see recitals (133) to (138) below) were to be left to ‘home producers’. Sometimes there were several ‘home producers’ for a single ‘home country’. The other European cartel members were not supposed to intervene in the arrangement amongst ‘home producers’. Therefore, European projects originating in ‘home countries’ did not need to be discussed with the other European producers and they did not have to be accounted for.
- (116) Second, the Japanese and the European companies agreed on a joint Japanese worldwide quota and a joint European worldwide quota (see recital (143) below). There existed a common understanding between the two groups that the Japanese companies would not bid in Europe. Reference to ‘Europe’ must be understood in this context as reference to ‘Western Europe’ at the initial stages of the cartel, while at a later stage it must be understood as covering also other European countries from Central and Eastern Europe as they progressively became open to market economy. This common understanding applied even where the European cartel members did not have a stronghold comparable to the one they had in their ‘home countries’ (or equivalent to the stronghold of the Japanese in their ‘home country’ Japan). However, European¹⁴ projects allocated outside ‘home countries’ amongst the European cartel members were fed into the joint European worldwide quota, so that the joint Japanese worldwide quota could be fed with more projects elsewhere in compensation for the projects systematically reserved to the European counterparts.
- (117) The joint European quota was further allocated amongst the individual European cartel members. Although in principle the Japanese companies did not need to be party to the allocation mechanisms in this regard, they were at least informed of the results thereof for them to monitor the correct loading of the projects secured in Europe.
- (118) For the rest of the world, all members of the cartel were, generally speaking, possible candidates for allocation and a full set of written detailed rules was agreed upon to make that possible and to monitor the correct loading of projects in the respective quotas. Projects were assigned rates in terms of production units (‘pu’) or loading

¹³ Except for the USA and Canada, and, for some time also Russia and China, as explained in recital (119) below.

¹⁴ Meaning European projects in most European market economies, as explained in detail below.

value ('LV') reflecting the volume or worth attributed to them for the purposes of the credit system operated by the cartel. Comparable mechanisms were also necessary for the individual allocation both of European projects (outside 'home countries') and other projects worldwide amongst the European producers. At the outset, the GIS cartel members made those detailed rules explicit in written agreements: the 'GQ-Agreement'¹⁵ and the 'E-Group Operation Agreement for GQ-Agreement' (hereafter, 'EQ-Agreement'), both signed on 15 April 1988, at the Marriott Hotel in Vienna.

- (119) The joint global quotas of each group were attributed in the 'GQ-Agreement' (see recital (143) below) between both European and Japanese suppliers ('European GQ quota'/'Japanese GQ quota'). The 'GQ-Agreement' specified the rules applicable for bid-rigging worldwide, except for GIS projects arising within the USA and Canada, or within Japan and some identified countries in Western Europe (including the 'home markets'). As far as Western Europe and Japan were concerned, the exceptions inserted in the 'GQ-Agreement' were necessary to respect the above mentioned 'common understanding' (recital (116)) that the Japanese would refrain from competing in the main European market economies and that the European companies would refrain from competing in Japan. They also allowed for the preservation of prior arrangements in Europe amongst the European participants concerning GIS projects where also so-called 'home countries' were reserved for one, sometimes two or three companies with a traditional stronghold therein. In principle those projects were not subject to the notification and allocation mechanisms applicable between the Japanese and the European groups of cartel members, but only to the notification and allocation mechanisms applicable amongst the European cartel members. However, throughout the whole duration of the cartel, the result of the allocation of those European projects outside the 'home countries' was anyway notified to the Japanese members of the cartel (the 'J-Group') once they had been allocated amongst the European members and they were accounted for under the 'European GQ quota' and under the individual European quotas (the 'EQ quotas') accordingly.
- (120) The EQ-Agreement was explicitly subordinated (even by name: 'E-Group Operation Agreement for GQ-Agreement') to the GQ-Agreement and concerned the implementation of the GQ-Agreement by the major European suppliers. Consequently, it codified some procedures internal to the European members of the cartel (the 'E-Group') to comply with the 'GQ-Agreement' and to allocate the E-Group's share in worldwide projects amongst European members of the cartel ('E-Members'). Also the allocation of projects originating in Europe (outside the 'home countries') followed the rules described in the text of the EQ-Agreement (see section 6.4.4 of this Decision for more details). The 'EQ-Agreement' relies on the institutions, facilities and mechanisms set out in the 'GQ-Agreement'¹⁶ and, in other aspects, the 'EQ-Agreement' replicates *mutatis mutandis* features of the 'GQ-Agreement'¹⁷ for the needs of individualised allocation of projects.

¹⁵ 'G' stood for 'gear' (i.e. switchgear) and 'Q' for 'quota'.

¹⁶ Such as the notification facilities, the E-Secretary, the codes attributed to the relevant members, the European GQ quota to be split amongst the European producers, etc.

¹⁷ Such as the specification of the individual quotas of the European members adding up to the European GQ quota, a procedure for job meetings to prepare supporting submissions equivalent to the relevant GQ procedure, the provision regarding the change of the agreement, identical provisions on duration of

- (121) The Japanese and European cartel secretaries ('J-Secretary'/'E-Secretary') were at the heart of the information flows of the cartel (see recital (147) below). When a participant in the cartel would become aware of a GIS project outside Japan or Europe, it was expected to inform its secretary (the Japanese secretary for the Japanese undertakings, the European secretary for the European undertakings) by means of a form. This secretary would subsequently inform its counterpart of the project and in due course all participants would be informed.
- (122) Participants in the cartel could express their interest in the project. If an agreement could be reached that the project should be allocated to a participant, it would be discussed against which price the nominated winner would bid. Moreover, he could ask another undertaking to make a 'supporting bid' in order to leave an impression of genuine competition. Should the nominated winner win the project, this would be reported to the secretaries by means of a form and the winner's quota would be charged accordingly. If a project were 'unsuitable for allocation', the 'GQ-Agreement' and 'EQ-Agreement' foresaw that price arrangements had to be agreed upon. The price arrangements would establish price objectives and bottom limits for the parties' bids.
- (123) If the project were in Europe but not inside a 'home country' the European undertakings would similarly arrange allocations among themselves and would only inform the Japanese secretary after the project had been secured (see section 6.2 below).

6.2. A common understanding to respect historic stronghold positions in the parties' domestic markets

- (124) The GIS cartel was devised to maintain the status quo, taking into account historic market shares and historic stronghold positions.
- (125) The worldwide sharing of projects relied on the 'common understanding' that (a) the Japanese should not quote for projects in Europe and vice-versa, and (b) Japan and the European countries where the European cartel members had their stronghold were reserved to the cartel members concerned, without interference by the others. This information was first stated by [...] and confirmed in [...] described several instances of Japanese undertakings considering replying to European tenders (sometimes through general contractors) and the difficulties which that created within the cartel, although they would normally decline them and mention it to the European counterparts. According to [...], no serious agreement could have been reached on foreign markets if the domestic projects would have not been secured. This information has been corroborated by [...] in its reply to the Statement of Objections and in further submissions and has not been challenged by ALSTOM (who argued in 2002 towards Hitachi/JAEPS in the terms of the 'common understanding', as explained in recital (127) below) or AREVA either in their respective replies to the Statement of Objections or in the subsequent submissions upon receipt of [...] acknowledgment of the common understanding. VA TECH did not openly contest it.

the agreements, or the provision regarding the membership withdrawal, equivalent to the GQ provision on group withdrawal, etc.

- (126) The scope of 'Europe' for the purposes of the cartel seems to have grown with the market economy. The GQ agreement originally contained a list of excluded countries (see recital (119) [...]consisting of, among others, Japan and most of Western Europe. This allowed those territories to be treated in a different way, that is to say, in the spirit of the 'common understanding' and according to their specific allocation rules.
- (127) Allocation to Japanese companies was not excluded with regard to [...].The fact that some Central and Eastern European countries were initially open to Japanese members, became controversial over time and, at least as from 2002, the European cartel participants feared that contestation of the Central and Eastern European markets put at risk the price levels charged in the European area traditionally protected by the 'common understanding', i.e. in Western Europe. In a context where the integration of those markets in the Community could be anticipated, the European cartel members perceived Central and Eastern Europe as theirs. The Japanese members were aware that their European counterparts considered those countries as their territory and during the discussions regarding the adjustments of the cartel in 2002, this issue came up, without it being discussed again thereafter. ALSTOM expressly argued the content of the 'common understanding' against Hitachi/JAEPS in two meetings in 2002: [...]
- (128) Despite the alleged rejection by Hitachi/JAEPS of the proposal to include Central and Eastern Europe under the 'common understanding' already covering Western Europe, the Commission file contains evidence that, in fact, the European cartel members allocated amongst themselves the relevant European projects, including, from 2002 onwards, projects in Eastern Europe.
- (129) The Japanese members were also aware of the existence of (sub-) arrangements at the European level (although not necessarily of the concrete procedures or their name or written form) regarding GQ projects. Moreover, the Japanese members were also aware of the projects allocated amongst European companies. Fuji's reply to the Statement of Objections further corroborates this finding which had previously been established in the Statement of Objections.
- (130) [...] corroborates the documentary evidence indicating that Japanese companies were aware of two kinds of information: [...] (although it argues that there is no evidence in the file showing that the same details were exchanged after 1999).
- (131) Further to reporting to the J-Secretary on the European projects that the European members had allocated amongst themselves for the purposes of monitoring their loading in the joint European quota, the Japanese members would have also got (prior) notification of European projects, not only in Iceland but also in some of the countries excluded in Appendix 2 to the GQ-Agreement. This is reflected in [...]. This was rendered possible by Appendix 2 to the EQ-Agreement, which provided that European members could decide to notify European projects to the J-Group. In contrast, the other projects were automatically notified to the J-Secretary by means of the GQ notification form
- (132) Neither the reporting to the J-Secretary on allocations amongst European members nor the lists of projects for joint discussion between Japanese and European producers regarded the 'home countries'.

6.3. Reserved countries in Europe (European ‘home countries’)

- (133) The cartel applied a ‘home-producer’ principle, that is to say, certain national markets were reserved for one, sometimes several, companies with a traditional stronghold in these markets. These were the ‘home countries’ or ‘home markets’. They were not discussed amongst the rest of cartel members and the volumes sold in these countries were left outside the quota calculation both at worldwide and at European level, unlike the volumes sold in the other markets.
- (134) Home-producers ‘entitled’ to projects coming up in the ‘home countries’ were in France: ALSTOM and Schneider; in Germany: Siemens, ABB and AEG; in Switzerland: ABB; in Sweden: ABB; in Italy: Magrini, Gerin (which formed part of Schneider and is nowadays part of VA TECH as far as transmission and distribution is concerned); in the United Kingdom, for some time: Reyrolle, GEC, then ALSTOM and VA TECH Transmission & Distribution Ltd. Similarly, only the Japanese suppliers were entitled to sell in Japan.
- (135) A document found during the inspections at VA TECH’s premises confirms the existence of European home markets by expressly mentioning the concept ‘home countries’ and enumerating in a non-exhaustive list, examples of European countries that were not home countries. It further confirms the fact that sales outside European home markets were accounted for within the cartel’s quotas. Another example confirming that the United Kingdom, Germany, Austria and France had the status of ‘excluded home countries’ is an internal note found during the inspection in the office of [...] of VA TECH reporting on a meeting in [...].
- (136) [...]
- (137) A note written circa September 2002 by [...] in his personal notebook identifies Italy and England as VA TECH’s ‘home market’. However, ‘home producers’ of some ‘home markets’ appears to change over time, as by 2003 Siemens could win a contract in Italy.
- (138) The United Kingdom was also Reyrolle’s and GEC’s ‘home country’ (at least at that time) when [...] ALSTOM, having acquired GEC, apparently had a claim on the United Kingdom. Also regarding the United Kingdom, an e-mail exchange of 18 January 1999 between [...] (then NEI Reyrolle, now VA TECH), and between [...] (also a VA TECH executive) found at VA TECH’s premises in Vienna with subject line “*Siemens in the UK*” shows that Reyrolle (now VA TECH) perceived the alliance of Siemens with the general contractor Amec (who sold GIS in the United Kingdom) as a threat and a violation of the agreement to respect home markets and a confirmation that Reyrolle and GEC (ALSTOM) were ‘home producers’ in the United Kingdom. VA TECH’s manager suggested to retaliate against Siemens by entering Germany (Siemens ‘home country’ by Siemens) as the sales lost to VA TECH would have to be compensated for by sales elsewhere.

6.4. Cartel rules for GIS projects outside ‘home countries’: the ‘GQ-Agreement’ and the ‘EQ-Agreement’

6.4.1. Basic framework

- (139) [...] The agreements became immediately applicable on 15 April 1988.
- (140) The GQ-Agreement foresaw the possibility of its amendment after negotiation within the E/J committee (the committee composed of the principal European and Japanese members of the cartel), while the cartel remained in operation. The agreement has been updated several times since 15 April 1988. The revisions in writing date from 12 April 1989 (for a major part of the main document), and for annexes from about 5 September 1991 (“*rev 3*”), about 12 March 1993 (“*rev 4*”), about 11 February 1994, 12 August 1995 and about 13 December 1996 (“*Rev. 3*”)¹⁸ This clearly indicates that the agreement was applied and adapted when appropriate. Similarly to the GQ-Agreement, the EQ-Agreement provided for its amendment, by negotiation amongst its European members and that the cartel would remain in operation in the meanwhile.
- (141) The GQ-Agreement established penalties applicable to a whole group in case of non-respect of the rules and the need to foresee “*a penalty clause for the member who spoils the agreed price level*”. The EQ-Agreement only refers to penalties for individual (European) companies.

6.4.2. *The parties and their quotas*

- (142) The cartel members were divided into two groups: the ‘E-Group’ (consisting of European companies) and the ‘J-Group’ (consisting of Japanese companies). Appendix 1 to the GQ-Agreement lists by their codes the original parties, whose identity is not controversial. The members of the ‘E-Group’ were simultaneously parties to the ‘EQ-Agreement’. This correlation is confirmed by point 8 of the ‘EQ-Agreement’, listing the individual quotas attributed to the E-members identified by their GQ code number. The original codes used from April 1988 resulted from the ones used within the International Electrical Association¹⁹ (see table I below), and they were adjusted later on. At least from July 2002 onwards (see table II below), a different set of codes was used by the members of the cartel. [...]

TABLE I: signatories to the GQ agreement and their code names

Original party	At the end of the infringement	1988 Code
<i>E-members</i>		
AEG	Later AREVA (regarding GIS)	1
ABB		3, also 2 and EKT-KT
GEC	Later AREVA (regarding GIS)	4
Siemens		8
Reyrolle	Later VA TECH -now Siemens’s- (for GIS)	13
ALSTOM	Later AREVA (regarding GIS)	16, also 17
Schneider	Later VA TECH -now Siemens’s- (for GIS)	26
Magrini	Later VA TECH -now Siemens’s- (for GIS)	32
Sprecher	Later AREVA (regarding GIS)	34, also 33
<i>J-members</i>		

¹⁸ The numbering of these revisions is not inconsistent: the numbers refer to different annexes that were revised at different occasions, hence the apparent incongruity.

¹⁹ This institution was based in Geneva, Switzerland.

Hitachi	parent company of 'JAEPS'	A
Melco	parent company of 'TM T&D', ²⁰	B (BT = Melco Tokyo, BL = Melco London)
Toshiba	parent company of 'TM T&D'	C
Fuji	parent company of 'JAEPS'	F
Nissin		N

TABLE II: codes applied at least from July 2002

<i>European parties together</i>	0
ABB	1
ALSTOM	2
Siemens	3
VA TECH	4
<i>Japanese parties together</i>	5
JAEPS	6
TM T&D	7

- (143) Each group was attributed in the GQ-Agreement a joint quota of the worldwide sales covered by the agreement (this concerns also Europe outside 'home countries'). The quotas were used for the calculation of the so-called 'loading value' which was also determined by certain other factors. During the allocation sequence, the right of one group (Europeans or Japanese) to the allocation of a certain project was determined by the reference to the total group loading value. The group with the lower group loading value had the right to priority to allocation.
- (144) The original joint European quota totalled 62,5%; the original joint Japanese quota totalled the remaining 37,5%²¹. The 'EQ-Agreement' specified in 1988 how the joint European GQ quota was to be shared amongst the E-members for the calculation of the 'loading value'. These quotas had been determined by the historical market shares of the participants for the period 1980-1985, and changed in the course of the years.

TABLE III: European quotas in 1988

EQ-Agreement	Individual European quotas in 1988
AEG	5,46%
ABB	18,70%
GEC	1,87%

²⁰ Melco and Toshiba had their GIS activities bundled in the JV TM T&D at the time of the Commission inspections when the cartel presumably ended. The JV has been dissolved since.

²¹ P. 732 point 12; 763 point 8 of the E group operation agreement.

Siemens	12,27%
NEI ²²	2,79%
Alstom	9,29%
Schneider, Magrini	7,28% (Schneider's and Magrini's joint quota)
Sprecher	4,84%
Sum [GQ quota]:	62,50%

- (145) The quotas were later adjusted to 65,84% for the joint European quota and 34,16% for the joint Japanese quota. This is corroborated by further documentary evidence. [...] shows that the quotas were adjusted reflecting the new joint European quota and the acquisitions between members. This is reflected in the original document, by typed figures which are crossed out next to the handwritten figures are crossed out with typed figures and handwritten figures (in italics):

TABLE IV: Later European quotas

Member	Quota ²³	LV/pu [loading value]/[production unit]
4+16+33+1	34.34 32.24	2.91 3.10
26	11.65 10.94	8.58 9.14
8	19.63 18.43	5.09 5.43
3	29.92 28.09	3.34 3.56
13+31	4.46 10.3	22.42 9.71
E	100	
EU	65.84	
J	34.16	

- (146) In the last years of the cartel the quota system worked somewhat differently. Projects were grouped into lists and the allocation process between the members of the cartel was done so as to ensure an allocation per list of projects in line with the quotas.

²² I.e. NEI Reyrolle (acquired by VA TECH in 1999)

²³ The figures in the second column, both the original and new numbers, can be found as well in two documents discovered with VA TECH. The first document shows the same two figures (rounded of) for each of five entities; the second shows eight figures for each of seven entities of which the first and the fourth correspond to the figures presented above.

6.4.3. Internal cartel organisation and rules

- (147) Each group had to nominate a secretary company which was its contact point between the cartel members and had a crucial role for the organisation of meetings and the compilation of information from and for the members. Members were to notify to their secretary the upcoming projects and indicate their claims or interest in them. In practice, the ‘J-Secretary’ rotated every two years among the Japanese cartel members, while the ‘E-Secretary’ was taken over by Siemens until September 1999. ALSTOM acted as E-Secretary during the period from 1999-2004 [...]. Direct and indirect information corroborate this, [...].
- (148) When a participant in the cartel would become aware of a GIS project in the countries subject to the GQ system, it was expected to notify this to its Group Secretary with a form. In its reply to the Statement of Objections, Fuji stated that it “*reported to the J-Secretary details of new projects received by Fuji*” and “*faxed such information to the J-secretary almost daily, probably 200 times a year.*” All notifications of upcoming projects in the area covered by the GQ-Agreement and other important information were exchanged on a continuous basis between the E-secretary and the J-secretary. The notification of European projects outside ‘home countries’ to the Japanese parties was not automatic, but depended on the decision of the European members (see recital (131) above).
- (149) The E-Secretary distributed to the E-members the notifications and claims contributed by the J-Secretary and vice-versa. All these were matters for debate amongst E-members, which would discuss J-claims and agree on proposals for allocations to be negotiated by the E-committee in the E/J Committee (if necessary imposing limitations to that negotiation). The E-Secretary informed E-members of the allocations and decisions (“*binding for all E individual companies*”) made at the E/J Committee meetings immediately thereafter.
- (150) For most of the infringement, each group (Japanese/European) had a Committee representing the respective Group in the joint E/J Committee, where the allocation of projects was discussed and decided upon, as foreseen in the GQ-Agreement. Each group committee was responsible for the fulfilment of obligations (notification of projects etc.) towards the other group. The E-Committee consisted of ABB, Siemens, ALSTOM (now AREVA) and alternating AEG (later ALSTOM, now AREVA) and Schneider (now VA TECH). The J-Committee consisted of Hitachi, Melco and Toshiba.
- (151) Cartel members could express their interest in projects. The members (like Fuji) who were not in the respective committee took part in the annual general meeting foreseen in the GQ-Agreement for all parties, as well as in the preparatory meetings of each group in view of the ‘E/J joint committee meetings’, (‘working level meetings’ and often ‘management level meetings’) to be held every two weeks to “*exchange claims and/or interests of projects*” and decide on the projects. The results of the joint meetings were communicated to the members who did not attend by their respective secretaries and were binding for both the E-group and the J-group. In the later years, both European and non-European projects were listed in packages for allocation (see recital (163) below).

- (152) The EQ-Agreement addressed the issue of project allocation amongst E-members. Each E-member had the right and the obligation to take allocations for projects it had claimed. In case only one E-member had claimed a project, it received the allocation automatically after it had been allocated to the E-group. If more than one E-member claimed the same project, it was allocated on the basis of certain further specified factors. If no solution among claiming companies was found, a decision for allocation was taken by the majority of E-members.
- (153) In order to ensure that contracts were actually awarded to the company having obtained the allocation within the cartel joint committee meetings, the so-called 'allottee' could request a supporting bid (called "*supporting tender*" in the cartel terminology) from a cartel member from the other group, with the help of the E/J committee, in order to leave an impression of genuine competition. Likewise, the latter could then request at least one further protecting offer from the group to which the 'allottee' belonged. By contrast, pursuant to the EQ-Agreement, "*at least two [European] companies having received the specification must be prepared to submit supporting tenders, if so requested by the allottee*". Therefore, a European allottee could request supporting tenders from two European companies. When dealing with non-European projects it would be entitled to an additional Japanese supporting tender under the GQ-Agreement.
- (154) This was organised in '*job meetings*' or '*job arrangement meetings*' or through bilateral contacts. Also the EQ-Agreement foresaw '*job meetings*' or '*job arrangement meetings*' to be held after allocation or in order to reach a price arrangement. However, especially during the last years those took place simply by exchanging '*arrangement sheets*' and messages by electronic devices. [...]
- (155) The price level, as well as other details of all bids was agreed upon. The decisions taken in job meetings were binding on all members.
- (156) The joint action of cartel members against outside competition went as far as providing for the rule that if a project having been allocated to either the J-group or the E-group faced severe price competition from outside the cartel, the relevant group would fight together against the outsider and inform the E/J committee about any price reduction immediately after granting the discount. If the relevant group's capacity to fight was limited, the project might be offered for reallocation to the other group.
- (157) For projects '*unsuitable for allocation*', price arrangements were foreseen to establish price objectives and bottom limits for the parties' bids with the help of certain pricing formula. Those meetings were convened and chaired by the secretary company of E- and J-group by turns when the subject matter was price arrangements. Also projects subject to the EQ-Agreement for which no allocation could be made, would be subject to price arrangements ("*fighting forbidden*"). It would be up to the E-Committee to help the 'allottee' to convene the meeting or to convene and chair meetings to arrange prices for non-allocated jobs.
- (158) The file contains many examples of projects that were not allocated, but for which the undertakings agreed to respect the price formula ('*level price*' arrangements). [...]

- (159) As soon as the ‘allottee’ got the order by the client, this was reported to the secretaries with a form and the winner’s quota was charged accordingly. Projects won by European members were counted in the European quota under the ‘GQ-Agreement’, irrespective of whether they had been allocated outside Europe or within Europe (except for transactions in ‘home countries’).
- (160) After 15 April 1988, it was forbidden for all cartel members to enter into new agreements with uncontrolled licensees, that is to say, licensees of cartel members who did not belong to the cartel. A list of existing uncontrolled licensees included in Appendix 8 to the GQ Agreement was often updated. The fact that uncontrolled licensees of the cartel members did not belong to the cartel was taken into account by the cartel members and licensors were requested to make their best effort to inform the E/J committee meeting of their uncontrolled licensees’ activities as soon as possible.

6.4.4. Specifics of the allocation of European projects (outside ‘home countries’)

- (161) The allocation of projects originating in Europe followed the same rules and procedures as for the allocation of projects originating elsewhere. This is clear from [...] and from abundant evidence in the file that also upcoming European projects were notified, listed, allocated, arranged or assigned a minimum price level, etc (some examples are mentioned below under “*Implementation of the cartel arrangements*”). It is also clear from “*Communication Scheme between E-Group and J-Group*”, (Appendix 2 to the EQ-Agreement), stipulating that European upcoming projects were not automatically notified to the J-Group by the E-Secretary, but they could be notified anyhow if the European members so decided. This is consistent with point 2 of the EQ-Agreement, which distinguishes notifications to the E-Secretary by means of the “*GQ notification formula*” for discussion with J-group from notifications “*as usual*”.
- (162) Appendix 2 to the EQ-Agreement contains also a sequence of steps (‘E1’ to ‘E8’, ‘GQ1’ to ‘GQ3’) and a graphic and a time-line summarizing in general terms the type of discussions and decisions that should take place, at what level, on the basis of which input (this is shown by connecting the steps with arrows) and their relative timing. The graphic shows that the final allocation (‘E8’) of the European projects concerned was supposed to take place in a meeting amongst European members three days after the distribution to European members of the notified upcoming projects (‘E3’: both worldwide and European). The meeting where the European projects were definitively allocated was also the occasion to prepare the E/J Committee meeting to be held the day after (‘GQ2’, ‘GQ3’). To this end, the European members: (a) might decide about the notification of European projects to the J-Group (‘E4’); (b) were to “*discuss and decide about claims for allocation, reservation, interest and strong interest, suitability of allocations*” (‘E5’); and (c) were to “*decide about negotiation margin for committee*” (‘E7’). In contrast, the decision on final allocations (‘E8’) of non-European projects amongst the European members took place only once the E/J Committee had decided (‘GQ3’) the allocation in favour of the E-Group.
- (163) In the last years of the cartel, projects were discussed in project packages, but the parallelism between the allocation (and price arrangements) means and methods regarding European and non-European projects was maintained throughout the whole duration of the cartel. Several packages were discussed from October 2002 until

February 2004. A differentiation was made between packages which included worldwide projects outside Europe and packages containing European projects. The first category of packages was simply referred to as ‘P’ whereas the European packages were referred to as ‘EP’. The number behind this categorisation indicated the chronological number of a specific package, for example, ‘P2’ for the second worldwide package or ‘EP1’ for the first European package. Separate project lists were drawn up with respect to Italy and Spain. The cartel evolved to simpler working methods in the last years, when it comprised fewer members and used new electronic means.

6.5. Implementation, monitoring and enforcement of the cartel rules and concealment of cartel practices

6.5.1. Implementation of the cartel agreements

- (164) During the 1990s, various projects were allocated between the suppliers of GIS. [...] gives a historical overview of the cartel’s allocation process. This document indicates for hundreds of projects worldwide for most of the 1990s (including those presented below), which undertaking(s) showed interest in them, what the eventual decision was regarding that project (typically a ‘level price’ arrangement where all parties would respect the price formula, occasionally a project allocation) and at what date that decision was taken. [...] provided the Commission with similar lists of projects.[...] The worldwide list also referred to projects inside the EEA: [...]
- (165) [...] a list of projects in Europe which were subject of allocation between ABB, ALSTOM/AREVA, Siemens and VA TECH in the period 2002-2004 of the cartel. . In the first columns the project numbers are listed, in the second column the project countries, that is to say, the countries in which the projects should be performed are listed. In the next column the respective customer name is provided. The multiplication of the number of units and the voltage provided the so-called production unit (‘PU’) is listed in the next column (see recital (105) above). This mathematical result was used as an internal currency for the evaluation of the factory load and for the relative valuation of the various projects. It was important to find such valuation since the companies intended to keep their market shares stable over time. The next column lists the expected approximate contract value by providing a figure in millions of euro. The column headed TDD provides the tendered due dates for the various projects. In the next columns information can be found to which extent allocation of projects already been agreed upon and, if so, which PU value is then entered for the respective company. The projects were always packaged together with a view to achieving a ‘fair’ market share allocation within each package and, to the extent this was not achievable, to compensate for variations in the next packages.

TABLE V: Project list

[Table deleted]

(166) In the file numerous other examples for project allocation can be found. [...]

6.5.2. *Monitoring of the cartel arrangements*

(167) The mandatory notification of projects made it possible for the cartel members to monitor each others' behaviour both at the worldwide level and at the European level. Moreover, the high frequency of meetings allowed the participants to the cartel agreement to keep track of one another's commercial behaviour and to question possible deviations from the agreement.

(168) A market study made by ABB, ALSTOM/AREVA, Siemens and VA TECH reviews market shares for the period 1990-2002. In this study the market share for all then 15 Member States, Norway, Iceland and Liechtenstein, and many other countries were presented according to the shared view of ABB, ALSTOM/AREVA and Siemens on the one hand and the view of VA TECH on the other hand. Committee members ABB, ALSTOM/AREVA and Siemens apparently knew the overall market better than VA TECH. Long term statistics were also reported for the purpose of surveillance and determination of quota.

6.5.3. *Enforcement of cartel rules*

(169) Failure to comply with the cartel rules led either to the application of penalties for existing cartel members or groups of them (see recital (141) above), or to the adoption of retaliatory measures (for former members of the cartel). The Commission file contains evidence that Siemens was challenged by other members of the cartel in the spirit of the rule mentioned in recital (156) above when this company temporarily interrupted its participation. The cartel attempted for a certain time to punish Siemens for its departure by fighting it worldwide for particular projects. Inside the cartel, it was considered whether to encourage such conduct by counting those projects only for half their normal value under the quotas, in order to encourage the participants to fight Siemens more energetically.

6.5.4. *Precautions to conceal meetings and contacts*

(170) At both the worldwide level and the European level, the participants took elaborate precautions in order to disguise or conceal their contacts and meetings. These concealment measures existed since the start of the cartel and multiplied from 2002 onwards. The participants continued to use these measures until the end of the cartel.

(171) From the instruction for the use of the e-mail system it is clear that the participants intended to avoid detection of their secret cartel, indicating that they were aware of its illegal nature (see for example recitals (172)-(174) below).

(172) In addition to the use of codes for companies names (see recital (142) above) some individuals were also attributed codes to cover their identities. Their codes were based on the company number, followed by one or more letters typically based on the first name of the person. The cartel evolved towards more sophisticated means to communicate and to protect its secrecy, by using secured E-mail and SMS messages, 'Blowfish' (a software system for encryption of documents) and encrypted telephone communications.

- (173) The cartel members set up a system of ‘E-mails Secure Transmission’ (EST) in order to “*allow faster, straightforward, totally electronic, anonymous, safe and secure communication*”. The participants had to select a free e-mail provider and to open ‘anonymous mailboxes’ (AMBs). Names were changed regularly. Several of the participants were found to use such e-mail accounts. Moreover, they often exchanged mails with ‘zip-mailed’ or password protected documents. The necessary codes were changed every month by the secretary.
- (174) [...] The use of the EST was subject to a “*progress review*” on [...]. A number of recommendations were added to the previous instructions. Senders should erase all files attributes; after sending an e-mail it should be destroyed; receivers should download the attachments directly on to memory sticks rather than opening them. In fact, during the inspections memory sticks have been found or have been identified with several members of the cartel. Moreover, participants sent each other SMS messages concerning the cartel and evidence of the exchange of information on prices among the parties has been found in SMS messages.
- (175) [...], AREVA (former ALSTOM) suggested to ABB, VA TECH and JAEPS to send documents encrypted by a new version of the programme Blowfish. Apparently, the members of the cartel had been using an older version until that day. A manual for the use of this system has been found with [...] (ALSTOM/AREVA), who had a 55 page manual on how to use ‘Blowfish’ and has actually used the software. [...] (ALSTOM/AREVA) also used Blowfish on his PC. The last identified use was on 16 April 2004. At VA TECH’s premises, ample proof was found that [...] used ‘Blowfish’ in the period 20 October – 17 December 2003. [...] (Hitachi/JAEPS) confirmed that he had used Blowfish and that it had been recommended to him by [...] (ALSTOM/AREVA).
- (176) Siemens provided (at least initially for free) the European and Japanese participants of the cartel with Siemens mobile telephones equipped with encryption options (this can be placed around mid 2002). A document was found at [...] office (VA TECH) written in about August-October 2002 confirming this. Moreover, manuals of these telephones and/or the telephones themselves were found in several of the offices visited by the Commission during the inspections.

6.6. Chronological overview of the evolution of the cartel

- (177) The 1988 GQ-Agreement listed by their codes a total of 14 members: 9 European and 5 Japanese. The two Committees, one for the Japanese, another for the Europeans, comprised fewer members in order to render the cartel operational while the representation of other E-members by the E-Committee was facilitated by the internal links between some of them. AEG, Sprecher and later GEC were part of the Alstom group and Nuova Magrini was part of the Schneider group and it shared a joint quota in the cartel with Schneider Electric SA. Only Reyrolle did not belong to the group of any of the others. Its acquisition by VA TECH in September 1998 did not change that situation.
- (178) Siemens discontinued its participation in the cartel meetings in September 1999, followed by Hitachi and Schneider/VA TECH in 2000. Siemens’s absence was

particularly destabilising from the European perspective, since it had been the E-Secretary since 1988 and it was a major market player both outside and inside Europe. However, the cartel activities continued and ALSTOM took over as E-Secretary. With fewer members as compared with 1988, the logistics were simplified and a complex structure was no longer justified.

- (179) In 2002, Siemens, Hitachi and VA TECH returned to the cartel. In October 2002, the GIS businesses of Hitachi and Fuji were transferred to their joint venture JAEPS and Toshiba and Melco created TM T&D.
- (180) In view of the new, simpler constellation of cartel members, the political and economic developments in Europe and the technological improvements available, over time some adjustments were introduced in the cartel organisation and modus operandi. All members could still be present at the joint meetings to decide on allocation at global level, without intermediate bodies. Most of the job meetings to manipulate bids became bilateral. Many contacts took place through electronic and telephonic traffic, often using encryption and other increasingly sophisticated means to conceal their activities.

6.6.1. Cartel meetings

- (181) The Commission file contains evidence of multiple cartel meetings having been held since the one organized in the Marriott Hotel in Vienna on 15 April 1988, where the parties met to conclude the agreements. Pursuant to the GQ-Agreement, the European and Japanese committee members were to meet every two weeks to discuss ongoing projects (see recital (151) above).
- (182) Moreover, all members were to meet in annual meetings (worldwide level) organised in turns. [...]
- (183) [...]
- (184) [...]
- (185) [...]

6.6.1.1. Siemens's and Hitachi's interruption of participation in the cartel

- (186) Siemens claims that it interrupted its participation in cartel meetings as from the [...] summit meeting on 24 April 1999. ABB indicated that Siemens interrupted its participation in cartel meetings as from late 1999. The Commission established that Siemens's departure took place no earlier than September 1999. A document found at VA TECH's premises, confirms that Siemens's suspension of its participation in the meetings dated from September 1999 when it reads: "Stop 3 == > 09/99" ('3' being Siemens), followed by market shares from 1988 until 1998. This is confirmed by AREVA, Melco, Fuji and Hitachi/JAEPS.

- (187) [...] The Commission concludes (see recital (296) below) that Hitachi left the cartel on 1 January 2000.

6.6.1.2. VA TECH's and Schneider's interruption of their participation in the cartel

- (188) ABB stated that ABB and ALSTOM decided to exclude VA TECH from the cartel as its quota was high relative to its production capacity. They did so by organising in December 2000 a party fictitiously bringing an end to the cartel. In reality, the cartel went on between ABB, Alstom, Fuji, Melco and Toshiba.
- (189) By this time, VA TECH and Schneider, which would join their operations in March 2001 in the joint-venture VAS, already acted together. The two undertakings were represented at the meeting by Schneider employee [...].
- (190) VA TECH submits that it was already been informed in this regard on 12 October 2000, in a cartel meeting held in [...].

6.6.1.3. Continuation of the cartel after VA TECH/Schneider's departure

- (191) The evidence in the file shows that the cartel went on after VA TECH/Schneider's departure. [...] series of fax messages between ABB, Melco and TES (TES stands for 'Temporary European Secretariat', namely ALSTOM - now AREVA) relating to meetings and project allocations for the period around the year 2000.
- (192) [...]
- (193) [...]
- (194) [...]
- (195) [...]
- (196) [...]
- (197) [...]
- (198) [...]

6.6.1.4. Siemens's, VA TECH's and Hitachi's resumption of their cartel activities

- (199) There is evidence in the Commission file that Siemens's renewed participation dates from 26 March 2002, VA TECH's from at least 1 April 2002 and Hitachi's from 2 July 2002).
- (200) [...]

(201) [...]

(202) [...]

(203) [...]

(204) [...]

(205) [...]

6.6.1.5. Cartel meetings between March 2002 and May 2004

(206) [...]

(207) [...]

(208) [...]

(209) [...]

(210) [...]

(211) [...]

(212) [...]

(213) [...]

6.6.2. *End of the cartel*

(214) After ABB stopped communications with the cartel in February 2004, planned meetings including ABB were annulled at the beginning of March 2004 and all mailboxes, telephone numbers, codes etc. were changed by the other cartel members which enabled the cartel to communicate without ABB.

(215) Moreover, the contacts and meetings between the remaining members continued. [...]

(216) The last working level meeting known to the Commission was held on 11 May 2004 [...] this meeting came to an abrupt end as Siemens's participants informed the other participants of the Commission's inspections that were carried out on that day.

E. Legal Assessment

7. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

7.1. The Treaty and the EEA Agreement

7.1.1. *Relationship between the Treaty and the EEA Agreement*

(217) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994.

(218) The agreements and concerted practices as set out in this decision were worldwide in scope (with the exception of the USA and Canada) and applied to the territory of the Community and the EEA. The European cartel members sold GIS in all Member States (at the time) and in three EFTA-countries which were Contracting Parties to the EEA-Agreement (namely Norway, Iceland and Liechtenstein).

(219) Insofar as the arrangements affected competition and trade between Member States, Article 81 of the Treaty is applicable; as regards the operation of the cartel in Norway, Iceland and Liechtenstein and its effect upon trade between the Community and those EFTA states which were or are part of the EEA, this falls under Article 53 of the EEA Agreement.

7.1.2. *Jurisdiction*

(220) In this case, the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the cartel had an appreciable effect on trade between Member States, as described in section 7.2.4 below.

7.2. Application of Article 81 of the Treaty and Article 53 of the EEA Agreement

7.2.1. *Article 81 of the Treaty and Article 53 of the EEA Agreement*

(221) Article 81 of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply. On the basis of the facts before the Commission, there are no indications that suggest that the conditions of Article 81(3) of the Treaty could be fulfilled in this case.

(222) Article 53 of the EEA Agreement (which is modelled on Article 81 of the Treaty) contains an identical prohibition. However, the reference in Article 81 of the Treaty to “*trade between Member States*” is replaced in Article 53 of the EEA Agreement by a

reference to “*trade between Contracting Parties*” (in this context “*contracting parties*” means the European Community and the individual (then) EFTA-States) and the reference to “competition within the common market” is replaced by a reference to “competition within the territory covered by ... (the EEA) agreement”. The issues related to the effects of the cartel on trade are dealt with below, under the heading ‘Effect upon trade between Member States and between EEA Contracting Parties’.

7.2.2. The nature of the infringement in this case

7.2.2.1. Agreements and concerted practices

7.2.2.1.1. Principles

- (223) Article 81 of the Treaty and Article 53 of the EEA Agreement prohibit anticompetitive agreements, concerted practices between undertakings and decisions by associations of undertakings.
- (224) An agreement can be said to exist when the parties adhere to a common plan, which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It is sufficient that the undertakings in question express their joint intention to conduct themselves on the market in a specific way²⁴. However, an agreement does not need to be made in writing. No formalities are necessary, and no contractual sanctions or enforcement measures are required. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan.
- (225) An ‘agreement’ for the purposes of Article 81 of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term ‘agreement’ can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose.
- (226) As the Court of Justice of the European Communities (upholding the judgment of the Court of First Instance) has pointed out in Case *Commission v Anic Partecipazioni SpA*²⁵, it follows from the express terms of Article 81 of the Treaty that that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.
- (227) Although Article 81 of the Treaty²⁶ distinguishes between ‘agreements between undertakings’, ‘concerted practices’ and ‘decisions by association of undertakings’, the object is to bring within the prohibition of that article a form of co-ordination between

²⁴ Case T-7/89, *SA Hercules Chemicals VN v Commission* [1991] ECR II-01711.

²⁵ Judgment of the Court of Justice in Case C-49/92P [1999] ECR, I-4235, at paragraph 81.

²⁶ The case law of the Court of Justice and Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA agreement. References in this text to Article 81 therefore apply also to Article 53.

undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition²⁷.

- (228) Thus conduct may fall under Article 81 of the Treaty and Article 53 of the EEA Agreement as a ‘concerted practice’ even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour²⁸. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.
- (229) Indeed, the criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market²⁹.
- (230) Although in terms of Article 81 of the Treaty the concept of a ‘concerted practice’ requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81 of the Treaty irrespective of anti-competitive effects on the market³⁰.
- (231) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 of the Treaty, of information concerning their respective deliveries already made but which is intended to facilitate constant

²⁷ Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619 at paragraph 64.

²⁸ See also judgment of the Court of First Instance in Case T 7/89 *Hercules v Commission* [1991] II ECR 1711, at paragraph 256; judgments of the Court of Justice in Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663, at paragraph 63; in Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR, I-4235, at paragraph. 115; and judgment of the Court of First Instance of 5 April 2006, in case T-279/02, *Degussa AG v Commission* (not yet published), at paragraph 133.

²⁹ Judgments of the Court of Justice in Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663; Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR, I-4235, at paragraph. 117.

³⁰ See also the judgments of the Court of Justice in Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at paragraphs 158-166.

monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.³¹

- (232) The concepts of agreement and concerted practice are fluid and may overlap. It is not necessary, particularly in the case of a complex infringement of long duration, for the Commission to characterise it as exclusively one or other of these forms of illegal behaviour. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement of this type³².
- (233) In its *PVC II* judgment³³, the Court of First Instance stated that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article 81 of the EC Treaty”.

7.2.2.1.2. Application to this case

- (234) The facts set out in this Decision show that the undertakings subject to these proceedings entered into agreements and concerted practices within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement concerning the market for GIS projects worldwide and implemented them.
- (235) They agreed on allocating the worldwide GIS market (except for the USA, Canada and, for some time, Russia and China) amongst all cartel members on the basis of quotas largely reflecting historic market shares and according to the following underlying principles.

Japan had the status of a ‘home country’

- (236) The Japanese market (a ‘home country’ in the terminology of the cartel) would be reserved only to the Japanese cartel members and the projects obtained therein would not be accounted for under the joint Japanese global quota. From the European perspective the Japanese were entitled, as a group, to a joint 100% quota in Japan. The acceptance of Japan as a ‘home country’, can be explained as a recognition of the

³¹ See, in this sense, the judgments of the Court of First Instance in Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission*, *Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, at paragraph 72

³² See judgment of the Court of First Instance in Case T-7/89 *Hercules v Commission*, [1991] ECR II 1711, at paragraph 264.

³³ Judgment of the Court of First Instance of 20 April 1999, joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), ECR [1999] p II-00931, at paragraph 696.

relative strength of Japanese and European companies in Japan in exchange for a corresponding recognition of their relative strength in the European 'home countries'. For the Europeans, this was a self-implementing mechanism, which did not require any common implementing rules or specific monitoring.

- (237) In order to render this treatment possible, the GQ Agreement simply excluded Japan from the application of the GQ notification and allocation mechanisms for projects in Japan.

European home countries

- (238) Conversely, the European countries where the European cartel members had their stronghold (France, Germany, Austria, Switzerland, Sweden, Italy, United Kingdom) received an equivalent treatment (also considered as 'home countries'). For the same reasons, each of those territories was not reserved to all European companies in general, but to the relevant 'home producers' (see section 6.3 above and recital (276) below). Accordingly, the projects allocated within those territories were not reflected either in the joint European global quota, or in the individual quotas of either global or European projects in the GQ-Agreement and the EQ-Agreement. For the Japanese, the European cartel members were entitled, as a group, to a joint 100% quota in the European 'home markets'.
- (239) From both the Japanese perspective and the perspective of the European cartel members who were not home producers in the national markets concerned, this was a self-implementing mechanism, which did not require any common implementing rules or specific monitoring.
- (240) In order to render this treatment possible the GQ Agreement simply excluded those countries from the application of the GQ notification and allocation mechanisms.

EEA countries other than 'home countries'

- (241) The rest of the European countries, in which the European cartel members did not have a comparable stronghold, were also reserved to the European cartel members, but not to any of them in particular, that is to say, there were no 'home producers'. Therefore, the projects obtained in those countries were loaded into the joint European global quota, as well as in the individual quotas for global and European projects. This way, the Japanese undertakings would be compensated for the projects systematically reserved to the European counterparts within Western Europe, (but outside 'home countries'), thereby avoiding a potential negative impact on the security offered with regard to the Japanese market.
- (242) The loading of (non-home country) European projects in the joint European global quota had another logical implication for the Japanese companies. They would immediately suffer economically if the European market would collapse or fail to provide projects to be allocated amongst the European companies. In that event, the joint European global quota to be fed into the overall quota calculation would have diminished, having as a consequence that the European undertakings could have claimed a larger part of non-European projects from their Japanese counterparts.

(243) This mechanism could not be considered self-implementing by anyone. From the European perspective, the projects had to be notified, allocated, followed up and monitored. From the Japanese perspective, the projects needed only to be monitored *ex post* to control their correct loading in the joint European global quota and hence their impact in their own business activities around the world.

(244) In order to render this possible:

- (a) In practice, the European GIS suppliers afforded the Japanese GIS suppliers the possibility to monitor the loading of European projects (but outside 'home countries') in the European global GQ-quota by providing details of GIS projects that the European cartel members would be supplying in Europe (see recitals (129) and (130) above).
- (b) The GQ-Agreement listed as excluded in 1988 all Member States and, more generally, the countries that formed the EEA in 1994, with the exception of Iceland and Liechtenstein (see recital (119) above). For the sake of simplicity, those countries are collectively referred to as 'Western Europe' or 'EEA countries'. By listing those countries, the GQ-Agreement excludes them from the application of the GQ (pre-) notification and allocation mechanisms. However, as explained above, the European projects in those countries (but outside 'home-countries') were subject to the GQ-Agreement in as far as they were counted in the worldwide joint quota of European cartel members attributed in point 12 thereof (see also recital (116) above).
- (c) The EQ-Agreement distinguishes notifications pursuant to the 'GQ notification formula' and notification 'as usual'. This implies the existence of parallel procedures. An explanatory annex to the EQ-Agreement clarifies how the two procedures work in parallel, specifies the foreseen frequency of E-Group preparatory meetings and of E/J Committee meetings (always consecutive), the type of discussion or decisions expected from each forum as well as the reciprocal input that could be anticipated (see recitals (161) to (163) above). However, it appears that although the Japanese producers did not participate in the meetings at the European level, they were aware of those meetings (see recitals (129) to (131) above). The Japanese cartel members did not need to attend the allocation and price fixing meetings for projects in Western Europe to monitor the correct attribution of 'loading values', but were informed thereof (see recitals (120) and (167) above).
- (d) Nevertheless, there are indications that the involvement of the Japanese companies in the discussion on allocation of European projects could have been closer in some cases. Appendix 2 to the E-Agreement provided that, contrary to other projects, which were notified automatically to the J-Secretary (those can only be the projects subject to the 'GQ notification formula'), the European members would decide about the notification of European projects

to the J-group (see recital (161) above). Also the lists [...] reflecting the projects discussed with the Japanese companies include GIS projects outside the excluded territory but within the EEA ([...]).

The rest of the world (including Iceland and Liechtenstein)

- (245) The rest of the world was allocated and monitored according to the terms of the GQ-Agreement (and the EQ-Agreement), although its implementation was somehow simplified throughout the years (see below under the heading 'Single and continuous infringement').
- (246) Taking together the underlying principles applicable to Japan and to the EEA territories (with the exception of Iceland and Liechtenstein), it appears that the cartel members had a 'common understanding' (see recitals (127) and (128) above) that the Japanese undertakings would refrain from selling in Europe and the European undertakings would refrain from selling in Japan. This 'common understanding' was updated and enforced when necessary (see recital (127) above). It limited their individual commercial conduct by determining lines of mutual abstention from competition on their respective market. It is further implicit in the behaviour of the parties and reflected in the list of excluded countries in Appendix 2 to the (written) GQ-Agreement (see recitals (119) and (244) above). It provided the necessary basis of mutual trust to collude on the allocation and price quotation for GIS projects worldwide outside the excluded areas (see recital (124) above). It further afforded comfort to European cartel members to organise the collusion for European projects (see recital (125) above), arranging their allocation and price level, reserving some in application of the 'home-producer' principle, and preserving existing arrangements in Europe (see recital (119) above).
- (247) The GQ-Agreement (operated amongst all undertakings subject to these proceedings) and the EQ-Agreement (operated amongst the European undertakings subject to these proceedings) constituted two written agreements to restrict competition including clear rules on the cartel participants' market behaviour, on regular exchange of sensitive market information and on the procedures and means for their implementation, monitoring and enforcement. The rules were implemented, updated and enforced where necessary.
- (248) The above elements can jointly be described as forming part of an overall multifaceted cartel that was worldwide in scope and had effects in the EEA. In line with the above mentioned case law (see section 7.2.2.1.1), the Commission considers that the behaviour of the undertakings concerned can be characterised as a complex infringement consisting of various actions which can be either classified as agreements or concerted practices, within which the competitors knowingly substituted practical co-operation between them for the risks of competition. Furthermore, the Commission considers, also based on the above mentioned case law, that the participating undertakings in such concertation have taken account of the information exchanged with competitors in determining their own conduct on the market, all the more so because the concertation occurred on a regular basis and over a long period. According to the above mentioned case law, such behaviour can be qualified as an agreement and/or concerted practice in the sense of Article 81 of the Treaty.

Arguments by the parties

- (249) Hitachi/JAEPS, Toshiba and Melco have argued that they had not been party to any 'common understanding' that they were not supposed to bid in Europe and the Europeans would not bid in Japan. The 'common understanding' would be a Commission theory that could be contradicted by an alternative, plausible explanation, as was found to be the case by the Court of First Instance in the 'German banks case'³⁴.
- (250) According to Hitachi/JAEPS, Toshiba, Melco and, to some extent, Fuji, there were alternative economic explanations to explain that Japanese companies were dissuaded from competing for European projects. They argue that the GQ-Agreement did not have an impact on Europe. Hitachi/JAEPS argues that the proposal of such 'common understanding' was made by the European GIS suppliers for the first time in July 2002 and was unreservedly rejected by Hitachi. Toshiba wonders how a rejection can be interpreted as evidence of a common understanding.
- (251) Although most of the parties have argued that the cartel did not have effects, their arguments actually suggest that the effectiveness would have varied over time and would have been minor or insignificant in some periods.
- (252) Toshiba denies ABB's, Fuji's and Hitachi/JAEPS's acknowledgement that European projects outside 'home countries' were included in the worldwide quotas attributed in the GQ Agreement. [...]
- (253) Some parties have put into question the reliability of the submissions by ABB on the basis of [...] statements arguing that they were inconsistent and self-servicing. In this regard, it has been claimed that ABB would have an interest in providing the Commission with information relating to longer or more serious infringements in order to qualify under the Leniency Notice.
- (254) [...]

Appraisal by the Commission

- (255) The 'common understanding' is not just the Commission's explanation of the cartel members' conduct. The file contains evidence of the existence of such 'common understanding', including both explicit and implicit acknowledgements by several cartel members on the European side that they shared [...] understanding that the allocation of GIS projects worldwide started by globally allocating the Japanese market to the Japanese cartel members and the European market to the European ones. Unlike the denials by other cartel members, the explicit and implicit acknowledgments have a self-incriminating value and are consistent with the rest of the evidence in the file. Therefore, they are also reliable and credible. [...] The Court of First Instance has already ruled in a case³⁵ that shows similarity in the constellation of facts that in this

³⁴ Case T-44/02, *Dresdner Bank AG v Commission* of 14 October 2004, pars. 65 and 75.

³⁵ "371 Although the exclusion of the European producers from the Japanese market logically constituted the feature of that aspect of the Fundamental Rules which was of interest to the Japanese producers, the

sort of situation, the Japanese companies must have known or ought necessarily to have understood the existence of arrangements relating to the division of markets, including the existence of 'home countries' in Europe, because they were those in which their European counterparts were based, but which were not loaded in the global quotas, as was the case for Japan itself.

- (256) For the reasons stated in recital (127) above, the proposal made in July 2002 by the European companies to consider Central and Eastern Europe as their market can only be interpreted as a proposal to extend the protection of the 'common understanding' beyond Western Europe. Despite the alleged rejection of that extension by Hitachi, the European cartel members actually proceeded on that basis thereafter (see recital (128) above). Moreover, even if the exchanges had reflected a brand new 'common understanding' encompassing Western Europe (which was not the case), the respective positions of the European and the Japanese companies can only be explained by the fact that they shared the perception that the Japanese companies were credible potential competitors in Western Europe.
- (257) The shared perception of the Japanese companies as potential competitors in most of Europe also explains why the European companies accepted having to 'sacrifice' projects outside Europe by loading the European projects (outside the 'home markets') in their global quota, in exchange for being able to control their own price level in Europe. It also explains why only some European countries were attributed the category of 'home markets' together with Japan and were hence subject to the same level of reciprocal protection.
- (258) The existence of a 'common understanding' and of 'home countries' as described in the factual part of this Decision and in recitals (235) to (246) above constitutes a coherent explanation compatible with the evidence in the file. In particular, the texts of the 'GQ-Agreement' and the 'EQ-Agreement' cannot explain by themselves why the sales in some EEA countries (those which were not considered as 'home countries') were counted in the cartel quotas and monitored by the parties to those agreements while, in contrast, the sales in Japan and in other EEA countries (the 'home countries') were not 'loaded'. The same is true in respect of the fact that the worldwide quotas included sales in most of Europe and that the difference in treatment of sales within the EEA is not reflected in the texts as such, since all EEA countries (except for Iceland and Liechtenstein) were simply listed as excluded territory in the 'GQ-Agreement'.
- (259) It is fully consistent with the available documentary evidence (see recitals (124) to (134) above) that the Japanese undertakings did not bid more often in Europe because

latter knew, or ought necessarily to have understood that that principle was applicable as much at intra-Community level as at inter-continental level.

372 (...) It necessarily follows that the presence of a national producer that was a member of the cartel on the national market of a State was perceived as a precondition for respect of a market by the other members of the club.

374 It is clear from the foregoing that it was not appropriate, in this case, for the Commission to treat the infringement (...) as comprising two separate infringements, the first relating to relations between the European and Japanese producers and the second to intra-Community relations". Case T-67/00, T-68/00, T-71/00 and 78/00, JFE Engineering Corp. v. Commission of 8 July 2004.

they had agreed not to with the European counterparts and because their mutual agreement included as an inherent feature that they were compensated accordingly in the rest of the world. This compensation was built into the cartel from the moment that European companies accepted loading their projects in Europe (outside the European home countries, but still within the list of excluded territories of the GQ-Agreement) in their global quota. So doing, the European companies implicitly recognized the Japanese companies as at least potential competitors and the Europeans renounced to obtain more projects in the rest of the world in exchange for the Japanese refraining from actual competition in Europe. Otherwise, the whole of the EEA would have been considered as a 'home territory' in exchange for their acknowledgement of Japan as a 'home country' and, accordingly, the sales made in the EEA would have not been loaded in the joint European global share. Therefore, this conclusion and the evidence available in the file mutually reinforce each other.

- (260) Moreover, the fact that the Japanese companies did not even consider³⁶ contesting the European market for 16 years by means similar to the ones used in other markets in the rest of the world, is also consistent with the fact that they were aware of the cartelisation of projects in Europe and they were certain of the risks involved. They were aware of this cartelisation in Europe because it was an integral part of the GIS cartel to which they were parties.
- (261) Further to the above explained logic of the cartel, it is established on the basis of company statements and other documentary evidence, that the anti-competitive agreement existed and included the mutual respect of most of the EEA market by the Japanese and the Japanese market by the Europeans. It is also established that, in the context of the monitoring of the global quotas, the sales made in the EEA outside the European home countries were taken into account under the global quotas. This mechanism reveals by its mere definition and implementation the existence of a restrictive object. According to settled case-law³⁷, such a restrictive object cannot be justified by an analysis of the economic context of the cartel, as some of the parties argue, nor would it matter whether the elements of the cartel were in the commercial interests of the Japanese undertakings, if it were established on the basis of evidence in the Commission file, that they in fact took part in the infringement.
- (262) The case-law to which certain parties refer in this regard concerns circumstances in which the Commission relies only on the conduct of the undertakings in question in order to arrive at its assessment. It is not sufficient for parties to put forward plausible alternative explanations, if they cannot prove that the evidence relied on by the Commission is unreliable or insufficient³⁸. The Commission relies on documentary

³⁶ None of the Japanese parties have provided concrete studies proving that they would have ever disregarded bidding for projects in Europe after a detailed study. They have only provided broad studies drafted in generic terms.

³⁷ Case C-49/92 P, *Commission v. Anic Partecipazioni* [1999] ECR I-4125, paragraph 123; Case T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp. v. Commission* of 8 July 2004, paragraphs 181-185; Case C-204/00 P, *Aalborg Portland A/S a.o. v. Commission*, of 7 January 2004 A/S, paragraph 261 and Case C-277/87 *Sandoz prodotti farmaceutici v Commission* [1990] ECR I-45.

³⁸ Case T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp. v. Commission* of 8 July 2004 and paragraphs 186, 187; supported by Advocate General Geelhoed in its Opinion delivered on 12

evidence (both contemporaneous and party statements) to establish to the required legal standard the existence of the anticompetitive object of the arrangements. In particular, [...] statements confirm the above conclusions, which can be objectively deducted from the global cartel mechanism.

(263) In the Commission's view, [...] statements constitute reliable, credible evidence and have great probative value. Neither [...] nor ABB would have any hidden interest in lying to the Commission or in reporting additional, non-existing, infringements. This view is founded on the following grounds³⁹:

- (a) ABB's application falls under the 2002 Leniency Notice. Unlike the 1996 Leniency Notice⁴⁰, ABB knew that it would be entitled to full immunity if it was the first company enabling the Commission to carry out an inspection, provided that it further satisfied the duty of full cooperation throughout the procedure. The Commission conducted inspections in the premises of other cartel members on the basis of the information provided by ABB and this was confirmed by a Decision conferring conditional immunity. Given that ABB had been granted conditional immunity, in any subsequent submissions ABB did not need to invent additional infringements or a longer duration to obtain immunity. On the contrary, it had every interest in fully cooperating with the Commission and in providing only truthful information in order not to jeopardize the immunity provisionally granted. As regards the statements submitted before the granting of conditional immunity, these were, by definition, self-incriminating, which in principle renders them particularly reliable.
- (b) According to settled case-law, [...] statements would also be of particularly great probative value since he was a direct witness of most of the circumstances he described (which nobody has contradicted). He was interviewed by the Commission and provided answers on behalf of ABB. Answers given on behalf of an undertaking as such carry more weight than that of an employee of the undertaking, whatever his individual experience or opinion. When [...] made his first submissions, he was also under a professional obligation to act in the interests of ABB. Furthermore, the statements made added to the evidence to be used against ABB and it is considered that a witness, on behalf of an undertaking would not lightly confess to the existence of an infringement without weighing the consequences of so doing, and there is nothing in the file to support the view that he might have failed to fulfill that obligation.

September 2006 in Joined Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission*, (not yet published), paragraphs 185 to 191.

³⁹ T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp. v. Commission* of 8 July 2004, paragraph 205-212; Case T-23/99 *LR AF 1998 v Commission* [2002], ECR II-1705; Case t-25/95, *Cimenteries CBR SA Groupe Danone a.o. v Commission* (Cement), 2000 ECR II-491, paragraph 1838.

⁴⁰ OJ C 207 18.07.1996, p. 4.

- (c) The fact that [...] (and ABB, accordingly) revised and supplemented the content of both his own statements and provided additional information after the Statement of Objections shows his commitment to provide accurate information and prevent misinterpretations. It also shows the deliberate, reflective nature and seriousness of his statements. This is confirmed in particular by the fact that, having read the Statements of Objections, he realized that he had not yet provided information that could be exculpatory for VA TECH and submitted it, even if that evidence was irrelevant for ABB's position.
 - (d) In the Commission's view, [...] statements constitute a complete and consistent account, which explains all the aspects of the infringement, including its duration and many other details. It is corroborated by and/or consistent with other evidence in the file, including the original written agreements themselves which constitute contemporaneous direct undisputed documentary evidence. Indeed, the few elements that are not corroborated by contemporaneous evidence are consistent with the rest of that evidence. None of the other companies has provided explanations with the same standard of reliability and all the facts retained in this decision are either explicitly corroborated or not denied, by the one or the other party.
- (264) Taken together, [...] statements and the rest of the evidence in the file constitute a "body of consistent inculpatory evidence" in the sense of the case-law.⁴¹ Therefore, it is not necessary for each item of evidence produced by the Commission to reflect precisely and concordantly the statements by [...] in relation to each element of the infringement. It is sufficient for a document to evidence significant elements of the agreement described by [...] to have some corroborative value in the context of the body of inculpatory evidence.

7.2.2.2. Single and continuous infringement

7.2.2.2.1. Principles

- (265) A complex cartel may properly be viewed as a single and continuous infringement for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty.

⁴¹ Judgment of the Court of First Instance in Joined Cases T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp. v. Commission* of 8 July 2004, paragraphs 201 to 204, 323, 330, 334 and 335.

- (266) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81 of the Treaty where there is a single common and continuing objective.
- (267) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk⁴².
- (268) In fact, as the Court of Justice stated in its judgment in *Commission v Anic Partecipazioni*⁴³, the agreements and concerted practices referred to in Article 81 (1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty⁴⁴.
- (269) The principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued without interruption between two specific dates⁴⁵.

7.2.2.2.2. Application to this case

- (270) The Commission considers that the complex of arrangements in this case present the characteristics of a single and continuous infringement.

A coherent set of measures to implement a single purpose of restricting competition for GIS projects at global and European level

⁴² See judgment of the Court of Justice in Case C-49/92, *Commission v Anic Partecipazioni*, [1999] ECR, I-4235, at paragraph 83.

⁴³ *Ibidem*.

⁴⁴ See the judgment of the Court of Justice in Case C-49/92, *Commission v Anic Partecipazioni*, [1999] ECR, I-4325, paragraphs 78-81, 83-85 and 203.

⁴⁵ Judgments of the Court of First Instance of 5 April 2006, in case T-279/02, *Degussa AG v Commission* (not yet published), paragraph 153; in case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 79; and in case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 188.

- (271) The arrangements described in this Decision were part of an overall scheme which laid down the lines of action or of abstention by the members of the cartel in all the geographic areas, including the EEA, which were subject to the agreements, and restricted their individual commercial conduct in order to pursue a single anti-competitive economic aim, namely the distortion of normal competitive conditions for GIS projects, as explained in recitals (234) to (248) above. For this purpose, they coordinated amongst themselves the allocation of GIS projects worldwide and their price levels according to common rules and agreed exceptions (such as the ‘home countries’). They further coordinated their common response towards cartel competitors (see recitals (156) and (169) above) including ‘supporting tenders’ (see recital (153) above) and a policy of no longer granting licenses to outsiders (see recital (160) above).
- (272) The Japanese and the European undertakings subject to these proceedings participated in the cartel activities at the global level. Moreover, the European undertakings had their own arrangements applying to Europe in the understanding with the Japanese undertakings that the latter would not sell in Europe and that European ‘home countries’ would not be counted under the European joint quota, just as Japan (another ‘home country’) was not to be counted under the Japanese joint quota. The Japanese companies accepted that the other European projects would be allocated amongst the European cartel members if they were counted in the European global joint quota.
- (273) Hitachi/JAEPS, Toshiba and Melco have argued that they were only involved in a worldwide GIS cartel, separate from the European GIS cartel. On the one hand, they would not have been party to any common understanding that they were not supposed to bid in Europe and the Europeans would not bid in Japan. Likewise, they would have been unaware of the attribution of ‘home markets’ within Europe. These arguments have been rejected in recitals (127), (129) to (131) and (255) to (261) above.
- (274) Concerning the intimate relationship between the texts and operation of the ‘GQ Agreement’ and of the ‘EQ-Agreement’ as part of the overall scheme agreed between the European and the Japanese producers on a global level, it must be recalled that: a) they are contemporaneous (see recital (118) and (139) above); b) the EQ-Agreement is expressly subordinated to the GQ Agreement (see recital (120) above); c) the members of the E-Group were simultaneously parties to both Agreements (see recital (142) above); and d) the content and mechanisms of both Agreements are interlinked (see section Cartel rules for GIS projects outside ‘home countries’: the ‘GQ-Agreement’ and the ‘EQ-Agreement’ above).
- (275) The facilities, institutions, meetings, rules and codes set out in the E-Agreement (for example, see recitals (161) to (163) above), were also those applied as a matter of course for the allocation of projects within the EEA (outside ‘home countries’) solely amongst the European cartel members. Moreover, also the individuals, the *modus operandi* and the devices (including encrypted telephones and computer programs) concerned with the implementation of the GQ-Agreement and the EQ-Agreement were used for the allocation of those projects.
- (276) It is not indispensable that the Japanese companies would have known the exact terms of the ‘EQ-Agreement’ for them to be able: a) to realise that the ‘GQ-Agreement’

required some implementation rules by which they reallocated amongst European cartel members the GQ projects obtained pursuant to the joint quota and that a similar arrangement was in place for European projects outside the 'home countries'; and b) to infer that this was the case in view of the project lists of allocations made both outside and inside Europe which were regularly updated for monitoring purposes with the exclusion of projects in the European 'home countries' (or Japan, which was also a 'home country' for the Japanese companies). This is all the Japanese needed to be aware of, at their level, to contribute to the overall scheme. In this respect, Hitachi confirms the documentary evidence in the file showing that "*the European GIS suppliers disclosed to the Japanese GIS suppliers details of GIS projects that they would be supplying in Europe. Hitachi further confirms that the purpose of such reports was to ensure that the value of the European projects was taken into account when agreeing the quota of projects to be allocated between the European suppliers and the Japanese suppliers*", although it argues that there is no evidence in the file showing that the same details were exchanged after 1999. For those cumulative reasons, Hitachi/JAEPS' argument that such regular access by the Japanese companies to that information would not prove that the Japanese providers knew that it was obtained from a 'separate European cartel' run by the European GQ-cartel members must be dismissed.

- (277) In the last years of the cartel, the allocations of projects and the price arrangements took place directly amongst all cartel members, without the intermediary of the E/J Committee. Nevertheless, even if there would have been an interruption in the exchange of details on the allocation of European projects (*quod non*, see below under the heading 'Continuity of purpose and of key features'), the Japanese companies would have had more than a decade to realise the existence of a European side to the cartel. No new, independent Japanese company entered the cartel at a later stage, which could have argued that it did not know about those practices.
- (278) The Commission therefore considers the measures agreed and taken at the European level as one coherent set of measures of the arrangements agreed at both the global and the European level.

Continuity of purpose and of key features

- (279) Some cartel members have argued that the evolution of the cartel made it change its nature as from 2002, and two⁴⁶ infringements should be distinguished accordingly, rather than a single and continuous one. They refer to the aspects of the cartel that evolved throughout the 16 years between 15 April 1988 and 11 May 2004. However all those aspects were of a superficial nature and changes took place at different points in time, leading gradually to a simplification of the contacts and arrangements and an increased sophistication of the means to conceal the cartel.
- (280) After April 1999, the summit meetings were no longer held regularly. The cartel began discussing projects in packages in 2000. In 2001, the logistics of the cartel were further simplified, since it went on with fewer members (ABB, Alstom, Mitsubishi,

⁴⁶ Schneider, which argues not to have any more knowledge of how the cartel operated, submits its view based on the file that the Commission should establish three successive infringements.

Toshiba and Fuji), as compared with the 14 founding members in 1988, and a complex structure was no longer justified. Since the beginning of the cartel, the arrangement of supporting bids and minimum prices took place either in multilateral job arrangement meetings or in bilateral arrangement meetings or, simply, by exchanging arrangement sheets by fax. Progressively, multilateral job arrangement meetings were discontinued, but the exchange of arrangement sheets and the bilateral arrangement meetings continued. The participants' codes changed in July 2002, when former individual cartel members started to be represented by their joint ventures. Encrypted mobile communications were possible at least since 2002, and e-mails were increasingly used. Throughout the last two years of the cartel the means to conceal their information, went from using 'zips' to the use of 'E-mails Secure Transmission' (EST) in 2003 and software to encrypt documents ('Blowfish') in 2004 (see recitals (172) to (176) above). From the perspective of the members of the cartel whose participation was interrupted, these changes may appear abrupt as they compare the situation of late 1999 with mid 2002.

- (281) The infringement showed throughout a consistent pattern of collusive contacts aimed at restricting competition: a) the object of the infringement remained the same; b) projects were notified, discussed, allocated; c) contacts and meetings took place at both management and working level; d) tenders were manipulated by organising bids and supporting tenders; e) price competition was avoided for projects not suitable for allocation; f) licensing of 'uncontrolled' outsiders was avoided; g) confidential information was regularly exchanged; h) compensation mechanisms were applied and retaliation mechanisms were put in place; i) measures to conceal the cartel were used; j) Japan and the European home countries were reserved, while projects won outside home countries were counted in the relevant quotas; and k) the individuals and companies participating in the cartel showed a high degree of continuity.

- (282) Moreover, both the GQ-Agreement and the EQ-Agreement contained review provisions (see recital (140) above) establishing that their respective provisions would continue to apply during any negotiation aimed at modifying the terms of the agreements.

- (283) Given these elements, it would be artificial to split up such continuous conduct, characterised by a single aim, by treating it as consisting of several separate infringements, when what was involved was a single and common plan which manifested itself in the various agreements and concerted practices.

- (284) [...] The submissions made by those undertakings arguing that there were two successive infringements diverge considerably as to the end date of the first one (see recital (290) below). The contradicting submissions are also at variance with the documentary evidence obtained from the inspections. A closer analysis reveals that the contradicting submissions constitute simple statements (none of them contemporaneous to the facts) unsupported by any contemporaneous or otherwise compelling evidence showing that the GIS cartel would have ended on any of the various dates suggested. They do not constitute factual evidence, but assessments of the facts proposed by the parties or inferences by witnesses in documents written at the request of the attorneys for the purpose of the companies' defence in this procedure.

Parties tend to allege dates on which they consider that the cartel worked less efficiently as dates where the cartel should be deemed as ended *de facto*.

- (285) Siemens/VA TECH, Schneider and ALSTOM have argued that part of the cartel constituted a separate infringement which ended with the Annual Meeting held on 24 April 1999. However, ABB (see recital (279) above), AREVA, Fuji, Hitachi/JAEPS, Melco and Toshiba confirm that the cartel continued thereafter and that Siemens's and Hitachi's participation lasted longer before it was interrupted. According to them, Siemens announced the suspension of its participation in the cartel meetings in September 1999, followed by Hitachi a couple of months (according to Hitachi/JAEPS) or six months (according to ABB) thereafter [...].
- (286) The submissions by ABB, AREVA, Hitachi/JAEPS, Fuji, Melco and Toshiba are considered more credible for the purpose of establishing the moment when Siemens left the cartel than those of Siemens/VA TECH, ALSTOM and Schneider for several reasons. First, the categorical acknowledgement of the continuity of the cartel by the ABB, AREVA, Hitachi/JAEPS and Melco implicitly prevents these parties from arguing that part of the infringement is time barred. Second, because the Commission file contains corroborating evidence showing both that the participation of Siemens and Hitachi in the cartel continued beyond April 1999 and that the cartel itself continued in their absence, once Siemens and Hitachi temporarily interrupted their participation in it. Finally, the statements by Siemens, VA TECH, ALSTOM and Schneider are ambiguous, uncertain and inconclusive, even if considered individually (see recitals (287) to (289) below).
- (287) Regarding the last point, the Commission takes into account the following as regards the intrinsic value of Siemens/VA TECH statements:
- (a) Although VA TECH and Siemens constituted separate undertakings during their participation in the infringement, VA TECH is now part of the Siemens group (see recital (77) above and recital (439) below) and remains active in the GIS activities under Siemens direction. Therefore, their concurring submissions as such do not qualify as mutually corroborating evidence. However, only Siemens's and VA TECH's replies to the Statement of Objections are fully in line in this respect, since VA TECH has thereby corrected its own leniency application, where it submitted that the cartel had broken up "*in the end of 1999*".
 - (b) VA TECH had submitted previously that its own involvement in the cartel was interrupted only after a meeting held in Zurich on 12 October 2000. When the Commission put forward for comments ABB's statement containing potentially exculpatory evidence for VA TECH (see recital (297) below), VA TECH replied by giving two mutually exclusive statements. The cartel would have ended in April 1999 and a different one would have started only in 2002, but – by way of contradiction – its own participation in the first cartel would have been interrupted after the Zurich meeting of 12 October 2000.

- (c) Siemens's acknowledgement that it cannot know whether ABB's information regarding VA TECH's withdrawal in 2000 is accurate, because Siemens itself had withdrawn in 1999, is incompatible with its own assertion stating that the cartel ended in April 1999. If the cartel had ended in April 1999, nobody could have left it in 2000.
- (288) Regarding ALSTOM's and Schneider's submission stating that a first cartel ended in April 1999, the Commission takes into account that both undertakings have consistently claimed during the procedure that they no longer had information on their past conduct, after the sale of their T&D businesses to, respectively, AREVA and VA TECH. If this were true, their statements would constitute simple assessments prepared for the purpose of their defence in this case, made on the basis of the file documents rendered accessible in these proceedings. They should be considered as parties' arguments, but they lack any evidentiary value whatsoever and cannot corroborate Siemens/VA TECH's submission.
- (289) By way of exception, [...] ALSTOM, on its own motion, provided the Commission with a statement by one of its employees, [...], who had taken part in cartel contacts. The statement by [...], dated the same day and provided following on AREVA's claim, says that [...] had left AREVA and was currently employed by ALSTOM. However, [...] statement does not constitute reliable evidence to corroborate that Siemens would have left the cartel in April 1999, nor to prove that the cartel itself ended then (or at any other moment before 11 May 2004), for the following reasons.
- (a) Even if the fact was not taken into account that the submission of [...] statement has been prompted by AREVA's contentions, the statement by [...], as such, could still have limited exculpatory value. It has been made at a late stage of the procedure, for the sole purposes of ALSTOM's defence, under the sole control of ALSTOM's lawyers.
- (b) The account itself is speculative and inconclusive on the matter at stake, because [...] acknowledges that until August 1999 he knew about the existence of the cartel, but had no information on how it worked. He was unaware of who the members were, when or where the meetings took place or what rules applied. However, he conjectures in September 2006 that the cartel must be considered as *de facto* ended in April 1999 on the grounds that, if Siemens announced then its departure from the cartel, the possible discussions could not be effective in the absence of such an important competitor. He further infers that this *de facto* situation would have been at the origin of a price decrease in the second half of 1999 which would have continued until 2003. [...] does not provide any factual information on the departure of Siemens or on any interruption of the cartel. He only provides his own speculations on what might have happened, on the basis of the information submitted for his consideration and which he himself acknowledges not to have known at the relevant time. To the extent that those conjectures are submitted to the Commission by ALSTOM, they constitute arguments to be pondered by the Commission, but they

do not have any evidentiary value. Moreover, [...] inferences regarding the level of prices are also unlikely, since the price decreases are documented already in 1997 and ALSTOM acknowledges that Siemens was back in the cartel at least in 2002.

- (290) The Commission cannot rely on the submissions by AREVA, Melco, Hitachi/JAEPS and Toshiba as regards their respective claims that the cartel would have ended for the first time sometime in 1997 (AREVA), or in September 1999 (Melco and Toshiba), or sometime in 1999 after Siemens's departure (Hitachi/JAEPS), or in or around September 2000 (Fuji). They are not reliable on that point because they contradict each other and, as already mentioned, they are at odds with the evidence in the file. Melco, Toshiba, Fuji, ABB, Alstom, Reyrolle/VA TECH, and Magrini/Schneider (both became later VAS and hence VA TECH), continued to take part in multilateral meetings and contacts in 2000 and/or 2001. Furthermore, they are ambiguous and inconclusive.
- (291) AREVA submits contradictory and ambiguous statements. It stated that what it would consider the first cartel had ended in 1997, while it stated instead in its Reply to the Statement of Objections that the period between September 1999 and March 2002 was a transitional time where meetings would have been less frequent and, although maintaining their anticompetitive character, deployed no significant anticompetitive effects.
- (292) Melco submits contradictory and ambiguous statements regarding this issue in its Reply to the Statement of Objections. In point 50, "*Melco is of the view that the prior arrangement between the Group effectively stopped in 1999 following Siemens' departure and at the very least the terms of the GQ Agreement and practices associated with it were not followed after 1999*". However, it also acknowledges that the discussions continued, although in point 51, Melco becomes only "*of the view that the Group's discussions did not have any real effect after 1999*". Moreover, according to Melco, its views in this respect are based on the submissions by other parties to these proceedings. Therefore, Melco's views on this aspect of the case constitute assessments prepared for the purpose of Melco's defence. They lack any evidentiary value and cannot corroborate other submissions.
- (293) [...] originally submitted that the infringement was interrupted in 1999. [...] in their Reply to the Statement of Objections Hitachi and JAEPS argue that they were not aware of its continuation: "*Furthermore, Hitachi confirms that it did not even know whether the GQ cartel continued to operate in its absence*". The Commission file allowed Hitachi/JAEPS to learn about the continuation of the cartel: "*Hitachi confirms that it believed the cartel had in fact broken down, largely as a result of Siemens' earlier departure. In fact when Siemens contacted Hitachi in early June 2002, it proposed the establishment of a 'new scheme' for GIS suppliers. This reference to a 'new scheme' served to support Hitachi's belief that the cartel had broken down in the interim*". To the extent that Hitachi argues that it left the cartel in late 1999, after Siemens' departure in September 1999, it confirms that the infringement was not interrupted in 1997, in April 1999, or in September 1999. To the extent that it was unaware of the infringement during its absence, it does not corroborate the cartel interruption at any time thereafter.

- (294) Toshiba argues that the cartel was interrupted from September 1999 to August 2002 on the basis of the statements made by AREVA, Melco and Hitachi/JAEPS to which Toshiba had access during the procedure. A close analysis of those statements has shown that they have been either contradicted or corrected by their authors and that no evidentiary value can be attributed to them. Also Toshiba's statements, which are unsupported by evidence and contradicted by the evidence in the file, lack any evidentiary value and cannot corroborate other submissions on this issue.

Interruption of membership by some participants

- (295) Given the lack of a precise date for Siemens's departure from the cartel and in view of the available evidence that it took place sometime in September 1999, it is placed at the start of the month, that is to say, on 1 September 1999. Siemens is known to have resumed participating in multilateral meetings from 26 March 2002 onwards.
- (296) [...] Therefore, in the absence of a more precise date, the Commission places Hitachi's departure on 1 January 2000. Hitachi is known to have been present in the meeting on 2 July 2002. The Commission considers that it resumed its participation then.
- (297) [...] Therefore, the Commission considers that Schneider ended its participation in the cartel on 13 December 2000 and that VA TECH interrupted it between 13 December 2000 and 1 April 2002. Because the cartel is considered to be a single and continuous infringement, the participation in the cartel of Siemens, Hitachi and VA TECH must be considered as repeated participation in the same infringement.
- (298) In 2002, Siemens, Hitachi and VA TECH returned to the cartel. In October 2002, the GIS businesses of Hitachi and Fuji were transferred to their joint venture JAEPS and Toshiba and Melco created TM T&D. Some minor adjustments were introduced in the cartel organisation and modus operandi taking into account the new, simpler constellation of cartel members⁴⁷, the political and economic developments in Europe as well as the technological improvements available (see recitals (280) and (281) above). All members could be present at the joint meetings to decide on allocation at global level, without intermediate bodies and most of the meetings to manipulate bids became bilateral or took place by exchanging arrangement sheets and many contacts took place through electronic and telephonic traffic, often using encryption and other sophisticated means.
- (299) In view of the above, the Commission considers that the cartel as described in this Decision, constitutes a complex but single and continuous infringement from 15 April 1988 until 11 May 2004.

7.2.3. Restriction of competition

⁴⁷ The 1988 GQ Agreement listed by their codes a total of 14 members: 9 European and 5 Japanese. The two Committees with fewer members rendered the cartel operational while the representation of other E-members by the E-Committee was facilitated by the internal links between some of them. AEG, Sprecher and GEC were part of the Alstom group and Nuova Magrini was part of the Schneider group and it shared a joint quota in the cartel with Schneider Electric SA.

7.2.3.1. Principles

- (300) The complex of agreements and/or concerted practices in this case had the **object and effect** of restricting competition in the Community and the EEA.
- (301) Article 81 of the Treaty and Article 53 of the EEA Agreement expressly mention (in a non-exhaustive list) as restrictive of competition agreements and concerted practices which:
- (a) directly or indirectly fix selling prices or any other trading conditions;
 - (b) limit or control production, markets or technical development;
 - (c) share markets or sources of supply.

7.2.3.2. Application to this case

- (302) More particularly, in this case, the principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition in order to find a breach of Article 81 of the Treaty and Article 53 of the EEA Agreement are:
- (a) the sharing of markets;
 - (b) allocation of quotas and maintenance of the respective market shares;
 - (c) allocation of individual GIS projects to designated producers and manipulation of the bidding procedure for those projects (bid-rigging) in order to ensure that the assigned producers were awarded the contract in question;
 - (d) the fixing of prices by means of the complex price arrangements for projects which were not allocated;
 - (e) agreement to cease license agreements with non cartel members;
 - (f) exchange of sensitive market information.
- (303) The complex of agreements and/or concerted practices described in this Decision has as its **object** the restriction of competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement.
- (304) It is settled case-law that for the purpose of application of Article 81 of the Treaty and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved⁴⁸.

⁴⁸ Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178.

- (305) In this case, the parties involved in the infringement showed a consistent pattern of collusive contacts which were aimed at restricting competition. The Commission also considers that there is evidence that the parties have implemented and enforced the restrictive agreements and/or concerted practices: projects were notified, discussed, allocated; price offers and supporting tenders were organised and manipulated in ‘job arrangement meetings’ or through the exchange of arrangements sheets; competition was avoided for projects non suitable for allocation, licensing ‘uncontrolled’ outsiders was avoided; confidential information was regularly exchanged; compensation mechanisms were applied and retaliation mechanisms were put in place; European ‘home countries’ were reserved, and ‘won’ projects (outside ‘home countries’) were counted in the relevant quotas.
- (306) Although [...]acknowledged that the details of the results of the allocation of European projects were regularly disclosed to the Japanese GIS suppliers in order to ensure that their PUS value was charged onto the worldwide quota to be allocated pursuant to the GQ-Agreement (see recital (276) above), it takes the view that those details constituted ‘non-commercially sensitive historical data’, because they would have been submitted to the Japanese companies only once the European projects were allocated by the European counterparts, ‘post infringement’. Toshiba uses the same argument. This view must be dismissed on at least two grounds. On the one hand, some European projects were actually disclosed to the Japanese counterparts prior to their allocation within the cartel or prior to the final customer’s decision (see recital (244) above), or were even available for allocation also to Japanese companies (see recital (127) above). On the other hand, the commercial sensitivity of the updated exchanges of information regarding the results of the allocation of projects, whether European or not, is inherent in the fact that they constituted a continuous input essential to the functioning of the cartel at global level, which had immediate consequences for the allocation of on-going projects both inside and outside Europe and which also determined the automatic allocation to the so-called ‘pre-supplier’ of any future tenders regarding physical extensions of the same plant⁴⁹.
- (307) The fact that some participants might have not respected the arrangements in all instances would not imply that they did not implement the cartel agreement. As the Court of First Instance held in Cascades⁵⁰, “*an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit*”. The Commission considers that the evidence available is sufficient to confirm that the cartel arrangements were restrictive by object, as well as the fact that those agreements and concerted practices were implemented in practice.
- (308) By its very nature, the implementation of a cartel agreement of the type described above leads to a significant distortion of competition, to the exclusive benefit of producers participating in the cartel and to the detriment of their customers.

7.2.4. Effect upon trade between Member States and between EEA Contracting Parties

⁴⁹ point 10 of the GQ-Agreement.

⁵⁰ Case T-308/94, [1998] ECR II-925, paragraph 230.

7.2.4.1. Principles

- (309) Article 81 of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
- (310) For an agreement, decision or concerted 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 objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. It follows that the Commission is not required to demonstrate the actual existence of such an effect on trade, a potential effect being sufficient, provided that such actual or potential influence is not insignificant⁵¹.
- (311) The application of Articles 81 of the Treaty and 53 EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States⁵².

7.2.4.2. Application to this case

- (312) As explained in the section 4.5 on 'Interstate trade', the market for GIS is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the Community and EFTA countries belonging to the EEA. The restriction of competition as concerns Iceland, Liechtenstein and Norway which are members of the EEA but not of the Community constitutes a violation of Article 53 of the EEA Agreement.
- (313) In this case, the cartel arrangements covered at least a large part of the trade throughout the Community and EEA. The existence of a bid-rigging mechanism and a quota allocation system must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed⁵³.
- (314) The Japanese companies subject to these proceedings have argued that their participation in the GIS cartel cannot be regarded as having had any effect on trade between Member States, or at least not any appreciable effect, since they did not

⁵¹ Judgments of the Court of First Instance in Case T-395/94 *Atlantic Container Line and Others v Commission* [2002] ECR II-875, paragraphs 79 and 90; in Joined Cases T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp. v. Commission* of 8 July 2004, paragraph 392; and the judgments of the Court of Justice in Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 48; and Case C-306/96 *Javico* [1998] ECR I-1983 (paragraph 17).

⁵² See the judgment of the Court of First Instance in Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

⁵³ See the judgment of the Court of Justice in Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 170.

conduct (or would not have conducted) themselves differently in the absence of the cartel agreements. Some parties have argued that the counting of European projects in the worldwide quota would not have affected Europe.

- (315) Those arguments have been addressed already in this Decision under the heading ‘Single and continuous infringement’. Since the GIS cartel constitutes a single and continuous infringement affecting trade between Member States, the impact of the Japanese applicants’ involvement in the infringement cannot be evaluated in isolation from the impact of the involvement of the European producers. Thus, it is clear that the intra-Community aspect of the illegal agreement at least potentially affected trade between Member States, so that the condition concerning the impact of the agreement on trade between Member States is satisfied in this case.
- (316) Moreover, there is evidence that contradicts the argument of the Japanese undertakings that they did not bid more often in Europe because they were not competitive due to industry standards or transport costs as compared to those for the Europeans. Evidence in the file shows that:
- (a) Japanese companies were not excluded from allocation in the whole of the EEA (see recital (127) above);
 - (b) some of the Japanese companies declined the offers made to them by European customers and they occasionally informed the Europeans thereof;
 - (c) allocation to Japanese companies was possible for projects in [...];
 - (d) for a long time, allocation to Japanese companies was not excluded regarding Eastern Europe. As already mentioned, the lists [...] reflecting the projects discussed with the Japanese companies include GIS projects outside the European countries listed as excluded in the GQ-Agreement and outside the EEA (at the time): projects in [...]. The issue of whether Central and Eastern Europe (the new market economies not listed in Appendix 2 to the 1988 GQ-Agreement) was subject to the common understanding covering Europe was subject of controversy between Hitachi and the European counterparts during the discussions on the so-called ‘New Scheme’.
- (317) The explanation that Japanese undertakings did not bid more often in Europe because they had agreed not to with the European counterparts and were compensated for that in the rest of the world is consistent with the available evidence. Indeed, this explanation is concurrent with the European companies accepting loading their projects in Europe in their global quota, thereby renouncing to obtain more projects in the rest of the world. If the Japanese companies would have not been seen as potential competitors for the EEA market (see in this regard the arguments of the parties in the context of the 2005 merger between Siemens and VA TECH⁵⁴), the whole of the EEA would have been considered as a ‘home territory’ in exchange for their acknowledgement of Japan as a ‘home country’ and, accordingly, the sales made in the EEA would have not been loaded in the joint European global share.

⁵⁴

Commission Decision of 13 July 2005 in Case COMP/M.3653 – *Siemens/VA Tech*.

(318) For 16 years the Japanese companies apparently did not even consider⁵⁵ making the necessary investments to become actual firm competitors within the EEA by any of the modalities they had chosen to contest the markets in other parts of the world also because they were aware of the cartelisation of projects in Europe and they were certain of the risks involved. They were aware of this cartelisation in Europe because it was an integral part of the GIS cartel to which they were parties.

(319) In view of the above, the Commission concludes that the agreements and/or concerted practices between the producers of GIS were capable of having an appreciable effect upon trade between Member States and between contracting parties of the EEA.

7.2.5. Provisions of competition rules applicable to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden

(320) In the period 1 January to 31 December 1994, the provisions of the EEA agreement applied to the EFTA Member States which had joined the EEA. The cartel thus constituted a violation of Article 53 of the EEA Agreement as well as of Article 81 of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in the EFTA states during this one year period falls under Article 53 of the EEA Agreement.

(321) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81 of the Treaty became applicable to the cartel insofar as it affected those markets. The operation of the cartel in Norway remained in breach of Article 53 of the EEA Agreement.

(322) In practice, it results from the foregoing that, in so far as the cartel applied to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

7.2.6. Duration of participation in the infringement

(323) In view of the above, it is concluded that the agreements and/or concerted practices between the producers of GIS lasted at least from 15 April 1998 until 11 May 2004.

(324) ABB, ALSTOM, Fuji, Hitachi, Melco, Siemens, Schneider, Toshiba and VA TECH (its predecessors) were involved in the infringement from at least 15 April 1998, date of adoption and entry into force of the GQ-Agreement and the EQ-Agreement (see recitals (139)-(142), (216) above).

(325) ABB was involved in the infringement until 2 March 2004 (see recital (88) above), when it ended its participation in the cartel prior to its submission pursuant to the Leniency Notice.

⁵⁵ None of the Japanese parties have been able to provide concrete studies proving that they would have ever disregarded bidding for projects in Europe after a detailed study. They only provide broad studies in draft in generic terms.

- (326) ALSTOM, Fuji, Melco and Toshiba were involved in the infringement until 11 May 2004, date of the last working meeting, which was abruptly interrupted by the Commission inspections (see recital (216) above). Fuji pursued its participation in the infringement through JAEPS from 1 October 2002, when its GIS activities were transferred to that joint venture (see recital (33) above and recitals (390) to (402) below). Melco and Toshiba participated in the infringement through their joint venture TM T&D from 1 October 2002 (see recital (61) above and recitals (405) and (429) below).
- (327) Siemens interrupted its participation in the infringement from 1 September 1999 to 26 March 2002 (see recitals (297) and (298) above) and then pursued it until 11 May 2004 (see also recital (216) above).
- (328) Hitachi interrupted its participation in the infringement from 1 January 2000 until 2 July 2002 (see recitals (296) and (298) above) and then pursued it until 11 May 2004 (see also recital (216) above). From 1 October 2002, date when its GIS activities were transferred to JAEPS, it participated in the infringement through this joint venture (see recitals (390) to (402) below).
- (329) Schneider and VA TECH (and/or its economic and legal predecessors) interrupted their participation in the infringement on 13 December 2000 (see recital (297) above). VA TECH resumed its participation on 1 April 2002 (see also recital (297) above) until 11 May 2004 (see also recital (216) above).
- (330) JAEPS participated in the infringement from 1 October 2002, when the GIS activities of Hitachi and Fuji were transferred to it (see also recitals (33), (39) and (41) above) until 11 May 2004 (see recital (216) above).
- (331) AREVA currently owns two entities which participated in the infringement within the group ALSTOM (see recital (23) above) from 7 December 1992 (see recital (20) above) and 22 December 2003 (see recital (21) above) respectively and continued their participation in the infringement until 11 May 2004 (see also recital (216) above).
- (332) In concise terms, the following addressees should be considered liable for the infringement for the periods indicated:

TABLE VII: Duration of the infringement

ABB Ltd.	from 15 April 1988 to 2 March 2004
ALSTOM (Société Anonyme)	from 15 April 1988 to 8 January 2004
AREVA SA	from 9 January 2004 until 11 May 2004
AREVA T & D AG (ex ALSTOM T&D AG)	from 22 December 2003 to 11 May 2004

AREVA T&D Holding SA	from 9 January 2004 until 11 May 2004
AREVA T & D SA (ex ALSTOM T&D SA)	from 7 December 1992 to 11 May 2004
Fuji Electric Holdings Co., Ltd	from 15 April 1988 to 11 May 2004
Fuji Electric Systems Co, Ltd.	from 15 April 1988 to 11 May 2004
Hitachi Ltd.	from 15 April 1988 to 31 December 1999, and from 2 July 2002 to 11 May 2004
Hitachi Europe Ltd.	from 15 April 1988 to 31 December 1999, and from 2 July 2002 to 30 September 2002.
Japan AE Power Systems	from 1 October 2002 to 11 May 2004
Mitsubishi Electric Corporation	from 15 April 1988 to 11 May 2004
Nuova Magrini Galileo S.p.A.	from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004
Schneider Electric SA	from 15 April 1988 to 13 December 2000
Siemens AG	from 15 April 1988 to 1 September 1999, and from 26 March 2002 to 11 May 2004
Siemens Aktiengesellschaft Österreich (ex VA Technologie AG)	from 20 September 1998 to 13 December 2000, and from 1 April 2002 to 11 May 2004
Siemens Aktiengesellschaft Österreich (ex VA TECH T&D GmbH, ex VAS)	from 1 April 2002 to 11 May 2004
Siemens Transmission & Distribution Ltd. (ex VA TECH Transmission & Distribution Ltd., ex Reyrolle)	from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004
Siemens Transmission & Distribution SA (ex VA TECH Transmission & Distribution SA, ex Schneider Electric High Voltage)	from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004
Toshiba Corporation	from 15 April 1988 to 11 May 2004
VA TECH Transmission & Distribution GmbH & Co KEG	from 20 September 1998 to 13 December 2000, and from 1 April 2002 to 11 May 2004

7.2.7. Addressees of the Decision

7.2.7.1. Principles

- (333) The subject of Article 81 of the Treaty and Article 53 of the EEA Agreement is the 'undertaking', a concept that is not identical with the notion of corporate legal personality in national commercial, company or fiscal law. In order to determine liability for an infringement of Article 81 of the Treaty, it is necessary to identify the undertaking which can be held liable. The term 'undertaking' is defined neither in the Treaty nor in the EEA Agreement, but it may refer to any entity engaged in a commercial activity. However, acts enforcing the Community and EEA competition rules should be addressed to legal entities. A decision concerning an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement may therefore be addressed to one or several entities having their own legal personality and forming part of the undertaking, and thus to a group as a whole, or to sub-groups, or to subsidiaries. Consequently, it is necessary for the purposes of applying and enforcing a decision to identify legal entities within the undertakings involved to be the addressees of the Decision.
- (334) In principle, the subsidiaries are liable alone when they were able to determine autonomously their behaviour on the market when they committed the infringement⁵⁶. However, it is established case-law that the mere fact that the subsidiary has separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company⁵⁷, since “*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 and 82 of the Treaty if the companies concerned do not determine independently their own conduct on the market*”⁵⁸. Hence, if a subsidiary does not determine its own conduct on the market independently, its parent forms a single economic entity with the subsidiary, and may be held liable for an infringement on the ground that it forms part of the same undertaking.
- (335) Parent companies exercising a decisive influence on a subsidiary's commercial conduct can be held jointly and severally liable for the infringement of Article 81 of the Treaty (and Article 53 of the EEA Agreement) committed by the subsidiary⁵⁹. According to established case-law⁶⁰, when a parent company owns, directly or

⁵⁶ Case C-279/98 *Cascades v. Commission* [2000] ECR I-9693, paragraph 79.

⁵⁷ See judgment of the Court of Justice in Case 48/69 *ICI v Commission* [1972] ECR 619; judgment of the Court of First Instance of 20 April 1999. *Limburgse Vinyl Maatschappij NV and others mentioned above (PVC II)*. ECR 1999, ECR II-0931.

⁵⁸ Judgment of the European Court of Justice in case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and Court of First Instance in Case T-102/92 *Viho v Commission* [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin v Commission* [2003] ECR II-4071.

⁵⁹ See judgments by the Court of Justice in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-0000, paragraphs 117; Case C-294/98 P *Metsä-Serla Oyj and Others v Commission* [2000] ECR I-10065, paragraph 27. See also judgment by the Court of First Instance of 27 September 2006, in Case T-134/01, *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v. Commission*, not yet published.

⁶⁰ Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraphs 50 and 51; Case C-310/93P, *BPB Industries & British Gypsum v. Commission* [1995] ECR I-865, at par. 11; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, at paragraph. 80; Case T-43/02, *Jungbunzlauer AG*, Judgment of 27 September 2006 (not yet published), at par. 125; Case T-223/01, *Akzo Nobel NV v Commission*, judgment of 27 September 2006 (not yet published) at paragraph 82; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and others v. Commission (PVC II)*, [1999] ECR II-931, at paragraphs 961

indirectly, the totality (or almost the totality) of the shares of a subsidiary, at the time the latter commits an infringement of Article 81 of the Treaty (or of Article 53 of the EEA Agreement), it can be presumed that the subsidiary follows the policy laid down by the parent company⁶¹ and thus does not enjoy such an autonomous position. It is likewise established that “*the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power*”⁶². In those circumstances, it is for the parent company to reverse that presumption by adducing sufficient evidence⁶³. The fact that it has been shown that a parent company is responsible for the conduct of its subsidiary does not in any way exonerate the subsidiary of its own responsibility. The subsidiary continues to be individually accountable for the anticompetitive practices in which it took part. Any responsibility on the part of the parent company, by reason of the influence and control it exercises over its subsidiary, is additional.

- (336) It results from the above that in this case, the Commission could legitimately set out its intention to hold parent companies jointly and severally liable with their (former or current) wholly owned subsidiaries involved in the infringement, thereby assuming that they had effectively exerted a decisive influence on the subsidiaries during the infringement. The parent companies that are addressees of the Statement of Objections were afforded the opportunity to state their position on that point and to possibly dispute this finding by submitting evidence supporting the assertion that the wholly owned subsidiaries had behaved autonomously. It should be noted that the use of this presumption based on the level of shareholding does not prevent the Commission from also relying on other pertinent factors to demonstrate the exercise of decisive influence and therefore to attribute liability to the parent companies concerned, provided that they have had an opportunity to state their views on them.
- (337) Legal entities within an undertaking having participated in their own right in an infringement and which have subsequently been acquired by another undertaking continue to bear responsibility themselves for their unlawful behaviour prior to their acquisition, when they had not been absorbed by the acquirer, but continued their activities as subsidiaries⁶⁴ (that is to say they retain their legal personality). In such a

and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 at paragraph 290; Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published) at paragraphs 59-60); and Case T-325/01, *DaimlerChrysler AG v Commission*, judgment of 15 September 2005 (not yet published) at paragraphs 217-221.

⁶¹ Case 48/69 *Imperial* quoted above, paragraphs 132-133.

⁶² See the judgment of the Court of First Instance of 15 June 2005 in *Tokai*, quoted in footnote 60, paragraph 60; in the same sense see the Court of First Instance in case T-354/94, *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 80, upheld by the European Court of Justice in case C-286/98P, *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraphs 27-29; and the European Court of Justice in case 107/82, *AEG v Commission* [1983] ECR 3151, paragraph 50. In Case T-314/01 *Avebe v Commission*, not yet reported, the Court of First Instance stated at para 136 that “*the Court of Justice recognised that when a parent company holds 100% of the shares in a subsidiary which has been found guilty of unlawful conduct, there is a rebuttable presumption that the parent company actually exerted a decisive influence over its subsidiary’s conduct*”.

⁶³ See case T-314/01 *Avebe v Commission*, not yet reported at para 136: “*In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent*”.

⁶⁴ Case 279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraphs 78 to 80

case, the acquirer may only be liable for the conduct of the subsidiary from the moment of its acquisition, if the latter persists in the infringement and liability of the new parent company can be established⁶⁵. If the undertaking which has acquired the assets infringes Article 81 of the Treaty and/or Article 53 of the EEA Agreement, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets⁶⁶.

- (338) Liability for unlawful behaviour may pass to a successor where the corporate entity which committed the violation has ceased to exist in law after the infringement has been committed⁶⁷. When an undertaking committed an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement and when this undertaking later disposed of the assets that were the vehicle of the infringement and withdrew from the market concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence.⁶⁸ However, the Court of Justice considers that, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed⁶⁹. The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow that undertaking to avoid liability⁷⁰.
- (339) The fact that a company retains legal personality after having transferred part of its activities to another company within the same group does not prevent the Commission from holding the latter company liable for the infringement committed by the former.⁷¹

⁶⁵ Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, at paragraph. 80.

⁶⁶ See Commission decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865, *PVC II*), OJ L 239 14.9.1994, p.14, paragraph 41: "It is (...) irrelevant that an undertaking may have sold its PVC business to another: the purchaser does not thereby become liable for the participation of the seller in the cartel. If the undertaking which committed the infringement continues in existence it remains responsible in spite of the transfer. On the other hand, where the infringing undertaking itself is absorbed by another producer, its responsibility may follow it and attach to the new or merged entity. It is not necessary that the acquirer be shown to have carried on or adopted the unlawful conduct as its own. The determining factor is whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged".

⁶⁷ Case C-49/92 *Commission v. Anic Partecipazioni SpA* 8.7.1999, paragraph 145.

⁶⁸ Case T-95/89 *Enichem Anic SpA v. Commission* (Polypropylene), ECR II-1623, paragraphs 237-8; case C-49/92 *Commission v. Anic Partecipazioni* quoted.

⁶⁹ See the judgment of 16 November 2000 in case C-279/98P *Cascades v Commission* [2000] ECR I-9693, paragraphs 78 and 79: "It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it".

⁷⁰ See the judgment of the Court of First Instance in case *PVC II*, cited in footnote 33, paragraph 953.

⁷¹ Case C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland a.o. v Commission*, [2004], paragraphs 356 to 359, p. I-123 and case T-43/02, *Jungbunzlauer AG v Commission*, judgment of 27 September 2006, (not yet published), at paragraph 132.

7.2.7.2. Application to this case

- (340) It has been established that during the periods identified in recital (332) above, (under the section 'Duration of participation in the infringement') the following entities should be held liable for the infringement committed by the respective undertakings.

ABB Ltd.

- (341) ABB Ltd. has participated in the collusive behaviour described in this Decision and is liable for it from 15 April 1988 (date on which it entered into the GQ Agreement and the E-Group Operation Agreement) until 2 March 2004 when it left the cartel (see recital (88) above).

ALSTOM

- (342) ALSTOM (Société Anonyme) and its legal and economic predecessors were 100% owners of the following legal entities having participated in the collusive behaviour described in this Decision⁷²: (a) Alsthom SA, GEC Alsthom SA, Kléber Eylau SA, GEC Alsthom T&D and ALSTOM T&D SA (now AREVA T&D SA) and (b) Sprecher Energie AG, GEC ALSTOM T&D AG, ALSTOM T&D AG (now AREVA T&D SA), ALSTOM Power AG (Switzerland), ALSTOM AG (Switzerland) and ALSTOM Schweiz Services AG (now AREVA T&D AG).
- (343) In the Statement of Objections, the Commission announced its intention to hold ALSTOM (Société Anonyme), AREVA T&D SA (ex ALSTOM T&D SA) and AREVA T&D AG (ex ALSTOM T&D AG) jointly and severally liable for ALSTOM's involvement in the infringement between 15 April 1988 (date on which it entered into the GQ Agreement and the E-Group Operation Agreement) and 8 January 2004, when ALSTOM sold its Transmission and Distribution activities to AREVA.
- (344) In its reply to the Statement of Objections, AREVA claimed that only ALSTOM should be held liable for the infringement at least until 1993, since what is now the ALSTOM group directly controlled the T&D activities throughout the period 1988-1993, until ALSTOM T&D SA's predecessor (GEC Alsthom T&D SA) was set up. In this regard, it must be pointed out that ALSTOM's reply to the Statement of Objections explicitly acknowledges having had access to AREVA's reply pursuant to the terms agreed between the two groups in the Share Purchase Agreement and that it addressed in detail AREVA's contentions on liability issues. During the Oral Hearing held on 18 and 19 July 2006, both ALSTOM and AREVA could restate their respective arguments and mutually react thereupon.

Arguments by ALSTOM

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With the exception of Kléber Eylau SA which was a subsidiary of GEC Alsthom SA (legal predecessor of Alstom (Société Anonyme)), for 99,76% and of Etoile Kléber for 0,04%, circumstances under which the Commission considers that the presumption of control also holds true.

- (345) In its reply to the Statement of Objections, ALSTOM (Société Anonyme) rejected the existence of what they claim would in fact be an irrefutable presumption on which the Commission could rely to impute liability on ALSTOM (Société Anonyme) jointly and severally with AREVA T&D SA and AREVA T&D AG and argues that such a presumption would breach the principles of individual liability and legal certainty as well as the presumption of innocence. According to ALSTOM, its corporate structure would be irrelevant to identify the legal person determining ALSTOM's commercial policy. Instead, other factors would show that ALSTOM never participated in the cartel nor exercised a decisive influence on its T&D activities.
- (346) ALSTOM argues that it cannot be attributed liability because ALSTOM's management would have never been aware of the alleged practices nor did it any decisive influence on any of the former employees having operational responsibilities in its T&D division/sector. The fact that the highest sector managers ("les présidents de chaque secteur") are members of ALSTOM's executive committee would not prove that they knew about the cartel. The practical organisation of the T&D sector prevented ALSTOM's parent company from being informed or able to take part in the business activities of the T&D division/sector or of its own subsidiaries in that sector. Likewise, the fact that some individuals held simultaneous or consecutive senior positions in ALSTOM parent company and ALSTOM T&D SA or ALSTOM T&D AG does not show that they could have influenced the subsidiaries' behaviour on the market. ALSTOM parent company's managers would only need to approve envisaged bids for contracts and tenders exceeding a certain threshold or involving certain substantial risks for the ALSTOM group. For this purpose, they would only examine summary notes (mainly regarding electric turnkey substations) prepared by the relevant bodies within the T&D sector. Those summary notes described the main conditions of tenders and offers but made it "*strictly impossible for ALSTOM*" ("*rigoureusement impossible à ALSTOM*") to establish that they were related to an underlying cartel. Therefore, ALSTOM's management was not (and could not have been) aware of the infringement committed at sector level and has never exerted a decisive influence on any of those entities.
- (347) ALSTOM denies having been directly active in the GIS business or involved in the GIS cartel before 1993 because the T&D division, later the T&D sector (to which ALSTOM T&D SA and ALSTOM T&D AG belonged) has always behaved as an autonomous undertaking on the market, both before and after having been conferred legal personality. The T&D sector (as any other within ALSTOM) would implement the global strategy and objectives decided by ALSTOM's executive committee in their decentralised, autonomous commercial activities. The tasks of ALSTOM's administrators and executive committee consisted precisely in delegating their responsibility for commercial policies on sector managers such as marketing directors, while ensuring the proper functioning of the delegation system. ALSTOM admits that some decisions were under the control of the parent company, which also maintained the cohesion of the group by coordinating certain policies, but it argues that this did not concern commercial strategy or affect the subsidiaries' autonomy. This primacy of the operative organisation over the legal structure also stems from ALSTOM managers' mobility (including staff from the T&D sector) throughout the different ALSTOM sectors, facilitated by two specific companies within the group devoted to

this task. The decision by the French Competition Council imposing a fine on Alstom on 1 March 1988⁷³ cannot constitute a precedent for the Commission, since Alstom was considered liable because at the time it was the only legal entity to which the practices in the T&D sector could be attributed. Only the T&D sector and thus, AREVA T&D SA and AREVA T&D AG should be held liable for the infringement in this case.

Appraisal by the Commission

Presumption of parental liability based on 100% ownership

- (348) Despite ALSTOM's claims, the Commission relied nowhere in the Statement of Objections on any novel irrefutable presumption that ALSTOM (Société Anonyme) (or its predecessors) had exercised a decisive influence on its former wholly owned subsidiaries. On the contrary, the Statement of Objections referred to established case-law (see point (335) above) to recall that a subsidiary can be presumed to have followed the policy laid down by its single owner, if the contrary has not been proven. The Commission is entitled to rely on this principle after having made its intentions known to the parent company involved and granting it the opportunity to reverse that presumption by adducing sufficient evidence. ALSTOM (Société Anonyme) (or its predecessors) participated in the infringement, both directly and by exercising a direct influence on some of its current and former subsidiaries. ALSTOM has not provided suitable explanations and convincing arguments which the Commission could use to conclude that it was not in a position to exert a decisive influence on its subsidiaries' commercial policy.
- (349) Nevertheless, by relying on the presumption of parental liability, the Commission does not renounce its right to rely also on other pertinent factors alleged by ALSTOM or on which ALSTOM has been able to express its views.

Own involvement not excluded by delegation of responsibility

- (350) ALSTOM would not be relieved from its responsibility by merely delegating functions on lower decision levels or by happening to approve selected projects on the basis of exiguous information. ALSTOM would remain accountable even if the Commission were to accept that during the infringement ALSTOM parent company's managers: (a) only approved some envisaged bids regarding turnkey GIS substations exceeding a certain threshold or involving certain 'substantial risks' for the ALSTOM group and that they did so solely on the basis of summary notes, without ever requesting clarifications or estimation of their competitors' or own chances to obtain the contract; (b) never received later explanations and feedback on the final outcome of tender procedures or negotiations engaged pursuant to their prior approval; and (c) therefore never raised any issue or extracted any conclusion from the past record on the competitiveness of the subsequent proposals.
- (351) Taking into account that ALSTOM (then Alstom) was fined FRF 1 million by the French Competition Council in March 1988 under the French competition rules for

⁷³ Decision of the French Competition Council 88-D-10 of 1st March 1988, p. 79.

bid-rigging practices regarding also electrical equipment (medium voltage transformers), it is unlikely that it would have failed to identify antitrust liability as a ‘substantial risk’ deserving scrutiny by ALSTOM parent company managers on 15 April 1988 (day of the inaugural meeting of the GIS cartel). If it nevertheless had, this would not detract from its responsibility and it should not be rewarded for it.

- (352) The Court of Justice has already disregarded⁷⁴ the argument that the Commission is required to show that the partners or managers of a company committed the infringement intentionally or negligently. In order to attribute liability, it is not necessary “*for there to have been action by, or even knowledge on the part of the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices*”. According to the same case-law, ALSTOM should have supported its allegations with evidence showing that the managers of the T&D division/sector exceeded the powers bestowed on them.
- (353) The file contains evidence that the (legal and physical) persons identified by the cartel as representatives of the ALSTOM group were engaged in the T&D division/sector and have regularly been able to commit ALSTOM. Moreover, ALSTOM (Société Anonyme) has abundantly argued (see recitals (346) and (347) above) that the T&D division/sector was entrusted with GIS activities within the ALSTOM group. Those arguments tend to show the primacy within ALSTOM of the operative organisation over the legal structure, which was often reorganised and they therefore suggest that GIS activities by ALSTOM T&D SA and ALSTOM T&D AG were tightly related and decisively influenced by the management at sector level. The management was accountable to ALSTOM (Société Anonyme) (or its predecessors), which was the only legal entity covering all relevant sector managers at top decision level.

Awareness of individuals exercising a decisive influence on subsidiaries

- (354) The contention that ALSTOM parent company’s management could not have exercised any decisive influence on the subsidiaries because it was and remained unaware of the infringement is not credible either. Entrusting individuals holding simultaneous senior positions both in the parent companies and the fully owned subsidiaries constitutes a classic mechanism to keep information flow and coherence within a group. AREVA has provided evidence - without being contradicted by ALSTOM - identifying six members of ALSTOM T&D SA’s board (‘conseil d’administration’) which have simultaneously or consecutively been members of the board of ALSTOM’s ultimate parent companies before January 2004 up to CEO level.
- (355) The knowledge of the sector or subsidiaries’ activities acquired by the individuals who simultaneously or consecutively held senior positions in ALSTOM parent company and ALSTOM T&D SA or ALSTOM T&D AG as well as their double position is incompatible with ALSTOM’s claim that ALSTOM (ALSTOM’s management) was unaware of and could have not have any influence on those activities. In any event, the top manager of the T&D Sector (who certainly exercised a decisive influence on the

⁷⁴ Cases 100-103/80, *SA Musique Diffusion Française v. Commission* of 7 June 1983, ECR 1983 p. 01825, paras. 96-98.

GIS activities of the ALSTOM group) was a member of ALSTOM's executive committee.

- (356) Additionally, the fact that ALSTOM's subsidiaries successively involved in GIS activities were wholly owned, directly or indirectly, by the same parent company makes it reasonable to conclude that they did not determine independently their own conduct on the market⁷⁵, but followed ALSTOM's policy, as established at a higher, common level.

Origin of AREVA T&D SA and AREVA T&D AG's liability

- (357) Before 7 December 1992, ALSTOM's GIS activities were carried out directly by GEC Alsthom SA and its predecessor Alsthom SA (France), and not by the current AREVA's subsidiaries (see recital (20) above). Before December 2002, the T&D activities in Switzerland were carried out by Sprecher Energie AG (acquired by Alsthom SA in January 1986) a company that has been renamed several times before getting its current name 'ALSTOM AG' (see recital (21) above). Since the relevant legal entities (with new names) still exist and form part of the ALSTOM group, ALSTOM (Société Anonyme) retains responsibility for their activities before the creation of AREVA T&D SA and AREVA T&D AG's predecessors (see recital (339) above). AREVA T&D SA and AREVA T&D AG are not to be held liable for that part of the infringement as legal and economic successors, despite the fact that the T&D activities were transferred to their respective predecessors (see also recitals (366) and (367) below).

- (358) In view of the above, ALSTOM (Société Anonyme) should be held:

- a) solely liable for its involvement in the infringement between 15 April 1988 (date on which it entered into the GQ Agreement and the E-Group Operation Agreement) and 7 December 1992;
- b) jointly and severally liable with AREVA T&D SA (ex ALSTOM T&D SA) for ALSTOM's involvement in the infringement between 8 December 1992 and 21 December 2003;
- c) jointly and severally liable with AREVA T&D SA and AREVA T&D AG (ex ALSTOM T&D AG) for ALSTOM's involvement in the infringement between 22 December 2003 and 8 January 2004, when ALSTOM sold its Transmission and Distribution activities to AREVA.

AREVA

- (359) AREVA T&D Holding SA (100% owned by AREVA SA) acquired in January 2004 the transmission and distribution activities of ALSTOM. AREVA T&D SA and AREVA T&D AG constitute (since January 2004) a single economic unit, under the control of AREVA T&D Holding SA, which owns 100% share in both subsidiaries

⁷⁵ Case T/203/01 *Michelin II*, [2003] ECR II-4371 par. 290.

and concentrates the T&D activities of the group. Consequently, two periods must be distinguished in the attribution of liability to the relevant legal entities within AREVA.

- (360) As regards the period preceding the acquisition of ALSTOM's GIS activities by AREVA, the Statement of Objections notified AREVA of the Commission's intention to hold AREVA T&D SA and AREVA T&D AG jointly and severally liable with ALSTOM (Société Anonyme) for their involvement in the infringement between 15 April 1988 and 8 January 2004.
- (361) The Statement of Objections also informed AREVA of the Commission's intention to hold AREVA SA, AREVA T&D Holding SA, AREVA T&D SA and AREVA T&D AG jointly and severally liable for AREVA's involvement in the infringement between 9 January 2004 and 11 May 2004.

Arguments by AREVA

- (362) AREVA replied that only ALSTOM should be held liable for the infringement committed before 9 January 2004, since it operated the T&D activities throughout the period 1988-1993, until ALSTOM T&D SA's predecessor (GEC Alsthom T&D SA) was set up and that it remained responsible for the practices of its subsidiaries thereafter.
- (363) AREVA further claims that, by holding AREVA's current subsidiaries jointly and severally liable with ALSTOM, the Commission: (a) disregards the case-law on succession between undertakings; (b) breaches the principles of proportionality and of individual attribution of liability; and (c) implicitly delegates its discretionary power to sanction in favour of a judge or an arbitrator, which would be contrary to the Treaty.
- (364) AREVA's arguments regarding the period from 9 January 2004 to 11 May 2004 aim at refuting the presumption that AREVA T&D Holding SA and AREVA SA had exercised a decisive influence on its wholly owned subsidiaries active in the GIS sector. To this end, AREVA puts forward a number of factual elements: (a) in view of AREVA's own lack of experience in the sector, as opposed to ALSTOM's, during the relevant four months, the operational managers were those recruited and trained by ALSTOM (although they were no longer accountable to ALSTOM); (b) none of the members of the respective boards of the subsidiaries held senior positions in AREVA parent companies, except for the only member who had not belonged to ALSTOM T&D SA or ALSTOM T&D AG's boards before the acquisition; (c) AREVA's parent companies had no previous experience in the T&D field before the acquisition of ALSTOM's subsidiaries and they were completely unaware of the existence of anticompetitive practices. They relied in this respect on ALSTOM's written statements made to them denying any involvement in cartel activities; and (d) the acquisition required complex and numerous restructuring operations in order to take operational control over the business after 8 January 2004.

Appraisal by the Commission

- (365) Both subsidiaries acquired by AREVA were the result of successive absorptions of assets and renaming of legal entities.

- (366) The Commission has taken into account in recital (358) above the fact that the T&D activities inherited by ALSTOM T&D SA were transferred to its predecessor, Kléber Eylau by agreement of 7 December 1992 (retroactively approved on 5 February 1993). Kléber Eylau had been created in November 1992 as GEC Alsthom SA's subsidiary (Kléber Eylau was renamed several times before taking the name ALSTOM T&D SA). Before December 1992, ALSTOM's GIS activities in France were carried out directly by GEC Alsthom SA and its predecessor Alsthom SA (France), and not by the current AREVA's subsidiaries (see also recital (20) above).
- (367) Similarly, the Commission has taken into account in recital (357) above that the T&D activities inherited by ALSTOM T&D AG were not transferred to its predecessor ALSTOM (Schweiz) Services AG upon its creation in November 2002, but on 22 December 2003. Before 22 December 2003, those T&D activities were carried out by Sprecher Energie AG (acquired by Alsthom SA in January 1986) a company that has been renamed several times before getting its current name 'ALSTOM AG', and which still belongs to the ALSTOM group (see recital (21) above).
- (368) In the Commission's view, the principle of individual attribution of liability is satisfied when legal entities having participated in an infringement continue to answer for their past behaviour when they had not been absorbed by the acquirer, but continued their activities as subsidiaries (see recital (337) above). The principle of proportionality should be respected when calculating the fine. Finally, any private contractual or contentious allocation of antitrust liability between the parties, does not affect the Commission findings or the Commission's possibility to find the companies jointly and severally liable.
- (369) Most of the arguments and information put forward by AREVA regarding the period before 9 January 2004 were relevant to establish that AREVA T&D SA and AREVA T&D AG used to form an economic unity with ALSTOM, so that they were unable to take autonomous decisions. Therefore, in the Commission's view, they are only relevant to establish that ALSTOM may be held jointly and severally liable for the infringement until 8 January 2004 (see recital (358) above). Yet, this finding as such does not exempt AREVA T&D SA or AREVA T&D AG from also being held jointly and severally liable for their direct involvement during the relevant period, since they still exist as separate legal entities.⁷⁶
- (370) As regards the period from 9 January 2004 to 11 May 2004, the Commission appraisal is the following. As explained in recitals (333) to (337), the substantive consideration for the attribution of liability for the behaviour of a subsidiary to a parent company is if the latter exercised decisive influence over the former in the course of the infringement and hence both were part of the same undertaking. The arguments mentioned in recital (364) put forward by AREVA to refute the presumption that AREVA T&D Holding SA and AREVA SA had exercised decisive influence over their wholly owned subsidiaries AREVA T&D SA and AREVA T&D AG however do not, in the Commission's view, prove the absence of such influence. The arguments in

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Cases T-236/01, T-239/01, T-244/01 to T-246/01 and T-252/01, *Tokai Carbon Co. Ltd. and Others v. Commission*, paras. 279 and 285 (judgment of 29 April 2004 confirmed by the Court of Justice in Case C-308/04 P, *SGL Carbon AG v Commission* on 29 June 2006).

(a) and (b) in recital (364) regarding the fact that except for one manager nominated by AREVA all the other managers of the subsidiaries were retained from the period when these belonged to ALSTOM, in fact support the conclusion that decisive influence had been exercised, given that the new member of the boards of the subsidiaries nominated by Areva was appointed director of the whole T&D business of AREVA on 19 January 2006, 10 days after the acquisition, and simultaneously appointed to the Executive committee of the whole AREVA group⁷⁷. Also, the decision of AREVA not to change the remaining management cannot prove the absence of decisive influence. Even the element of the alleged absence of knowledge of the T&D sector of the new CEO cannot disprove the exercise of decisive influence on the behaviour of the subsidiaries in question, for the exercise of decisive influence is not a question of the ability to successfully manage the business in question, but a question of the exercise of its influence upon it. AREVA, upon nomination had apparently considered that this individual was most suited for this position. Regarding the argument in (c) in recital (364) relating to the lack of awareness of AREVA SA of the existence of anticompetitive practices, it was pointed out in recital (354) that the appointment of individuals holding senior positions in the boards of both the subsidiary and the parent company is a classic mechanism to keep the information flow in the group. The alleged inadequate functioning of this mechanism in respect to illegal conduct on the part of the subsidiary is not proof of the lack of the existence of decisive influence of the parent company on the subsidiary, for the question of decisive influence relates to the level of autonomy of the subsidiary and not to the awareness of the parental entity with respect to the infringing behaviour of the subsidiary. Also the last argument of AREVA, mentioned in (d) in recital (364), regarding the complexity of the restructuring operation in the wake of the acquisition of ALSTOM's T&D business, does not in the view of the Commission show the lack of the exercise of decisive influence on the subsidiaries, but merely suggests the order of importance that AREVA placed on the various issues entailed in the acquisition/restructuring. The integration of the T&D business purchased from ALSTOM into the AREVA group was also demonstrated by the renaming, upon acquisition of the acquired subsidiaries, to have them bear the commercial name 'AREVA'. Lastly it must also be noted that AREVA's argument put forward in the course of the Oral Hearing is not capable of affecting the attribution of liability in this case. It regards the existence of a clause in the sale and purchase agreement with ALSTOM providing that ALSTOM should remain liable for any issues arising from the conduct of the transferred subsidiaries that had taken place before the transfer. This clause, however, could be relevant under civil law but not in relation to the rules governing the enforcement of Article 81 of the Treaty.

(371) For the reasons explained above as well as in recitals (333) to (337) and (345) to (358):

- a) AREVA T&D SA should be held jointly and severally liable with ALSTOM (Société Anonyme) for their involvement in the infringement between 7 December 1992 and 22 December 2003;

⁷⁷ Public information obtained from the official website of the Areva group.

- b) AREVA T&D SA, ALSTOM (Société Anonyme) and AREVA T&D AG should be held jointly and severally liable for their involvement in the infringement between 22 December 2003 and 8 January 2004; and
- c) AREVA SA, AREVA T&D Holding SA, AREVA T&D SA and AREVA T&D AG should be held jointly and severally liable for their involvement in the infringement from 9 January 2004 until 11 May 2004.

Fuji

- (372) Two periods must be distinguished in the attribution of liability to the relevant legal entities within Fuji: before and after the transfer of Fuji's GIS activities to JAEPS on 1 October 2002.
- (373) Fuji Electric Holdings Co., Ltd. (ex Fuji Electric Co., Ltd.) and Fuji Electric Systems Co, Ltd. have participated in the collusive behaviour described in this Decision from at least 15 April 1988 (date on which Fuji entered into the GQ Agreement) until 30 September 2002 (Fuji's GIS activities were transferred to JAEPS on 1 October 2002). Fuji Electric Holdings Co, Ltd. is the 100% owner of Fuji Electric Systems Co, Ltd (Fuji Electric Co. Ltd changed its name into Fuji Electric Holdings Co., Ltd. on 1 October 2003).

Arguments by Fuji

- (374) Fuji admits having participated in the cartel described in the Statement of Objections between 1988 and September 2000, but not thereafter. Fuji's participation in the cartel would have ended "*at the latest in or around September 2000. Fuji did not participate in the New Scheme at any time*" on the grounds that Fuji would have not participated in joint meetings with European suppliers thereafter and that it would have not continued to exchange information either.
- (375) Fuji argues that although some of the arrangement sheets provided by Fuji "*are expressed to be valid for periods beyond this date [September 2000], Fuji would not have been able to act upon these arrangements after September 2000 since all of the 'Tender Due Dates' expired several months before. Furthermore, Fuji understood that the arrangements previously made in connection to the GQ-Agreement no longer had any binding force between the cartel participants. Fuji did not win any of the tenders listed and so it did not profit from any of the arrangements*".

Appraisal by the Commission

- (376) Since Fuji was not a member of the E/J Committee, it was not expected to meet with European producers either at management or at working level, but only at Annual Meetings. Furthermore, annual meetings were not essential for the practical implementation of the cartel, as implicitly confirmed by Fuji's admission of having participated in the cartel also in 2000 (when no annual meeting took place).
- (377) Fuji's claim that it would have left the cartel around September 2000 has not been supported by any of the other parties to the proceedings, despite the fact that it was

part of the information submitted for their comments. Fuji's contention is also unclear, since it sometimes claims that it happened "*in or around September 2000*" and other times it claims in the same document that it was "*at the latest in September 2000*". Fuji also states that "*the latest arrangement sheet received by [...] was dated 28 September 2000*" and "*Fuji did not conduct any further GQ Agreement cartel communications after that date*". This means that Fuji was supposed to present an "arranged" bid to a client to create the impression that there was competition for the project, but it does not provide any evidence of having dropped the project or having bid for it in competitive terms. In addition to this, [...] statement says that Fuji left the cartel "*soon after Siemens*", but it has been established that Siemens left in September 1999. The claim is further not supported by any indication or evidence in the file that they would have publicly distanced themselves from the cartel in September 2000.

- (378) Finally, even if the Commission were to admit that there were no other cartel exchanges with Fuji until the creation of JAEPS, the Commission must take into account that the information already exchanged could not be disregarded by Fuji in its commercial activities and that the arrangements already agreed upon were still in force. According to the evidence in the file and in particular to the information supplied by Fuji, it was a party to some arrangements [...], which had a validity date extending beyond September 2000 and non-compliance with which was subject to penalties. Despite the fact that the Commission granted Fuji the possibility to comment and provide further evidence to contest these conclusions, it has not provided any evidence showing that it withdrew from the arrangements, that it actually contested them, or did not respect them. On the contrary, the fact that all "*Tender Due Dates expired several months before*", as Fuji argues, only adds to the conclusion that the arrangements were already adopted and in force and the fact that Fuji would not have finally won the tenders (which is also argued without supporting evidence) does not detract from the aforementioned conclusions. First, Fuji was a participant in all the arrangements listed, but not their organiser or, necessarily, their beneficiary. Its appearance in the list meant that it should submit the bids, not that it was the nominated winner. Second, even if it had been the designated winner by the cartel members (which Fuji has not argued or proven), that would still not be a total guarantee that the bid would have been ultimately won, since other bidders outside the cartel could have been more successful.
- (379) For the reasons explained above and in recitals (334) and (373), Fuji Electric Holdings Co, Ltd. and Fuji Electric Systems Co, Ltd. should be held jointly and severally liable for Fuji's involvement in the infringement between 15 April 1988 and 30 September 2002.
- (380) For the reasons explained in recitals (385) to (402) below, Fuji Electric Holdings Co., Ltd, Fuji Electric Systems Co., Ltd, Hitachi Ltd. and Japan AE Power Systems Corporation (JAEPS) should be held jointly and severally liable for the involvement of JAEPS in the infringement from 1 October 2002 until 11 May 2004.

Hitachi

- (381) Hitachi Ltd and its 100% subsidiary Hitachi Europe Limited have participated in the collusive behaviour described in this Decision from at least 15 April 1988 (when

Hitachi entered into the GQ Agreement and the E-Group Operation Agreement) until 31 December 1999 (Hitachi suspended its participation in 2000, as explained in recital (296) above) and from 2 July 2002 (when it resumed participation in cartel meetings, as explained in recitals **Error! Reference source not found.** and (298) above), until 30 September 2002 (Hitachi's GIS activities were transferred towards JAEPS on 1 October 2002). Therefore, Hitachi Ltd. and Hitachi Europe Ltd. should be held jointly and severally liable for Hitachi's involvement in the infringement between 15 April 1988 and 31 December 1999 and between 2 July 2002 and 30 September 2002.

- (382) For the reasons explained in recitals (385) to (402) below, Hitachi Ltd., Fuji Electric Holding Co., Ltd, Fuji Electric Systems Co., Ltd and Japan AE Power Systems Corporation (JAEPS) should be held jointly and severally liable for the involvement of JAEPS in the infringement from 1 October 2002 until 11 May 2004.

JAEPS

- (383) Japan AE Power Systems Corporation (JAEPS) was incorporated in July 2001 and has participated in the collusive behaviour described in this Decision between 1 October 2002 (when Hitachi's and Fuji's GIS activities were transferred to JAEPS) and 11 May 2004 (date of the last cartel meeting, due to the notification of the Commission's inspections).
- (384) JAEPS was formed to combine the T&D businesses of the parent companies for the supply of T&D customers. Hitachi Ltd and Fuji Electric Systems Co Ltd (Fuji Electric Holdings Co., Ltd's 100% subsidiary) are respectively 50% and 30% owners of the joint venture JAEPS (the third owner being Meidensha Corporation).
- (385) In the Statement of Objections, the Commission notified to Fuji, Hitachi and JAEPS its intention to hold them jointly and severally liable for the infringement between 1 October 2002 and 11 May 2004.

Arguments by Fuji, Hitachi and JAEPS

- (386) According to Fuji, the employees which were originally seconded by Fuji to JAEPS would have not been required to report and would have not reported back to Fuji on JAEPS's sales business. On 1 October 2002, those employees were transferred to JAEPS. This would be supported by the statements gathered by Fuji's lawyers for the purpose of this procedure from [...].
- (387) Fuji argues that it had no decisive control over the joint venture. [...]
- (388) Hitachi and JAEPS have largely confirmed the facts at the basis of the Commission's appraisal in this regard.

Appraisal by the Commission

- (389) The respective stakes alone of the parent companies in JAEPS do not allow the Commission to presume that they have exercised a decisive influence on JAEPS's

market behaviour in general or its cartel activities in particular. Nevertheless, the factual record shows clearly that Hitachi and Fuji were able to exercise and have actually exercised a decisive influence with regard to the involvement of JAEPS in the cartel activities described in this Decision from 1 October 2002 until 11 May 2004. The Commission considers that JAEPS did not determine autonomously its market behaviour, but followed the commercial practice and behaviour established by Hitachi and Fuji.

(390) By transferring their GIS interests to JAEPS (without transferring their respective subsidiaries formerly active in this area) Hitachi and Fuji were in effect using JAEPS as a vehicle to continue their long standing involvement in the cartel⁷⁸ of GIS producers (both Hitachi and Fuji continued to sell GIS products under their own name, but outsourced the production to JAEPS).

(391) Those conclusions are based on objective factors such as: (a) the supervisory and management role of Hitachi and Fuji on JAEPS's activities; (b) the previous involvement of both Hitachi and Fuji in the cartel activities before the creation of JAEPS; (c) the fact that Hitachi's and Fuji's subsidiaries formerly involved in GIS activities withdrew from them in order for JAEPS to succeed them with their subsequent assistance and kept their interest in the products as distributors thereof; (d) the presence in cartel meetings of individuals representing JAEPS and holding simultaneous or consecutive positions in Hitachi and/or Fuji, and (e) the fact that many individuals holding senior positions in JAEPS also held simultaneously or consecutively senior positions in Hitachi and Fuji.

(a) Hitachi's and Fuji's supervisory and management role in JAEPS

(392) Hitachi's and Fuji's supervisory and management role in JAEPS and their close scrutiny of JAEPS's affairs are documented in the Commission file. [...]

(393) [...]

(394) [...]

(395) [...]

(b) Previous involvement of Hitachi and Fuji in the cartel

(396) Both Hitachi and Fuji were involved in the cartel from at least 15 April 1988, when they became parties to the GQ-Agreement, as explained in recitals (142) and (381) above. They are therefore aware of their respective involvement. They remained aware of the involvement of JAEPS in the cartel, which they could have prevented on account of their supervisory role and responsibility for the management of JAEPS's affairs.

(c) Hitachi and Fuji pursued together their GIS business and cartel involvement

⁷⁸

The Commission file does not contain any evidence against Meidensha.

- (397) The fact that Hitachi and Fuji chose to pursue together their GIS business and their cartel involvement through JAEPS was reflected in their transfer of their respective GIS business to JAEPS. Hitachi's and Fuji's subsidiaries formerly engaged in GIS production no longer pursued those activities separately, but through JAEPS, which succeeded them with their assistance. [...] Hitachi and Fuji transferred equipment, system business, manufacturing facilities, related personnel and existing supply relationships. At least at the beginning, the parent companies promoted and introduced JAEPS in the GIS market. However, this was not necessary to allow JAEPS to carry on with the cartel involvement, since the attendees on JAEPS's behalf were key staff provided by Hitachi Ltd, Hitachi Europe Ltd and Fuji Electric Co., Ltd., who had already attended the cartel meetings representing them. The only change was that Hitachi and Fuji individual codes were replaced in 2002 with JAEPS's (see recital (142) above).
- (398) The parent companies continued to sell GIS to their own established non-utility customers. Since this kind of sales accounted for [...] of Fuji's GIS prior to the formation of JAEPS and it sourced its requirements for these purposes from JAEPS, Fuji is not only JAEPS parent company, but also its client. It is therefore unlikely and commercially unreasonable that Fuji would have lost interest in aspects such as the prices and conditions that JAEPS charges and why, particularly since it had the means to find out. Nevertheless, even if it were true that the cartel was not discussed at any JAEPS board meetings between 2002 and 2004, and that Fuji did not find out via its outside directors or corporate auditors, Fuji would not be exonerated. According to JAEPS' internal rules, Fuji's outside directors should have known as they were ultimately responsible for JAEPS's management. Their negligence is no excuse.
- (d) Presence in cartel meetings of Hitachi's and Fuji's individuals representing JAEPS
- (399) Regarding the presence in cartel meetings of individuals representing JAEPS and holding simultaneous or consecutive positions in Hitachi and/or Fuji, the following examples are relevant.
- a) [...], who was at the time of the inspections JAEPS's [...] and declared to act as a representative for JAEPS's substation business in Europe had simultaneous positions in Hitachi Ltd., Hitachi Europe Ltd. and JAEPS. [...]
 - b) [...], who was [...] of JAEPS's [...] and regular attendee of the cartel meetings on JAEPS's behalf, was simultaneously [...] within Fuji Electric until April 2002 and had attended cartel meetings on Fuji's behalf.
 - c) [...] held simultaneous positions in Hitachi Ltd. and JAEPS[...].
 - d) Moreover, there is evidence in the file of Hitachi's senior management still attending cartel meetings after the creation of JAEPS, next to JAEPS's representatives. This is the case of [...].
 - (e) Overlaps in senior positions between JAEPS and Hitachi or Fuji:

- (400) In this regard, the following examples concerning Fuji's overlapping senior management are relevant.

[...]

- (401) The following examples concerning Hitachi's overlapping senior management are also relevant.

[...]

- (402) Hitachi's and Fuji's choice to pursue their involvement in the cartel by means of a joint venture should not allow them to evade liability for it.

- (403) Therefore Japan AE Power Systems Corporation (JAEPS), Hitachi Ltd., Fuji Electric Holding Co., Ltd and Fuji Electric Systems Co., Ltd. should be held jointly and severally liable for the involvement of JAEPS in the infringement from 1 October 2002 until 11 May 2004.

Melco

- (404) Mitsubishi Electric Corporation participated in the collusive behaviour described in this Decision from at least 15 April 1988 (when it entered into the GQ Agreement) until 1 October 2002, when Melco's GIS activities were transferred to TM T&D Corporation.

- (405) TM T&D Corporation (TM T&D) has participated in the collusive behaviour described in this Decision from 1 October 2002 until 11 May 2004. Mitsubishi Electric Corporation and Toshiba held a 50% share each in TM T&D, which ceased to exist on 30 April 2005. [...] As a part of the transfer of their GIS activities to TM T&D, [...] of Melco and [...] of Toshiba moved to TM T&D. Finally, both Mitsubishi Electric Corporation and Toshiba, in their capacity as participants in the cartel until the transfer of their GIS activities into TM T&D, must have been fully aware the existence of the cartel and must have known of the participation of TM T&D Corporation in the cartel. In view of the above, both parent companies have exercised a decisive influence on TM T&D's behaviour. TM T&D has been dissolved in the meantime and its GIS activities have been resumed by the parent companies.

- (406) Melco does not dispute those findings in its reply to the Statement of Objections.

- (407) In the light of the above and of the general principles explained in recital (338), Mitsubishi Electric Corporation should be held:

- a) solely liable for its involvement in the infringement between 15 April 1988 and 1 October 2002.
- b) jointly and severally liable with Toshiba Corporation for the infringement committed by TM T&D between 1 October 2002 and 11 May 2004.

Schneider

- (408) Schneider Electric High Voltage SA (nowadays VA TECH Transmission & Distribution SA) and its predecessors and Magrini have participated in the collusive behaviour described in this Decision from 15 April 1988 until 11 May 2004.
- (409) Schneider Electric High Voltage SA (SEHV) and its predecessors and Nouva Magrini Galileo S.p.A (Magrini) were either wholly owned or simply absorbed by Schneider Electric SA or its predecessors until the establishment of VAS on 13 March 2001.
- (410) In the Statement of Objections, the Commission notified to Schneider Electric and its former subsidiaries VA TECH Transmission & Distribution SA and Nuova Magrini Galileo SpA its intention to hold them jointly and severally liable for their involvement in the infringement from 15 April 1988 to 13 March 2001.
- (411) In its reply to the Statement of Objections, ABB reports that [...] recalls that a farewell party was organized either at the end of November or in the first half of December 2000 near Versailles to lead [...] (as the person he considered to represent Schneider/VA TECH) to think that the cartel had ended.

Arguments by Schneider Electric S.A.

- (412) In its reply to the Statement of Objections, Schneider Electric S.A. argues that the Commission cannot rely on any refutable presumption of the exercise of decisive influence based on shareholding to hold it liable without invoking further evidence. It would not be possible to hold it liable for the conduct of SEHV and Magrini, because it was a simple holding company without resources to control the business activities of its subsidiaries and which did not directly own SEHV or Magrini until 13 March 2001. From 1994 and at the latest from 1 January 1999, Schneider Electric's indirect subsidiaries involved in the GIS business had the required autonomy not to be considered as having been subject to effective influence.
- (413) According to Schneider Electric, in any case, such a presumption would only apply to Magrini after 31 July 1992 and to SEHV after 1 January 1999, until 24 April 1999 because (a) only on 31 July 1992 did Schneider SA (now Schneider Electric) acquire 100% of the share capital of Merlin Gerin, which owned 100% of Magrini's share capital; (b) only on 1 January 1999 did SEHV start to be active in the high voltage sector.
- (414) Furthermore, Schneider argues that its parental liability would be time barred since there is no document in the file showing Magrini's direct involvement besides entering into the GQ Agreement and the E-Agreement in April 1988 and, at most, the Commission would "*only be able to acknowledge a possible participation in an infringement by SEHV and Magrini prior to April 1999*", date of the last meeting at which a representative of SEHV could have participated.

Appraisal by the Commission

- (415) Contrary to Schneider's contention, when a parent company owns all or almost all the shares of a subsidiary liable for an infringement of Community or EEA competitions

rules, the Commission can legitimately presume that it exercised decisive influence over the subsidiary, irrespective of whether it owned the latter directly or indirectly. Provided that the Commission makes its intention known, it is for the company concerned to provide evidence rebutting the presumption (see recital (335) above). Hence, it was for Schneider to reverse the presumption by adducing sufficient evidence. As stated in recital (336) above, in evaluating the whether the information provided is sufficient, the Commission may also rely on pertinent indications and evidence provided by Schneider or known to it.

- (416) In this respect, Schneider has merely alleged that Schneider Electric could not exercise any decisive influence on the subsidiaries because it was a simple holding company and because it did not directly own SEHV or Magrini. These arguments are not conclusive and they are not reinforced with any other indication or evidence.
- (417) The undisputed fact that Schneider and Magrini were both signatories of the GQ Agreement and the E-Group Operation Agreement for GQ Agreement and held a joint share in the cartel within the European quotas listed in point 8 of the E-Group Operation Agreement for GQ Agreement (see recitals (142)-(144) above) confirms that Schneider Electric (or its predecessors), SEHV (or its predecessors) and Magrini formed a single economic unit acting jointly in the cartel and were perceived as such by their competitors⁷⁹. The reallocation of activities amongst legal entities within the same group does not prevent the Commission from holding liable for the whole period the legal entities to which the activities have been transferred (see recital (339) above).
- (418) The fact that during the infringement the same relevant parent company ultimately owned, directly or indirectly, the Schneider subsidiaries involved in GIS activities (and in the GIS cartel) is an indication that they did not determine independently their own conduct on the market⁸⁰, but followed Schneider's policy, as established at a higher, common level. This conclusion is corroborated by Schneider Electric SA's own description of the group: Until mid-1994, the geographic divisions within the group were responsible within their respective perimeters for GIS sales as a stand alone product, while the sale and execution of high voltage turnkey projects worldwide were the responsibility of a global operational Division (DESA) comprising two departments, one dealing with industrial clients, the other dealing with utilities. There were also Strategic Activity Areas ('Domaines d'Activité Stratégiques', DAS) to ensure the functional coordination across the different activity sectors. High Voltage ('HT') was the DAS responsible for ensuring coherence regarding aspects such as marketing strategy, product catalogues or the orientation of R&D regarding GIS technology and was entitled to look over local activities. Thereafter, the organisation became tighter and the responsibility for GIS sales remained largely the same. A new DAS T&D covered both high and medium and medium voltage and DESA became DOITD ('Département des Opérations Industrielles T&D'). Schneider Electric SA's description depicts a very compact, coordinated and global internal organisation throughout the relevant period, incompatible with the claim that Schneider and Magrini did not follow Schneider's policy.

⁷⁹ Case T-66/99, *Minoan Lines v. Commission*, 11 December 2003, paragraph 129.

⁸⁰ Case T/203/01 *Michelin II*, [2003] ECR II-4371 par. 290.

- (419) More concretely, the individuals identified in this Decision as having represented Schneider in the cartel were responsible for the sales of GIS for the whole Schneider group, and not only as regards SEHV and its predecessors or Magrini. This is confirmed by the explanations provided by Schneider electric.
- a) [...] was head of the [...] (later DAS T&D) between 1992 and 1999, when he became [...]
 - b) [...] was a member of the [...], then became head of the department dealing with [...] and in 1999 he became [...], which consolidated all activities regarding GIS projects and related services.
 - c) [...] was head of a group within the department within [...], when he became head of the [...].
 - d) [...] held different responsibilities within the International Division between 1992 and 1999, when he had responsibilities in the [...].
 - e) [...] was head of the department within [...], when he became local director for sales in [...], within the International Division.
- (420) Schneider's claim that it could only be held liable for SEHV's conduct as from 1 January 1999 and that it could only be held liable for Magrini's conduct as from 31 July 1992 must be rejected. The information provided by Schneider Electric SA on 20 January 2006 shows a clear continuity of liability throughout the relevant period (see also recitals (338), (339) and (417) above). Schneider Electric SA took up that name in 1999, but during the period from 1988 to 1999, the successive predecessors of Schneider Electric SA, which were always called Schneider SA, were responsible for the GIS activities of the Schneider group. Although in 1988 the GIS activities were concentrated in Merlin Gerin, which was a 51% subsidiary of Schneider SA, this participation progressively grew to reach 100% in 1992, and its GIS activities and assets were later on purely and simply absorbed by Schneider SA and organised within their different constellations of wholly owned subsidiaries. In 1997 Magrini became an indirectly wholly owned subsidiary of the relevant SEHV's predecessor (which was called Schneider Electric SA at the time). Schneider Electric High Voltage (SEHV) was created in 1999 as a wholly owned subsidiary of Schneider Electric SA (Schneider SA was renamed that way in 1999) to gather the high voltage activities (including GIS) of the former subsidiaries of Schneider SA.
- (421) Regarding Schneider's claim that its parental liability would be time barred, it has already been established that none of the cartel members which do not share a direct or indirect interest in the attribution of liability to the former Schneider's subsidiaries has confirmed that they would publicly distanced themselves from the cartel at any point before April 1999 or at the meeting held that day. Moreover, there is evidence showing that they participated in Committee meetings and arrangements thereafter.
- (422) However, taken into account the degree of credibility ascribed in this Decision to [...] statements, the reasons explained in recital (297) above, and following the principle '*in dubio, pro reo*', the Commission acknowledges that Schneider Electric SA ended

its involvement in the cartel on 13 December 2000, while Siemens Transmission & Distribution SA and Nuova Magrini Galileo S.p.A. only interrupted it.

- (423) In the light of the above, Schneider Electric SA, Nuova Magrini Galileo S.p.A. and Siemens Transmission & Distribution SA should be held jointly and severally liable from 15 April 1988 until 13 December 2000.
- (424) Siemens Transmission & Distribution SA's and Nuova Magrini Galileo S.p.A.'s liability after 13 December 2000 is dealt with under the heading VA TECH below.

Siemens AG

- (425) Siemens AG participated in the collusive behaviour described in this Decision from at least 15 April 1988 (when it entered into the GQ Agreement and the EQ-Agreement) until at least 1 September 1999 (when Siemens suspended its participation, as explained in recital (186) above) and from at least 26 March 2002 (when it resumed its cartel activities by meeting ALSTOM and ABB, as explained in recital (417) above) until 11 May 2004 (the last meeting at working level and day of the Commission inspections).
- (426) Therefore, Siemens AG should be held liable for its involvement in the cartel from 15 April 1988 until 1 September 1999 and from 26 March 2002 (participation in a cartel meeting with ALSTOM and ABB) until 11 May 2004.

Toshiba

- (427) Two periods must be distinguished in the attribution of liability to the relevant legal entities within Toshiba: the period prior to the transfer of Toshiba's GIS activities to TM T&D Corporation and the period thereafter.
- (428) Toshiba Corporation has participated in the collusive behaviour described in this Decision from at least 15 April 1988 (when it entered into the GQ Agreement) until October 2002, when Toshiba's GIS activities were transferred to TM T&D Corporation.
- (429) TM T&D Corporation (TM T&D) has participated in the collusive behaviour described in this Decision. In the Statement of Objections, the Commission notified to Toshiba and Melco its intention to hold them jointly and severally liable for the infringement committed by TM T&D from 1 October 2002 to 11 May 2004.

Arguments by Toshiba

- (430) In its reply to the Statement of Objections, Toshiba argues that it would be unjustified to hold Toshiba and Melco jointly and severally liable for any fine that might be imposed in respect of TM T&D's behaviour, since there is no legal or economic connection between them.

Appraisal by the Commission

- (431) The Commission considers that argument relating to the alleged lack of legal or economic connection before or after TM T&D's involvement in the infringement does not affect the finding that Melco and Toshiba joined their efforts in the GIS field during TM T&D's life and exerted a decisive influence on it. TM T&D worked as a vehicle for the parent companies to continue to take part in the infringement.
- (432) The Commission may hold Toshiba (and Melco) jointly liable for TM T&D's conduct because, in principle, it falls to them to answer for that infringement, as legal persons having exercised a decisive influence on TM T&D at the time. This would be the case even if another person would have assumed responsibility after the infringement for operating TM T&D or its activities and assets. If TM T&D still existed, it could have been held jointly and severally liable for the infringement with Toshiba and Melco⁸¹, in so far as these entities exercised a decisive influence over TM T&D.
- (433) Neither Toshiba's nor Melco's replies to the Statement of Objections dispute that. Mitsubishi Electric Corporation and Toshiba held a 50% share each in TM T&D, which ceased to exist on 30 April 2005. [...] As a part of the transfer of their GIS activities to TM T&D, [...] of Melco and [...] of Toshiba, with long cartel experience, moved to TM T&D. Finally, both Melco and Toshiba, in their capacity as participants in the cartel until the transfer of their GIS activities into TM T&D, knew that the cartel existed and how it operated, and must have known of the participation of TM T&D Corporation in the cartel. TM T&D has been dissolved in the meantime and its GIS activities have been resumed by the parent companies.
- (434) In any event, Toshiba and Melco could not avoid answering for TM T&D's participation in the cartel in application of the case-law on succession, on the grounds that the joint venture no longer exists at law and that its GIS activities have been resumed by the parent companies (see recital (338) above). However, although this alternative basis for liability may also apply⁸², the Commission first and foremost

⁸¹ “It should be recalled in this respect that it falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking (...)”, Case T-304/02, *Hoek Loos NV v. Commission*, of 4 July 2006, not yet published, paragraph 121. See also for example Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 78 and Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, a.o. v Commission*, 20 April 1999, paragraph 953.

⁸² “(...) The case-law shows that, where an infringement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time, so that it can be made answerable for it. Where, however, between the infringement and the time when the undertaking in question must answer for it, the person responsible for the operation of that undertaking has ceased in law to exist, it is necessary, first, to establish the combination of physical and human elements which contributed to the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that because of the disappearance of the person responsible for its operation when the infringement was committed the undertaking may evade liability for it”, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, a.o. v Commission*, 20 April 1999, paragraph 953. See also for example Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 78, Case C-49/92 P *Commission v AnicPartecipazioni* [1999] ECR I-4125, paragraph 145 and Case T-304/02, *Hoek Loos NV v. Commission*, of 4 July 2006, p. 121.

relies on the reasoning in the above recitals to establish that Toshiba and Melco can be held liable for the participation of TM T&D in the cartel.

- (435) In the light of the above and of the general principle explained in recital (338), Toshiba should be held:
- a) solely liable for its involvement in the infringement between 15 April 1988 and 1 October 2002; and
 - b) jointly and severally liable with Mitsubishi Electric Corporation for the infringement committed by TM T&D between 1 October 2002 and 11 May 2004.

VA TECH

Overview

- (436) VA TECH Transmission & Distribution Ltd. (previously NEI Reyrolle, now Siemens Transmission & Distribution Ltd.), participated in the cartel from 15 April 1988 until at least 13 December 2000 and from at least 1 April 2002 to 11 May 2004 (see recital (440) and (448) below), first as an undertaking independent from the VA TECH group and, from 20 September 1998, within it (as VA TECH Transmission & Distribution Ltd). VA TECH Schneider High Voltage GmbH ('VAS'), - later VA TECH T&D GmbH, now absorbed by Siemens Aktiengesellschaft Österreich - participated in the cartel at least from 1 April 2002 to 11 May 2004.
- (437) Nuova Magrini Galileo S.p.A (ex Schneider) and Schneider Electric High Voltage (ex Schneider) – later 'VA TECH Transmission & Distribution SA', nowadays 'Siemens Transmission & Distribution SA' - participated in the cartel from 15 April 1988 until at least 13 December 2000 and from at least 1 April 2002 until 11 May 2004 (see section 6.6.1 above), first as undertakings independent from the VA TECH group and subsequently within it (Magrini and VA TECH Transmission & Distribution SA, from 1 April 2002).
- (438) VA Technologie AG (now 'Siemens Aktiengesellschaft Österreich'), indirectly, and VA TECH Transmission & Distribution GmbH & Co KEG, directly, owned 100% share in VA TECH Transmission & Distribution Ltd. (now Siemens Transmission & Distribution Ltd.) from 20 September 1998 until 13 March 2001, when the latter became VAS's wholly owned subsidiary. From 13 March 2001 until 1 October 2004, VA TECH Transmission & Distribution GmbH & Co KEG (and hence VA Technologie AG indirectly as well) held 60% of VAS, while Schneider held the remaining 40%. In October 2004, VA TECH took over Schneider's stake in VAS, and renamed the subsidiary 'VA TECH T&D GmbH'. VAS/VA TECH T&D GmbH held 100% share in VA TECH Transmission & Distribution Ltd (now 'Siemens Transmission & Distribution Ltd'), VA TECH Transmission & Distribution SA (now 'Siemens Transmission & Distribution SA') and Magrini from its establishment on 13 March 2001 until 11 May 2004.
- (439) Siemens Aktiengesellschaft Österreich replaced VA Technologie AG as addressee of the Statement of Objections and as party to the proceedings on 21 June 2006, date

when this was notified by the Commission to Siemens Aktiengesellschaft Österreich by means of an Addendum to the Statement of Objections. VA Technologie Aktiengesellschaft, which had legal personality when the Statement of Objections was notified, was one of its addressees. However, on 7 June 2006, the Commission was informed in writing by Siemens Aktiengesellschaft Österreich that the former mother company of VA TECH Group, VA Technologie Aktiengesellschaft had merged into Siemens Aktiengesellschaft Österreich with effect of 27 May 2006 and VA Technologie Aktiengesellschaft had thus ceased to exist as a legal entity. An excerpt from the Austrian company register confirming the deletion of VA Technologie Aktiengesellschaft from the register was attached. To the extent that VA Technologie Aktiengesellschaft no longer constituted a legal entity, it could no longer exercise rights of defence or be the addressee of a Commission decision. The Commission considers that liability for cartel infringements could not be eluded on the occasion of an internal restructuring of a group. For the reasons explained in recitals (338) and (339) above, liability for illegal behaviour passes to a successor where the corporate entity has ceased to exist in law, and the Commission is therefore entitled to impute VA Technologie AG's liability to Siemens Aktiengesellschaft Österreich. As explained in recital (73) above, VA TECH T&D GmbH has been absorbed by Siemens Aktiengesellschaft Österreich at a later stage, and thus it has ceased to exist as a separate legal entity on 22 July 2006. Consequently, since that date Siemens Aktiengesellschaft Österreich is the only owner of the addressees of this Decision which used to be VA TECH T&D GmbH's subsidiaries. Those circumstances, as well as the corresponding change of denomination of VA TECH Transmission & Distribution Ltd. and VA TECH Transmission & Distribution SA into, respectively, Siemens Transmission & Distribution Ltd (on 3 April 2006) and Siemens Transmission & Distribution SA (on 1 December 2006) was confirmed by Siemens Aktiengesellschaft Österreich on 19 December 2006, upon Commission's request. Accordingly, Siemens Aktiengesellschaft Österreich is also imputed VA TECH T&D GmbH's liability, as its legal and economic successor, while VA TECH Transmission & Distribution Ltd. and VA TECH Transmission & Distribution SA remain subject to this procedure under their new names Siemens Transmission & Distribution Ltd. and Siemens Transmission & Distribution SA.

(440) In its Statements of Objections, the Commission informed VA TECH of its intention to:

- a) hold VA TECH Transmission & Distribution Ltd. (formerly Reyrolle) solely liable for its involvement in the infringement from 15 April 1988 to 20 September 1998;
- b) hold VA TECH Transmission & Distribution SA (formerly SEHV) and Nuova Magrini Galileo S.p.A. jointly and severally liable with Schneider Electric SA from 15 April 1988 to 13 March 2001;
- c) hold Siemens Aktiengesellschaft Österreich (formerly VA Technologie AG) and VA TECH Transmission & Distribution GmbH & Co KEG (VA Technologie AG's formerly wholly owned subsidiary) liable from 20 September 1998 until 11 May 2004 (until 13 March 2001, jointly and severally with VA TECH Transmission & Distribution Ltd, and from 13 March 2001 onwards, also jointly

and severally with VA TECH T&D GmbH (former VAS), VA TECH Transmission & Distribution SA and Nuova Magrini Galileo S.p.A).

- (441) In its reply to the Statement of Objections, ABB reports that [...] recalls that a farewell party was organized either at the end of November or in the first half of December 2000 to pretend in front of [...] (the person he considers to represent Schneider/VA TECH) that the cartel had ended [...]. Similarly, [...] recalls that VA TECH would have been approached by other cartel members in 2002 and would have rejoined the cartel sometime during the three first months of 2002.

Arguments by VA TECH

- (442) VA TECH argues that the Commission should not hold VA Technologie AG (now Siemens Aktiengesellschaft Österreich) jointly and severally liable with each subsidiary in order to calculate different fines for each of the participations, by using the global turnover of the group. This would amount to the imposition of two separate penalties with respect to the same infringement and be contrary to the principle *ne bis in idem*. Instead, the Commission should hold VA Technologie AG (now Siemens Aktiengesellschaft Österreich) jointly and severally liable, for a single amount, with all the subsidiaries that are part of a single economic unit.
- (443) VA TECH argues that the Commission should take into account the short time elapsed between the acquisition of Reyrolle by VA TECH and the collapse of the GQ system in order not to hold VA TECH jointly liable with Reyrolle for the period from 20 September 1998 to 13 March 2001. It claims that VA TECH was not aware of Reyrolle's participation in the cartel at the time of its acquisition.
- (444) Schneider should be held solely liable for SEHV's and Magrini's conduct between 15 April 1988 and 13 March 2001. By holding VA TECH Transmission and Distribution SA (former SEHV) and Magrini jointly and severally liable with Schneider Electric, since they no longer constitute a single economic unit, VA TECH will ultimately be obliged to pay the fine that should be attributed to Schneider, if Schneider Electric does not.
- (445) VA Technologie AG (now Siemens Aktiengesellschaft Österreich) should not be severally and jointly liable for VAS between 2001 and 2004, because VAS was jointly controlled by its two parent companies. VA TECH owned 60%, but all major decisions, including commercial ones, were made by the Advisory Board, where each parent had three members. Moreover, since VAS was not a 100% daughter of VA TECH at the time, it cannot be presumed that VAS was acting under VA TECH's direction. VA TECH claims that day to day business was done autonomously under the direction of the Management Board and there is no evidence to the contrary in the file. Within the Management Board, [...] (appointed by Schneider) was responsible for marketing and business development. VA TECH would have not known that VAS was involved in a cartel affecting Europe because [...] was only present at cartel meetings at which the Community was not discussed.

- (446) Although Schneider only had joint control over VAS, it should be held solely liable for VAS's infringement because it knew about SEHV's and Magrini's cartel involvement but never took action to stop it. Moreover, all VAS's illegal actions were brought about by SEHV and Magrini, which had been Schneider's wholly owned subsidiaries, and by Schneider's employees [...].

Appraisal by the Commission

Ne bis in idem

- (447) Possible consequences of the application of the principle *ne bis in idem* in calculating the fine for the infringement should not affect the objective attribution of liability, but be taken into account in fixing the appropriate amounts of the fine to be imposed on each legal entity.

Interruption of VA TECH's involvement

- (448) Taking into account the credibility ascribed in this Decision to [...]statements, the reasons explained above and following the principle '*in dubio, pro reo*', the Commission acknowledges that VA TECH temporarily interrupted its involvement in the single and continuous infringement and determines the period of interruption on the basis of the most favourable dates for the company. This is reflected the rest of this section on VA TECH's liability.

VA TECH's liability for VA TECH Transmission & Distribution Ltd's involvement

- (449) VA TECH Transmission & Distribution Ltd. (previously NEI Reyrolle, now Siemens Transmission & Distribution Ltd.) participated in the collusive behaviour as an independent undertaking from 15 April 1988 (when Reyrolle entered into the GQ Agreement and the E-Group Operation Agreement) and subsequently as a subsidiary of among others VA TECH until 13 December 2000 and from 1 April 2002 to 11 May 2004. For the period prior to its acquisition by VA TECH (15 April 1988 – 20 September 1998) and for the reasons explained in recital (337), the Commission can hold Siemens Transmission & Distribution Ltd. liable alone for its participation on its own right in the infringement.
- (450) From 13 March 2001 until October 2004, VA TECH Transmission & Distribution Ltd. was one of VAS's (later VA TECH T&D GmbH, nowadays absorbed by Siemens Aktiengesellschaft Österreich), wholly owned subsidiaries. In view of the objective factors mentioned in recitals (454) to (460) and for the reasons explained in recitals (334) and (338), VA TECH Transmission & Distribution GmbH & Co KEG, Siemens Aktiengesellschaft Österreich (formerly both VA Technologie AG and VA TECH T&D GmbH), Siemens Transmission & Distribution Ltd. (formerly VA TECH Transmission & Distribution Ltd.), Siemens Transmission & Distribution SA (formerly VA TECH Transmission & Distribution SA) and Nuova Magrini Galileo S.p.A. formed a single economic unit for the purpose of the infringement and can be held jointly and severally liable for it from 1 April 2002 to 11 May 2004.

- (451) During the period between the acquisition of Reyrolle by VA TECH and its becoming one of VAS's wholly owned subsidiaries implicated in the cartel, Siemens Aktiengesellschaft Österreich (formerly VA Technologie AG), VA TECH Transmission & Distribution GmbH & Co KEG and Siemens Transmission & Distribution Ltd. (formerly VA TECH Transmission & Distribution Ltd.), can be held jointly and severally liable for the participation of the latter in the infringement, for the reasons explained in recitals (334) and (338). The GQ system did not collapse. It evolved in the way described in this decision and the participation of VA TECH was only interrupted because a party was given to pretend that the cartel would end, not because it had a will to put an end to it.
- (452) In view of the above, VA TECH has not supported its allegations with evidence showing that the representatives of VA Technologie Transmission and Distribution Ltd exceeded the powers bestowed on them or that VA TECH remained unaware for more than two years (27 months) of the participation of VA Technologie Transmission and Distribution Ltd (formerly Reyrolle) in the cartel.

VA TECH's liability for VAS's involvement

- (453) VA TECH Schneider High Voltage GmbH (VAS, - later 'VA TECH T&D GmbH', now absorbed by Siemens Aktiengesellschaft Österreich – was established on 13 March 2001. It participated in the cartel from 1 April 2002 to 11 May 2004. VA TECH Transmission & Distribution GmbH & Co KEG (VA Technologie AG's wholly owned subsidiary) held 60% of VAS, while Schneider held the remaining 40%. In October 2004, VA TECH AG took over Schneider's stake in VAS, and renamed the subsidiary 'VA TECH T&D GmbH'. On 22 July 2006, Siemens Aktiengesellschaft Österreich absorbed VA TECH T&D GmbH.
- (454) The Commission considers that VA Technologie AG (through VA TECH Transmission & Distribution GmbH & Co KEG) was able to exercise decisive influence on VAS's commercial conduct and that of VAS's wholly owned subsidiaries (VA TECH Transmission & Distribution Ltd, VA TECH Transmission and Distribution SA and Magrini) between 1 April 2002 and 11 May 2004, thereby constituting an 'undertaking' (a single economic unit) for the purpose of the infringement described in this Decision. The following objective factors indicate that neither VAS nor its three subsidiaries (VA TECH Transmission & Distribution Ltd, VA TECH Transmission and Distribution SA and Magrini) determined autonomously their behaviour on the market, but followed their established commercial practice and policy: (a) the supervisory role of VA Technologie AG on the other companies involved in GIS activities within VA TECH's T&D division; (b) awareness of the cartel activities of the subsidiaries in the past, combined with the own involvement of VA TECH in the cartel before the creation of VAS; (c) the joint code and quota enjoyed by all of them under the generic name of VA TECH; (d) the fact that VA Technologie AG, VA TECH Transmission & Distribution GmbH & Co KEG and VA TECH Transmission & Distribution SA have acted jointly since the beginning of the administrative procedure, and (e) joint representation in cartel meetings and presence of individuals simultaneously or consecutively holding senior positions in VA Technologie AG (ultimate parent company) or VA TECH Transmission &

Distribution GmbH & Co KEG (60% parent company) and VAS or any of its three subsidiaries.

- (455) As regards VA TECH's supervisory role, although VA TECH argues that day to day business was done mostly on the basis of a consensus between Schneider and VA TECH, the following circumstances should be mentioned: (a) VA Technologie AG's approval (and not Schneider's) was required for VAS's annual business plan and budget; (b) VAS's projects in 'risk countries' required the approval of VA TECH's management board, and finally, (c) changes in compensation of VAS's managing company officers required approval by VA Technologie AG's Supervisory Board and Management Board. These requirements extended to VAS's wholly owned subsidiaries mentioned above.
- (456) This internal supervision within VA TECH is consistent with VA TECH's description on how the group operated the GIS business as part of the T&D Division.

[...]

- (457) The statement that VA TECH did not know that VAS was involved in a cartel affecting Europe is unconvincing, unsupported by evidence and inconclusive to relieve VA TECH from its responsibility. All companies except for VAS had participated in the GIS cartel prior to the creation of VAS either in their own right or as subsidiaries of other undertakings or even as 100% parent companies of cartel participants, as explained below. Moreover, Reyrolle, who was a founding member of the cartel and a signatory of the written agreements before becoming VA TECH's subsidiary (not Schneider's) was necessarily aware of the scope of the cartel and of the prior participation of Schneider and Magrini in it. Finally, it has already been explained in recital (451) above that unawareness is no excuse, provided that the individuals or companies involved were allowed to represent the undertaking.
- (458) The fact that they acted as a single undertaking for the implementation of a common policy and cartel arrangements and that they were perceived as such by other cartel members⁸³ is reflected in the joint code and quota used by all of them for the purpose of allocating GIS projects under the cartel rules (see in recital (142) above that in the set of codes used from July 2002 onwards, VA TECH companies only have a code number for the attribution of projects).
- (459) Furthermore, VA Technologie AG (now Siemens Aktiengesellschaft Österreich), VA TECH Transmission & Distribution GmbH & Co KEG and VA TECH Transmission & Distribution SA (now Siemens Transmission & Distribution SA) have acted jointly since the beginning of the administrative procedure. They announced jointly their willingness to co-operate and replied jointly to the Commission's requests for information.

⁸³ Case T-66/99, *Minoan Lines v. Commission*, 11 December 2003, paragraph 129.

- (460) There is evidence in the Commission file that VA TECH was regularly represented in cartel meetings by individuals simultaneously or consecutively holding senior positions in different companies of the VA TECH group.
- a) [...] was [...] of Magrini, of VA TECH Transmission & Distribution SA and of VA TECH Transmission & Distribution Ltd (the legal successor of NEI Reyrolle), between 2000 and 2001;
 - b) [...] regular participant at working level cartel meetings, was from 2001 to 2003 [...] and [...] of VA TECH Transmission & Distribution SA, as well as [...] of Magrini, [...] of VA TECH Transmission & Distribution SA s.a.e. Egypt (VAS's subsidiary) and of [...] VA TECH Transmission & Distribution Co. Ltd, Thailand (also VAS's subsidiary). In 2004 he kept all those positions, but became [...] within VAS instead of [...];
 - c) [...] was member of of VAS and of of VA TECH Transmissao & Distribuicao Ltda. (also VAS's subsidiary) between 2001 and 2004
 - d) [...] regular participant at working level cartel meetings, had several successive management functions in VA TECH Schneider Transmission & Distribution SA from 2001 and was [...] Country Manager for VA TECH Transmission & Distribution SA in 2004.
 - e) [...] also a regular participant at cartel meetings, was in 2001 to 2003, [...] of VAS, [...] of VA TECH Transmission & Distribution SA, [...] of Magrini, and [...] of Schneider Electric High Voltage Taiwan Co. Ltd and [...] of VA TECH Transmission & Distribuion Guangzhou. In 2004, he kept all those responsibilities, but for the first one.
 - f) [...] successively held several successive management positions in VA TECH Transmission & Distribution SA and VA TECH Schneider Electric SA between 2001 and 2004.
- (461) According to the information provided both by VA TECH and by Schneider, [...] was simultaneously [...] of VAS (2001-2004) and of VA TECH Transmission & Distribution GmbH (the general partner company of VA TECH Transmission & Distribution GmbH & Co KEG, 2000-2004). By way of contrast, none of the individuals involved in cartel meetings on behalf of VAS or VAS's subsidiaries which had been transferred from Schneider to VAS and VAS's subsidiaries held simultaneously (nor resumed later) any other function within the Schneider Electric group.
- (462) VAS's argument that all VAS's illegal actions were brought about by SEHV and Magrini, formerly Schneider's wholly owned subsidiaries, and by Schneider's employees [...] is not conclusive. Firstly, the individuals and companies concerned were no longer Schneider's employees or wholly owned subsidiaries. Secondly, it is not true that all the actions were brought about by them (as shown in paragraph (461) above, regarding [...] involvement).

- (463) In the light of the above, VA TECH Transmission & Distribution GmbH & Co KEG and Siemens Aktiengesellschaft Österreich (formerly both VA Technologie AG and VA TECH T&D GmbH) form a single economic unit for the purpose of the infringement described in this Decision and can be held jointly and severally liable for the latter's involvement in the infringement as 'VAS' from 1 April 2002 to 11 May 2004.

VA TECH's liability for the involvement of Nuova Magrini Galileo S.p.A. and VA TECH Transmission & Distribution SA

- (464) Magrini and SEHV (later VA TECH Transmission & Distribution SA, nowadays Siemens Transmission & Distribution SA) participated in the collusive behaviour described in this Decision from 15 April 1988 (when they entered into the GQ Agreement and the E-Group Operation Agreement) to 13 December 2000 and from 1 April 2002 to 11 May 2004.
- (465) At the beginning of their involvement they belonged to Schneider SA (now Schneider Electric SA) and they enjoyed a joint quota for the purposes of project allocation pursuant to the cartel rules (see recital (144) above). The Commission considers that Magrini and Siemens Transmission & Distribution SA (formerly VA TECH Transmission & Distribution SA, ex SEHV) should be held jointly and severally liable with Schneider Electric SA from 15 April 1988 to 13 December 2000 and from 1 April 2002 to 11 May 2004, as explained in recital (423) above. The application of the principle of individual attribution of liability requires that legal entities having participated in an infringement continue to answer for their past behaviour as subsidiaries of the acquirer when they had not been absorbed by the acquirer, but continued their activities as subsidiaries (see recital (337) above).
- (466) On 13 March 2001, Magrini and SEHV became 100% subsidiaries of VAS (nowadays of Siemens Aktiengesellschaft Österreich). The Commission considers that the objective factors mentioned in recitals (454) to (462) apply to them. Since October 2004, Magrini, VA TECH Transmission & Distribution SA (now Siemens Transmission & Distribution SA) and VA TECH Transmission & Distribution Ltd (now Siemens Transmission & Distribution Ltd) have been wholly owned subsidiaries of VA Technologie AG (now Siemens Aktiengesellschaft Österreich).
- (467) In the light of the above, VA TECH Transmission & Distribution GmbH & Co KEG, Siemens Aktiengesellschaft Österreich (formerly both VA Technologie AG and VA TECH T&D GmbH), Nuova Magrini Galileo S.p.A and Siemens Transmission & Distribution SA (formerly VA TECH Transmission & Distribution SA) form a single economic unit for the purpose of the infringement described in this Decision and can be held jointly and severally liable for the latter's involvement in the infringement from 1 April 2002 to 11 May 2004.

- (468) Therefore,

- a) Siemens Transmission & Distribution Ltd (formerly VA TECH Transmission & Distribution Ltd., formerly Reyrolle) should be held solely liable for its involvement in the infringement from 15 April 1988 to 20 September 1998;
- b) Siemens Transmission & Distribution SA (formerly VA TECH Transmission & Distribution SA, formerly SEHV) and Nuova Magrini Galileo S.p.A. should be held jointly and severally liable with Schneider Electric SA from 15 April 1988 to 13 December 2000; and
- c) Siemens Aktiengesellschaft Österreich (formerly both VA Technologie AG and VA TECH T&D GmbH, former VAS) and VA TECH Transmission & Distribution GmbH & Co KEG (VA Technologie AG's formerly wholly owned subsidiary) should be held jointly and severally liable from 20 September 1998 to 13 December 2000 and from 1 April 2002 to 11 May 2004 (until 13 December 2000, jointly and severally with Siemens Transmission & Distribution Ltd, and from 1 April 2002 onwards, also jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini Galileo S.p.A.).

8. REMEDIES

8.1. Article 7 of Regulation (EC) No 1/2003

- (469) Where the Commission finds that there is an infringement of Article 81 of the Treaty or Article 53 of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.
- (470) While it appears from the facts that in all likelihood the infringement ended at the latest on 11 May 2004, when the Commission inspected the undertakings involved, it is necessary to ensure that the infringement has been effectively terminated and is not re-commenced in the future. It is therefore indispensable for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association of undertakings which would have the same or a similar object or effect.

8.2. Article 23(2) of Regulation (EC) No 1/2003

- (471) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty⁸⁴, which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not

⁸⁴ OJ L3, 21.2.1962, p. 204/62.

exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

- (472) Pursuant to Article 23(3) of Regulation (EC) No 1/2003 and Article 15(2) of Regulation No 17, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in those Regulations. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking. Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice.

8.3. The basic amount of the fines

- (473) The basic amount is determined according to the gravity and duration of the infringement.

8.3.1. Gravity

- (474) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

8.3.1.1. Nature of the infringement

- (475) The infringement in this case consisted of the following. The major Japanese and European providers of GIS coordinated the allocation of GIS projects worldwide according to agreed rules, thereby respecting quotas largely reflecting estimated historic market shares and fixing price levels, while reserving some territories to certain producers (see section 6.1). These kinds of restrictions are, by their very nature, among the worst kinds of infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement. The case law has confirmed that agreements or concerted practices involving the kinds of restrictions that were found in this case may warrant the classification 'very serious' solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or to have a particular impact.⁸⁵
- (476) The undertakings involved in this infringement were or should have been aware of the illegal nature of their activities. The measures taken to conceal the cartel show that the participants were fully aware nature of the activities (see recitals (170)-(176) above).

8.3.1.2. Actual impact on the market

⁸⁵ Joined Cases T-49/02 to T-51/02 *Brasserie nationale a.o. v Commission*, 27.7.05, paragraphs 178 and 179; Case T-38/02 *Groupe Danone v Commission*, in particular paragraphs 147-148 and 152 and Case T-241/01 *SAS v Commission*, in particular paragraphs 84,-85, 122, 130-131.

(477) It is not possible to measure the actual impact on the market of this cartel, due *inter alia* to the absence of information on likely prices of GIS projects in the EEA in the absence of the arrangements. Therefore, the Commission does not rely specifically on a particular impact, in line with the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty⁸⁶ (hereinafter 'the Guidelines'), according to which the actual impact should be taken into account when it can be measured. At any rate, as the Court concluded in the Roquette judgment,⁸⁷ the actual impact of a cartel on the relevant market can be considered to be adequately proven if the Commission can provide concrete and credible indications from which it can reasonably be deduced that the cartel has had an actual impact on the market. In this case, it is clear from the facts described in section 6 that the cartel arrangements were effectively implemented. It should also be considered that the cartel lasted for more than 16 years and that the participants were willing to incur substantial costs (time of executives, travelling expenditure, communications, the risk of substantial fines for infringement of Article 81 of the Treaty and other anti-cartel laws) in contribution to its continued existence. The long adherence to a costly scheme demonstrates that the cartel was profitable for its members and hence had an impact.

8.3.1.3. Size of the relevant geographic market

(478) In assessing gravity, it should be borne in mind that the infringement covered at least the whole territory of the EEA. The overall EEA market estimate based on the EEA turnover of the respective undertakings in 2003 (the last full year of the operation of the cartel) was approximately EUR 320 million. That being said, as was demonstrated in recitals (112)- above, the agreement was worldwide.

8.3.1.4. Conclusion on gravity

(479) Based on the above considerations, the Commission takes the view that it must be regarded as 'very serious' within the meaning of the Guidelines.

8.3.2. Differential treatment

(480) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of differences in their effective economic capacity to cause significant damage to competition. This is appropriate where, as in this case, there are considerable disparities between the respective market shares of the undertakings participating in the infringement. For this purpose, the undertakings concerned can be divided into different categories, established according to their relative importance in the relevant market.

(481) Given the global character of the cartel arrangements, the worldwide sales figures give the most appropriate picture of the participating undertakings' capacity to cause significant damage to other operators in the EEA. This approach is supported by the

⁸⁶ OJ C9, 14.1.1998, page 3.

⁸⁷ Case T-322/01 Roquette Frère v. Commission, paragraph 75.

fact that the object of the cartel was, *inter alia*, to allocate markets on a worldwide level. Thus, the worldwide turnover of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated. In fact, since it is concluded that a common understanding existed that the Japanese undertakings would refrain from competing on the European market, the Commission would substantially underestimate the role of the Japanese participants in the cartel if it were to rely on turnover data pertaining only to the EEA. The comparison is made on the basis of the worldwide product turnover in the last full year of the infringement for each undertaking.

- (482) Accordingly, the undertakings can be subdivided into several categories according to their worldwide sales of the product which forms the subject matter of the infringement. Fuji, Hitachi, Melco and Toshiba were for the longer part of their participation in the cartel present as individual undertakings, not through joint-ventures. Hence it is considered appropriate to base groupings on the sales of these undertakings in 2001. As regards Hitachi, it is noted that the year 2002 is the last year for which evidence of its individual participation exists. However, since during this year the joint-venture JAEPS became operational, the turnover figures of Hitachi for 2002 are influenced by that event. Hence the year 2001 is also chosen as regards Hitachi, as this is considered to be a year that is most proximate to 2002 and can be seen as representative of Hitachi's market position in 2002 as well⁸⁸ and equally allows a comparison on the basis of the same year between the other partner in JAEPS, Fuji.
- (483) The groupings have been determined in such a manner as to ensure that the differences between undertakings' shares of the sales of the total sales of the cartel members within the same group are smaller than between the shares of undertakings in different groups. The sales data upon which this grouping is based are those supplied by the undertakings in response to requests for information. For these data confidential treatment has been requested. However, in order to allow the undertakings to assess the Commission's reasoning for establishing the groups, whilst respecting confidentiality of the data provided, the Commission makes available the ranges demarcating the respective groups.
- (484) The first largest group consists of Siemens and ABB with [...] % of the worldwide turnover of GIS projects. On the basis of the value of the market in the EEA, the starting amount of the fine to be imposed on them should be set at EUR 45 000 000, which is considered to be the appropriate amount given the circumstances described in section 8.3.1 above.
- (485) The second largest group consists of Melco [...] % of the worldwide turnover. The starting amount of the fine to be imposed on it should be set at EUR 31 000 000.

⁸⁸ JAEPS became operational on 1 October 2002. When considering the turnover figure provided by Hitachi for 2002, considering this covers the period until 1 October 2002, there is not a material difference with its GIS sales in 2001.

- (486) The third largest group consists of ALSTOM/AREVA and Toshiba with [...] % of the worldwide turnover. The starting amount of the fine to be imposed on them should be set at EUR 17 000 000.
- (487) The fourth largest group consists of VA TECH and Hitachi with [...] % of the worldwide turnover. The starting amount of the fine to be imposed on them should be set at EUR 9 000 000.
- (488) The fifth group consists of Fuji with [...] % of the worldwide turnover. The starting amount of the fine to be imposed on it should be set at EUR 1 000 000.
- (489) JAEPS will also be held liable, jointly and severally with Fuji and Hitachi, for an amount that is intended to cover its liability. Similarly, an amount is to be calculated for Melco and Toshiba for which these entities will become jointly and severally liable, resulting from the period of the infringement they operated the TM T&D joint venture. The starting amounts from which these fines will be calculated are established as follows (however, the starting amounts calculated for the joint ventures will not be imposed as a fine in order to prevent that a starting amount is imposed twice on the parent undertakings). For the starting amounts to be used for the purpose of the calculation of the fines for which the joint venture JAEPS and its parents Fuji and Hitachi will be held liable the reference year 2003 is used as this was the last year of the infringement of JAEPS. JAEPS is placed in the same group as VA TECH and Hitachi. As regards TM T&D, its sales place it in the same group as Melco. Finally, the starting amount that is applied to Schneider Electric SA (and to VA TECH Transmission & Distribution SA and Nuova Magrini Galileo S.p.A. for the purpose of Schneider's infringement) is determined at 40% of the starting amount of VA Tech given that 40% was the share of Schneider in the joint venture VAS into which Schneider and VA TECH pooled their GIS resources and that the contribution of Schneider to the joint venture expressed in sales was, at the time of the formation of VAS, at least that percentage.
- (490) In summary, the appropriate starting amounts for the undertakings on which a fine is to be imposed in this proceeding are as follows:

Table VIII: Starting amounts

Undertakings	EUR
Siemens, ABB	45 000 000
Melco, TM T&D (JV of Melco and Toshiba)	31 000 000
Alstom/AREVA, Toshiba	17 000 0000
VA TECH, Hitachi, JAEPS (JV of Fuji and Hitachi)	9 000 000

Schneider	3 600 000
Fuji	1 000 000

8.3.3. Sufficient deterrence

(491) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking to be fined and the particular circumstances of the case. It is considered that for the undertakings that have a particularly large turnover compared to other players a multiplier is warranted to ensure sufficient deterrence. This means that the undertaking ABB with a turnover of EUR 18 038 million should have a multiplier of 1.25. The undertaking Melco with a turnover of EUR 26 336 million should have a multiplier of 1.5. The undertaking Toshiba with a turnover of EUR 46 353 million should have a multiplier of 2. The undertaking Hitachi with a turnover of EUR 69 161 million should have a multiplier of 2.5. The undertaking Siemens with a turnover of EUR 75 445 million should have a multiplier of 2.5. The multipliers of the parent companies of the joint ventures are used both for the period of the infringement before the joint ventures and for the period of the joint ventures.

Table IX: Multipliers

Undertaking	Worldwide turnover (2005)	Multiplier
Siemens	EUR 75 445 million	2.5
Hitachi	EUR 69 161 million	2.5
Toshiba	EUR 46 353 million	2
Melco	EUR 26 336 million	1.5
ABB	EUR 18 038 million	1.25

8.3.4. Duration of the infringement

(492) In line with the Guidelines, for infringements lasting longer than one year, the starting amount will be increased by 10% for each full year and by 5% for each additional period of at least six months but less than a year.

8.3.4.1. ABB

- (493) ABB Ltd. is held liable for an infringement of a duration of 15 years and 10 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 155%.

8.3.4.2. ALSTOM and AREVA

- (494) ALSTOM (Société Anonyme) is held liable for an infringement of a duration of 15 years and 8 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 155%. Of this amount, the starting amount increased by 110% relates to the period during which it was the owner of ALSTOM T&D SA (now AREVA T&D SA) and ALSTOM T&D AG (now AREVA T&D AG). The remainder relates to the period for which is exclusively held liable for the infringement.
- (495) AREVA SA and AREVA T&D Holding SA are held liable on account of the actual exercise of decisive influence over AREVA T&D SA and AREVA T&D AG for an infringement of a duration of 4 months, that is to say, an infringement of short duration. This justifies no increase in the starting amount of the fine to be imposed.
- (496) AREVA T&D SA is held liable for an infringement of a duration of 11 years and 5 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 110%.
- (497) AREVA T&D AG is held liable for an infringement of 4 months, that is to say, an infringement of short duration. This justifies no increase in the starting amount of the fine to be imposed.

8.3.4.3. Fuji, Hitachi and JAEPS

- (498) For the period before 1 October 2002, Fuji Electric Holdings Co., Ltd and Fuji Electric Systems Co, Ltd. are held liable for an infringement of a duration of 14 years and 4 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 140%.
- (499) For the period before 1 October 2002, Hitachi Ltd. and Hitachi Europe Ltd. are held liable for an infringement of a duration of 11 years and 11 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 115%.
- (500) In addition, for the period from 1 October 2002 until 11 May 2004, Fuji Electric Holdings Co., Ltd and Fuji Electric Systems Co, Ltd., Hitachi Ltd. together with Japan AE Power Systems Corporation are held liable for an infringement of a duration of 1 year and 7 months, that is to say, an infringement of medium duration. This justifies a percentage of the starting amount calculated for JAEPS (based on the turnover of JAEPS) of 15%. In addition, for the calculation of the fine of Hitachi, the multiplier for deterrence is applied to Hitachi alone and not to the duration amount calculated for

JAEPS. It is only the amount corresponding to the duration that is attributed as a fine to JAEPS, Hitachi and Fuji jointly and severally.

8.3.4.4. Melco and Toshiba

- (501) For the period before 1 October 2002, Mitsubishi Electric Corporation is held liable for an infringement of a duration of 14 years and 5 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 140%.
- (502) For the period before 1 October 2002, Toshiba Corporation Hitachi Ltd. is held liable for an infringement of a duration of 14 years and 5 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 140%.
- (503) In addition, for the period from 1 October 2002 until 11 May 2004, Mitsubishi Electric Corporation and Toshiba Corporation are held liable for an infringement by means of their subsidiary TM T&D of a duration of 1 year and 7 months, that is to say, an infringement of medium duration. This justifies a percentage of the starting amount of the fine to be imposed of 15% (based on the turnover of TM T&D). For each of the undertakings, its own multiplier for deterrence applies. It is only the amount corresponding to the duration that is attributed as a fine to Mitsubishi Electric Corporation and Toshiba Corporation jointly and severally.

8.3.4.5. Schneider and VA TECH/Siemens Aktiengesellschaft Österreich

- (504) Schneider Electric SA is held liable for an infringement of a duration of 12 years and 7 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 125%.
- (505) VA TECH Transmission & Distribution SA (the former Schneider Electric High Voltage SA, now Siemens Transmission & Distribution SA) and Nuova Magrini Galileo S.p.A. are held liable for an infringement of a duration of 14 years and 9 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 145%. Of this amount, 125% of the starting amount applied to Schneider, relates to the period during which these entities were controlled by Schneider Electric SA; the remainder relates to the period in which they were controlled by VA TECH.
- (506) VA Tech Transmission & Distribution Ltd. (the former Reyrolle, now Siemens Transmission & Distribution Ltd.) is held liable for an infringement of a duration of 14 years and 9 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 145%.
- (507) Siemens Aktiengesellschaft Österreich and VA TECH Transmission & Distribution GmbH & Co KEG are held liable for an infringement of a duration of 4 years and 4 months, that is to say, an infringement of medium duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 40%.

8.3.4.6. Siemens

- (508) Siemens AG is held liable for an infringement of a duration of 13 years and 6 months, that is to say, an infringement of long duration. This justifies a percentage increase to the starting amount of the fine to be imposed of 135%.

8.3.4.7. Conclusion on the basic amounts

- (509) In summary, the basic amounts for the legal entities on which a fine is to be imposed in this proceeding are as follows:

Table X: Basic amounts

Legal entities	(EUR)
ABB Ltd.	143 437 500
ALSTOM (Société Anonyme)	43 350 000
Of which	
Jointly and severally with AREVA T&D SA	35 700 000
AREVA T&D SA jointly and severally with ALSTOM (Société Anonyme)	35 700 000
Of the amount of AREVA T&D SA, AREVA SA, AREVA T&D Holding SA and AREVA T&D AG jointly and severally with AREVA T&D SA for	17 000 000
Fuji Electric Holdings Co., Ltd, and Fuji Electric Systems Co, Ltd., jointly and severally	3 750 000 ⁸⁹
Of which	
jointly and severally with Hitachi Ltd and Japan AE Power Systems Corporation	1 350 000

⁸⁹ The amount consists of EUR 2 400 000 for the infringement until 1 October 2002 and of EUR 1 350 000 for the infringement from that date.

Hitachi Ltd.	51 750 000 ⁹⁰
Of which	
jointly and severally with Hitachi Europe Ltd	48 375 000
and	
jointly and severally with Japan AE Power Systems, Fuji Electric Holdings Co., Ltd, and Fuji Electric Systems Co, Ltd.	1 350 000
Mitsubishi Electric Corporation	118 575 000 ⁹¹
Of which	
jointly and severally with Toshiba Corporation	4 650 000
Toshiba Corporation	90 900 000 ⁹²
Of which	
jointly and severally with Mitsubishi Electric Corporation	4 650 000
Schneider Electric SA	8 100 000
Of which	
jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini SpA	4 500 000
Siemens Transmission & Distribution Ltd	22 050 000
Of which	
jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini SpA	17 550 000

⁹⁰ The amount of consists of EUR 48 375 000 for the infringement until 1 October 2002 and of EUR 3 375 000 for the infringement from that date.

⁹¹ The amount of EUR consists of EUR 111 600 000 for the infringement until 1 October 2002 and of EUR 6 975 000 for the infringement from that date.

⁹² The amount consists of EUR 81 600 000 for the infringement until 1 October 2002 and of EUR 9 300 000 for the infringement from that date.

and	
jointly and severally with Siemens Aktiengesellschaft Österreich and VA Tech Transmission & Distribution GmbH & Co KEG	12 600 000
Siemens AG	264 375 000

8.4. Aggravating and attenuating circumstances

8.4.1. Aggravating circumstances

8.4.1.1. Recidivism

(510) The Commission stated in its Statement of Objections in this case that it would take into account as an aggravating circumstance previous findings of similar infringements by the same undertakings. At the time this infringement took place ABB had already been held liable for an infringement of Article 81 of the Treaty by a previous Commission Decision (Decision 1999/60/EC in Case IV/35691 *Pre-Insulated Pipe Cartel*⁹³). According to the case-law, *"in assessing the seriousness of an infringement for the purpose of setting the fine, the Commission must (...) ensure that its action has the necessary deterrent effect (...) In that respect, the analysis of the gravity of the infringement must take account of any repeated infringements. In the context of deterrence, repeated infringements are a matter which justifies a significant increase in the basic amount of the fine. It is evidence that the sanction previously imposed was not sufficiently deterrent"*.⁹⁴ Recidivism constitutes an aggravating circumstance justifying an increase of 50% in the basic amount of the fine to be imposed on ABB.

8.4.1.2. Role of leader

(511) The Commission has ascertained that during the life time of the cartel Siemens, and ALSTOM/AREVA have consecutively played the role of European secretary of the cartel, while the Japanese secretary, which mainly concerned the exchanges amongst the Japanese counterparts and exchanges with the European secretary for projects outside the EEA, rotated for shorter periods between Hitachi, Toshiba and Melco. The starting amount will not be increased for the undertakings that held the Japanese secretariat.

(512) While many organisational features of the cartel changed in the course of time, there remained a European secretariat, which was stable over time (since Siemens was only replaced by ALSTOM upon its temporary departure from the cartel and AREVA only took over upon the acquisition of ALSTOM's subsidiaries active in the GIS field). The

⁹³ OJ L 24, 30.1.1999, p. 1

⁹⁴ See e.g. judgment of 25 October 2005 in Case T-38/02, *Groupe Danone v. Commission*, at paragraphs 347-350 and Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, at paragraph 293

tasks of this European secretariat were extensive. It was the pivot for communication between the European undertakings, it handled the communication on behalf of the European undertakings with the Japanese secretariat, it convened and chaired meeting and it was responsible for accounting for the quotas.

- (513) In their reply to the Statement of Objections, Siemens, ALSTOM and AREVA have argued that the role of secretary was predominantly administrative. However, it is clear from the text of the messages from the secretariat, from the text of the GQ-Agreement and the EQ-Agreement, as well as from the practical operation of the cartel, that its role was substantial and, in fact, necessary for the functioning of the cartel (recital (148)). By taking the initiative those undertakings rendered a continuous service to the cartel without which the latter would not have functioned as well as it did. Consequently, the undertakings that assumed that role, dedicating significant resources to it, must bear a special responsibility in terms of their contribution to the functioning of the cartel.
- (514) Therefore, taking up the role of secretary warrants an increase in the fine to be imposed. In this case, it merits an increase of 50% for each of the European undertakings (Siemens, ALSTOM and AREVA) for leadership because they assumed responsibility for the cartel's secretariat.

8.4.2. Attenuating circumstances

8.4.2.1. Passive or 'follow my leader' role

- (515) Certain parties noted that their role in the cartel was minor and passive and requested that to be considered as an attenuating factor for the possible fine. Fuji claimed that it had a limited and passive role and that it was a small player. It would not have participated in many meetings where it was represented by another Japanese undertaking. Hitachi/JAEPS described its own role as small and passive. VA Tech described itself as a minor player. These allegations are not supported by evidence.
- (516) These parties had a small market share, rather than a minor role. In the method followed to determine the fines the relative size of their market share has therefore already been taken into account in the determination of the starting amount.
- (517) According to the criteria established by the Court of First Instance⁹⁵ a passive role can *inter alia* consist of not actively participating in the creation of any anti-competitive agreements, late entry into the cartel, significantly more sporadic participation in cartel meetings than ordinary members and a declaration of passive participation. None of the three undertakings meet these criteria. Fuji, Hitachi and VA TECH (and/or its economic and legal predecessors) participated in the establishment of the cartel and were original signatories to it. Hitachi was for a certain time the secretary of the Japanese undertakings in the cartel. Fuji acknowledged sending some 200 faxes per year pertaining to the cartel in the period up to late 2000. While Fuji, Reyrolle and

⁹⁵ See Judgment of the Court of First Instance in Case T-220/00, *Cheil Jedang Corp., v. Commission*, 2003(ECR) p II-2473, at paragraphs 167-168).

for some of the time Schneider (the latter two as economic predecessors of VA TECH) did not participate in all the meetings, it is clearly established that they took part in key meetings in the period until 1999 and that Fuji and Hitachi (through JAEPS) and VA TECH took part in many meetings and other expressions of the cartel in the period 2002-2004.

- (518) It should be borne in mind, however, that the Court of First Instance has concluded in any case that, *“the fact that different undertakings have played different roles in the pursuit of a common objective does not mean that there was no identity of anti-competitive object and, therefore, of infringement, provided that each undertaking has contributed, at its own level, to the pursuit of the common object”*⁹⁶ The Commission therefore considers that the different roles of the various participants cannot be considered as attenuating circumstances.

8.4.2.2. Non-implementation of the agreements and absence of benefit

- (519) Both Siemens and VA TECH submitted in their reply to the Statement of Objections the low discipline of the cartel members in general terms. Siemens also claimed to have been a maverick especially in the period leading up to the suspension of its cartel activities in 1999. They did not supply evidence of these allegations. In particular, Siemens's role as European secretary of the cartel until its temporary departure is hardly compatible with the role of a maverick. Their behaviour does therefore not qualify as an attenuating circumstance. The fact that an undertaking which participated in an infringement with its competitors did not always behave on the market in the manner agreed between them is not a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit⁹⁷.

8.4.2.3. Early termination of the infringement

- (520) Fuji claimed in its reply to the Statement of Objections that it had been informed in the second half of the year 2000 that the cartel had come to an end. The Commission considers, however, that Fuji remained in the cartel until its role was taken over by JAEPS (for the reasons explained in recitals (376) to (379) above). This can therefore not be regarded as an attenuating circumstance.

8.4.2.4. Forced participation

- (521) In its reply to the Statement of Objection, during the Oral Hearing and in further letters (notably in its submission dated 7 August 2006), Siemens claimed that ABB had,

⁹⁶ Case T-67/00, T-68/00, T-71/00 and 78/00, *JFE Engineering Corp. v. Commission* of 8 July 2004, at paragraph 370.

⁹⁷ See judgment of the Court of First Instance in *Cascades SA v Commission*, cited above, at paragraph 230; judgment of the Court of First Instance in *Tokai Carbon Co. Ltd and others v Commission*, cited above, at paragraph 297; judgment of the Court of First Instance in Case T-44/00 *Mannesmannröhren-Werke AG v Commission*, [2004] ECR II-729 at paragraphs 277-278, and judgment of the Court of First Instance in Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, at paragraph 142.

together with other participants to the cartel coerced Siemens around the time of its suspension from cartel activities in 1999. The information that Siemens submitted as proof for this allegation, including that which it supplied following questions at the Oral Hearing held on 18 and 19 July 2006, did not demonstrate that other companies actually coerced Siemens but merely showed that Siemens and the members of the cartel competed for certain projects. This has been taken into account in this Decision by acknowledging that Siemens interrupted its participation in the cartel for a certain period. However, the Commission concludes that there is no evidence that the conduct of the other cartel members towards Siemens amounted to coercion. This can therefore not be regarded as an attenuating circumstance. In any case, as the Court of First Instance concluded, an undertaking cannot rely on the fact that it participated in an infringement under pressure from the other participants as it *"could have complained to the competent authorities about the pressure brought to bear on it and have lodged a complaint with the Commission"*⁹⁸.

8.4.2.5. Conclusion on aggravating and attenuating circumstances

- (522) As a result of aggravating and attenuating circumstances, the basic amount of the fine to be imposed on ABB should be increased by 50 % to EUR 215 156 250, the basic amount of the fine to be imposed upon ALSTOM (Société Anonyme) should be increased by 50% to EUR 65 025 000, the basic amount of the fine to be imposed upon AREVA T&D SA, and AREVA SA, AREVA T&D Holding SA and AREVA T&D AG should be increased by 50% to respectively EUR 53 550 000 and EUR 25 500 000 and the basic amount of the fine to be imposed on Siemens should be increased by 50% to EUR 396 562 500.

Table XI: Conclusion on amounts including aggravating and attenuating circumstances

Legal entities	(EUR)
ABB Ltd.	215 156 250
ALSTOM (Société Anonyme)	65 025 000
Of which	
Jointly and severally with AREVA T&D SA	53 550 000
AREVA T&D SA jointly and severally with ALSTOM (Société Anonyme)	53 550 000
Of the amount of AREVA T&D SA, AREVA SA, AREVA T&D Holding SA and AREVA T&D AG jointly and severally with AREVA T&D SA for	25 500 000

⁹⁸ See Judgment of the Court of First Instance in Case T-23/99, LR af 1998 A/S v. Commission, paragraph 142.

Fuji Electric Holdings Co., Ltd, and Fuji Electric Systems Co, Ltd., jointly and severally	3 750 000 ⁹⁹
Of which	
jointly and severally with Hitachi Ltd and Japan AE Power Systems Corporation	1 350 000
Hitachi Ltd.	51 750 000 ¹⁰⁰
Of which	
jointly and severally with Hitachi Europe Ltd	48 375 000
and	
jointly and severally with Japan AE Power Systems, Fuji Electric Holdings Co., Ltd, and Fuji Electric Systems Co, Ltd.	1 350 000
Mitsubishi Electric Corporation	118 575 000 ¹⁰¹
Of which	
jointly and severally with Toshiba Corporation	4 650 000
Toshiba Corporation	90 900 000 ¹⁰²
Of which	
jointly and severally with Mitsubishi Electric Corporation	4 650 000

⁹⁹ The amount consists of EUR 2 400 000 for the infringement until 1 October 2002 and of EUR 1 350 000 for the infringement from that date.

¹⁰⁰ The amount of consists of EUR 48 375 000 for the infringement until 1 October 2002 and of EUR 3 375 000 for the infringement from that date.

¹⁰¹ The amount of EUR consists of EUR 111 600 000 for the infringement until 1 October 2002 and of EUR 6 975 000 for the infringement from that date.

¹⁰² The amount consists of EUR 81 600 000 for the infringement until 1 October 2002 and of EUR 9 300 000 for the infringement from that date.

Schneider Electric SA	8 100 000
Of which	
jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini SpA	4 500 000
Siemens Transmission & Distribution Ltd	22 050 000
Of which	
jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini SpA	17 550 000
and	
jointly and severally with Siemens Aktiengesellschaft Österreich and VA Tech Transmission & Distribution GmbH & Co KEG	12 600 000
Siemens AG	396 562 500

8.5. Application of the 10% of turnover limit

(523) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking is not to exceed 10% of its turnover. As regards the 10% ceiling, if “several addressees constitute the ‘undertaking’, that is the economic entity responsible for the infringement penalised, [...] at the date when the decision is adopted, [...] the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say, of all its constituent parts taken together. By contrast, if that economic unit has subsequently broken up, each addressee of the decision is entitled to have the ceiling in question applied individually to it”.¹⁰³

(524) The worldwide annual turnover achieved by the undertakings in 2005 was as follows.

Table XII: Worldwide annual turnover

Undertakings/legal entities	EUR (million)
ABB	18 038

¹⁰³ See Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai Carbon Co. Ltd and Others v Commission*, paragraph 390.

ALSTOM	13 413
AREVA	10 124
Fuji	6 556
Hitachi	69 191
JAEPS	511
Melco	26 336
Schneider	11 679
Siemens	75 445
Toshiba	46 353
VA Tech	4 073

8.6 Application of the Leniency Notice

(525) As indicated in section 5, ABB, AREVA, Siemens, VA Tech, Hitachi/JAEPS, Melco and Fuji applied at different stages of the investigation for immunity/leniency under the Leniency Notice. These applications are evaluated in this Section.

– **ABB**

(526) ABB was the first to inform the Commission about a worldwide secret cartel for GIS projects. On 3 March 2004, ABB applied for immunity from fines and submitted evidence in respect of the alleged cartel. In the weeks thereafter, ABB provided the Commission with additional information. This information included [...]. Prior to the application, the Commission had not undertaken an investigation into the alleged cartel activities, nor did it have sufficient evidence to order an investigation in respect of those activities. On the basis of the information provided, the Commission was able to adopt a decision to carry out surprise inspections. On 25 April 2004, the Commission therefore granted ABB conditional immunity from fines, in accordance with point 8(a) of the Leniency Notice. The surprise inspections took place on 11 and 12 May 2004.

(527) ABB continued to cooperate fully with the Commission throughout the administrative procedure in accordance with point 11 of the Leniency Notice. ABB ended its involvement in the infringement no later than the time when it submitted evidence under point 8(a) of the Leniency Notice. ABB has not taken steps to coerce other undertakings to participate in the infringement.

(528) ABB should therefore be granted immunity from any fines that would otherwise have been imposed on it.

– *Applications for reduction in fines*

- (529) In accordance with point 21 of the Leniency Notice, any application has to be assessed against the information in the possession of the Commission at the time the application is received. It is noted in this respect that the Commission inspections yielded much evidence confirming ABB's description of the cartel. These included: (a) documents detailing project allocation and price fixing; (b) documents describing quotas; (c) documents describing the functioning of the cartel; and (d) the date, place and participants to many meetings. In fact, on the basis of ABB's submission under the Leniency Notice prior to any other submissions under the Leniency Notice and the inspection findings, the existence of the cartel, in particular its nature, its object and scope, its modus operandi and its duration, can already be established.

– *AREVA*

- (530) AREVA was the second undertaking to approach the Commission under the Leniency Notice. On 14 May 2004 it announced its willingness to cooperate. [...]
- (531) Whereas the overall picture of AREVA's statement was on the whole consistent with the submissions of ABB, it contained little that could be qualified as providing 'added value'. The only information that was of added value was the declaration that 26 March 2002 was the day on which Siemens resumed its participation in cartel meetings. However, since such information concerned an addition of the duration of Siemens's participation of 3 months, this did not significantly strengthen the Commission's ability to prove the relevant facts and is hence not considered to qualify as significant added value. Moreover, some of AREVA's statements have been dismissed as insufficiently reliable in this Decision, which has not facilitated the Commission's findings in this case.
- (532) In conclusion, the information provided by AREVA does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

– *Siemens*

- (533) On 28 May 2004 Siemens submitted a written statement under the Leniency Notice. It supplemented its application in later submissions and during a meeting.
- (534) The submission of Siemens mentions [...]. All this was already known to the Commission.
- (535) [...] information the Commission already knew from ABB.
- (536) Siemens challenged the Commission findings, notably it maintains that it suspended its participation in the cartel meetings in April rather than September 1999 and it also challenged the existence of the common understanding, while both findings are established in this Decision on the basis of other evidence.

(537) In conclusion, the information provided by Siemens does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

– **VA TECH**

(538) On 30 July 2004 VA TECH sent the Commission a memorandum that the Commission decided to treat as a submission under the Leniency Notice.

(539) [...]

(540) VA TECH also claims that it provided the Commission with self-incriminating information on a voluntary basis in its replies to the Commission's requests for information. The questions that VA TECH answered were, however, factual questions and VA TECH's replies were, to the extent that it did reply, not self-incriminating. According to the Orkem judgment, the Commission is entitled to "*compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose it, even if the latter may be used to establish against it or another undertaking, the existence of anti-competitive conduct*", although it "*may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence which it is incumbent upon the Commission to prove*".¹⁰⁴

(541) VA TECH challenged the Commission findings, notably that the GQ and E-agreements concerned the EEA. Moreover it denied having taking part in meetings from October 2000 until December 2002, while it is established in this Decision that it took part until December 2000 and from 1 April 2002. Moreover, VA TECH has provided contradictory statements which have not facilitated the Commission's findings in this case.

(542) In conclusion, the information provided by VA TECH does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

– **Hitachi and JAEPS**

(543) On 8 September 2004 Hitachi and JAEPS made a joint corporate statement. [...] The information provided by Hitachi and JAEPS did not significantly strengthen the Commission's ability to prove the relevant facts.

(544) Hitachi and JAEPS challenged the Commission findings, notably as regards the existence of the 'common understanding' between the European and Japanese suppliers for the Japanese producers not to sell in Europe and vice versa and therefore of the existence of an infringement of Article 81 of the Treaty in their regard.

¹⁰⁴ See Case C 374/87 *Orkem v Commission* of 18 October 1989, paragraphs 34-35.

- (545) In conclusion, the information provided by Hitachi and JAEPS does not constitute significant added value which would merit a reduction of the fine in application of the Leniency Notice.

– ***Melco***

- (546) On 4 November 2004 Melco wrote to the Commission under the Leniency Notice. In its letter, it described [...]. The Commission knew of all of these since ABB's immunity application. Moreover Melco challenged the Commission findings, notably that the cartel concerned the EEA and that there existed a 'common understanding' between the European and Japanese suppliers for the Japanese producers not to sell in Europe and vice versa and therefore, the existence of an infringement of Article 81 of the Treaty in their regard. It also ambiguously contests the continuation of the cartel after 1999.

- (547) In conclusion, the information provided by Melco does not constitute significant added value on the basis of which the Commission should grant a reduction of the fine in application of the Leniency Notice.

– ***Fuji***

- (548) After the notification of the Statement of Objections to the parties, Fuji applied for a reduction of fines under the Leniency Notice (on 12 July 2006), while requesting that its reply to the Statement of Objections should also be taken into account for that purpose. [...]

- (549) In its submissions, Fuji described [...]. However, Fuji contested its individual participation after September 2000 as well as its liability for the infringement committed by the JAEPS.

- (550) In view of the fact that Fuji's application was only made after the notification of the Statement of Objections and of the content of that submission, the Commission considers that Fuji's submission did not significantly strengthen the Commission's ability to prove the relevant facts, since Fuji confirmed factual elements that had already been established to the required legal standard by the Commission on the basis of other pieces of evidence and it did not provide the grounds for new objections. Therefore, its contribution did not amount to significant added value as compared to the information already in the Commission's possession at the time of the submission of the evidence and does not justify the granting of a reduction of fines based on the Leniency Notice.

– ***Conclusion***

- (551) In conclusion, ABB should be granted immunity from the fine that would otherwise have been imposed on it.

8.7 The amounts of the fines imposed in this proceeding

- (552) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

Table XIII: fines imposed

Legal entities	(EUR)
ABB Ltd.	0
ALSTOM (Société Anonyme)	65 025 000
Of which	
Jointly and severally with AREVA T&D SA	53 550 000
AREVA T&D SA jointly and severally with ALSTOM (Société Anonyme)	53 550 000
Of the amount of AREVA T&D SA, AREVA SA, AREVA T&D Holding SA and AREVA T&D AG jointly and severally with AREVA T&D SA for	25 500 000
Fuji Electric Holdings Co., Ltd, and Fuji Electric Systems Co, Ltd., jointly and severally	3 750 000 ¹⁰⁵
Of which	
jointly and severally with Hitachi Ltd and Japan AE Power Systems Corporation	1 350 000
Hitachi Ltd.	51 750 000 ¹⁰⁶
Of which	
jointly and severally with Hitachi Europe Ltd	48 375 000
and	
jointly and severally with Japan AE Power Systems, Fuji Electric Holdings Co., Ltd, and Fuji Electric Systems Co, Ltd.	1 350 000

¹⁰⁵ The amount consists of EUR 2 400 000 for the infringement until 1 October 2002 and of EUR 1 350 000 for the infringement from that date.

¹⁰⁶ The amount consists of EUR 48 375 000 for the infringement until 1 October 2002 and of EUR 3 375 000 for the infringement from that date.

Mitsubishi Electric Corporation	118 575 000 ¹⁰⁷
Of which	
jointly and severally with Toshiba Corporation	4 650 000
Toshiba Corporation	90 900 000 ¹⁰⁸
Of which	
jointly and severally with Mitsubishi Electric Corporation	4 650 000
Schneider Electric SA	8 100 000
Of which	
jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini SpA	4 500 000
Siemens Transmission & Distribution Ltd	22 050 000
Of which	
jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini SpA	17 550 000
and	
jointly and severally with Siemens Aktiengesellschaft Österreich and VA Tech Transmission & Distribution GmbH & Co KEG	12 600 000
Siemens AG	396 562 500

¹⁰⁷ The amount of EUR consists of EUR 111 600 000 for the infringement until 1 October 2002 and of EUR 6 975 000 for the infringement from that date.

¹⁰⁸ The amount consists of EUR 81 600 000 for the infringement until 1 October 2002 and of EUR 9 300 000 for the infringement from that date.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a complex of agreements and concerted practices in the Gas Insulated Switchgear sector in the EEA:

- (a) ABB Ltd., from 15 April 1988 to 2 March 2004;
- (b) ALSTOM (Société Anonyme), from 15 April 1988 to 8 January 2004;
- (c) AREVA SA, from 9 January 2004 until 11 May 2004;
- (d) AREVA T&D AG from 22 December 2003 to 11 May 2004;
- (e) AREVA T&D Holding SA, from 9 January 2004 until 11 May 2004
- (f) AREVA T&D SA, from 7 December 1992 to 11 May 2004;
- (g) Fuji Electric Holdings Co., Ltd.. from 15 April 1988 to 11 May 2004;
- (h) Fuji Electric Systems Co, Ltd., from 15 April 1988 to 11 May 2004
- (i) Hitachi Ltd., from 15 April 1988 to 31 December 1999, and from 2 July 2002 to 11 May 2004;
- (j) Hitachi Europe Ltd., from 15 April 1988 to 31 December 1999, and from 2 July 2002 to 30 September 2002;
- (k) Japan AE Power Systems Corporation, from 1 October 2002 to 11 May 2004;
- (l) Mitsubishi Electric Corporation, from 15 April 1988 to 11 May 2004;
- (m) Nuova Magrini Galileo S.p.A., from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004;
- (n) Schneider Electric SA, from 15 April 1988 to 13 December 2000;
- (o) Siemens AG, from 15 April 1988 to 1 September 1999, and from 26 March 2002 to 11 May 2004;
- (p) Siemens Aktiengesellschaft Österreich, from 20 September 1998 to 13 December 2000, and from 1 April 2002 to 11 May 2004;
- (q) Siemens Transmission & Distribution Ltd., from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004;
- (r) Siemens Transmission & Distribution SA, from 15 April 1988 to 13 December 2000, and from 1 April 2002 to 11 May 2004;

- (s) Toshiba Corporation, from 15 April 1988 to 11 May 2004;
- (t) VA Tech Transmission & Distribution GmbH & Co KEG, from 20 September 1998 to 13 December 2000, and from 1 April 2002 to 11 May 2004.

Article 2

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

- (a) ABB Ltd.: EUR 0;
- (b) ALSTOM (Société Anonyme): EUR 11 475 000;
- (c) ALSTOM (Société Anonyme), jointly and severally with AREVA T&D SA: EUR 53 550 000. Of the amount of AREVA T&D SA (EUR 53 550 000), AREVA SA, AREVA T&D Holding SA and AREVA T&D AG jointly and severally with AREVA T&D SA EUR 25 500 000;
- (d) Fuji Electric Holdings Co., Ltd. jointly and severally with Fuji Electric Systems Co, Ltd.: EUR 2 400 000;
- (e) Hitachi Ltd.: EUR 50 400 000 of which jointly and severally with Hitachi Europe Ltd.: EUR 48 375 000,
- (f) Japan AE Power Systems Corporation, jointly and severally with Fuji Electric Holdings Co., Ltd., Fuji Electric Systems Co, Ltd. and Hitachi Ltd.: EUR 1 350 000;
- (g) Mitsubishi Electric Corporation: EUR 113 925 000;
- (h) Mitsubishi Electric Corporation jointly and severally with Toshiba Corporation: EUR 4 650 000;
- (i) Toshiba Corporation: EUR 86 250 000;
- (j) Schneider Electric SA: EUR 3 600 000;
- (k) Schneider Electric SA, jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini Galileo S.p.A.: EUR 4 500 000;
- (l) Siemens Transmission & Distribution Ltd.: EUR 22 050 000, of which
 - (i) jointly and severally with Siemens Transmission & Distribution SA and Nuova Magrini Galileo S.p.A.: EUR 17 550 000, and
 - (ii) jointly and severally with Siemens Aktiengesellschaft Österreich and VA TECH Transmission & Distribution GmbH & Co KEG: EUR 12 600 000;
- (m) Siemens AG: EUR 396 562 500.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account No:

733-9061900-93 of the European Commission with:

KBC Bank Rond-Point Schuman, 4 B-1040 Brussels

(Code SWIFT KREDBEBB – Code IBAN BE98 7339 0619 0093)

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted plus 3.5 percentage points.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

ABB LTD.

Affolternstrasse 44

PO Box 8131

CH – 8050 Zürich

Switzerland

ALSTOM (Société anonyme)

3, Avenue André Malraux

Le Sextant

FR - 92309 Levallois Perret Cedex

France

AREVA SA

33, rue Lafayette

FR - 75422 Paris Cédex 09

France

AREVA T&D AG

Carl Sprecherstrasse 3

CH - 5036 Oberentfelden

Switzerland

AREVA T&D HOLDING SA

33, rue Lafayette

FR - 75422 Paris Cédex 09

France

AREVA T&D SA

Tour Areva

1 Place de la Coupole

FR - 92084 Paris La Défense

France

FUJI ELECTRIC HOLDINGS CO., LTD

11-2 Osaki 1-Chome

Shinagawa-ku

Tokyo 141-0032

Japan

FUJI ELECTRIC SYSTEMS CO., LTD

11-2 Osaki 1-Chome

Shinagawa-ku

Tokyo 141-0032

Japan

HITACHI LTD.

6-6, Marounichi 1 Chome

Chiyoda-ku

Tokyo 100-8010

Japan

HITACHI EUROPE LTD.

Whitebrook Park

Lower Cookham Road

Maidenhead

GB - Berkshire SL6 8YA

United Kingdom

JAPAN AE POWER SYSTEMS CORPORATION

8-3, Nishi-Shimbashi 3 Chome

Minato-Ku

Tokyo 105-0003

Japan

mitsubishi electric corporation

2-7-3 Marunouchi

Chiyoda-ku

Tokyo 100-8310

Japan

NUOVA MAGRINI GALILEO S.P.A.

Via Circonvallazione Est, 1

IT - 24040 Stezzano

Italy

SCHNEIDER ELECTRIC SA

43-45, boulevard Franklin Roosevelt

FR - 92500 Rueil-Malmaison

France

SIEMENS AG

Freyeslebenstrasse 1

DE - 91058 Erlangen

Germany

SIEMENS AKTIENGESELLSCHAFT ÖSTERREICH

Siemensstrasse 92

AT - 1210 Vienna

Austria

SIEMENS TRANSMISSION & DISTRIBUTION LIMITED

Sir William Siemens House

Princess Road

GB - Manchester M20 2UR

United Kingdom

SIEMENS TRANSMISSION & DISTRIBUTION SA

1, rue de la Neva

FR - 38000 Grenoble

France

TOSHIBA CORPORATION

1-1, Shibaura 1-Chome

Minato-Ku

Tokyo 105-8001

Japan

VA TECH TRANSMISSION & DISTRIBUTION GMBH & CO KEG

Penzinger Strasse 76

AT - 1140 VIENNA

Austria

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels,

For the Commission
Neelie KROES
Member of the Commission