RESTREINT UE

UNTIL ADOPTION

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

Article 81 prohibition decision in a cartel case

Commission Decision

of 7 October 2009

notified under document number C(2009) 7601 final

relating to a proceeding under Article 81 of the Treaty

and Article 53 of the EEA Agreement

Case COMP/39.129 - Power Transformers

(ONLY THE ENGLISH AND FRENCH TEXTS ARE AUTHENTIC)

(Text with EEA relevance)

Decision

addressed to

ABB Ltd
AREVA T&D SA
ALSTOM (Société Anonyme)
Siemens AG
Siemens Aktiengesellschaft Österreich
Fuji Electrics Holdings Co., Ltd
Hitachi Ltd
Hitachi Europe Ltd
Toshiba Corporation

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

Case COMP/39.129 – Power Transformers

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COMMISSION DECISION

of

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

Case COMP/39.129 – Power Transformers

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 Treaty,[1] and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission Decision of 30 September 2008 to initiate proceedings in this case,

Having given the 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 Treaty,[2]

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

[1] OJ L 1, 4.1.2003, p. 1.
[2] OJ L 123, 27.4.2004, p. 18.

Having regard to the final report of the Hearing Officer in this case,[3]

Whereas:

1. INTRODUCTION

1.1. Addressees

1. This Decision is addressed to the following legal entities:

(a) ABB Ltd;

(b) AREVA T&D SA;

(c) ALSTOM (Société Anonyme);

(d) Siemens AG;

(e) Siemens Aktiengesellschaft Österreich;

(f) Fuji Electrics Holdings Co., Ltd;

(g) Hitachi Ltd;

(h) Hitachi Europe Ltd;

(i) Toshiba Corporation.

1.2. Summary of the infringement

2. The addressees of this Decision participated in a single and continuous infringement of Article 81 of the Treaty and of Article 53 of the Agreement on the European Economic Area (hereinafter "EEA Agreement"), covering the entire EEA, consisting of an agreement whereby they agreed on the sharing of markets by means of the Gentlemen's Agreement (hereinafter "GA") between European and

[3] To be published in the *Official Journal of the European Union.*

Japanese producers of power transformers to respect each others' home markets and to refrain from selling in those markets.

1.3. Duration of participation in the infringement

3. The addressees of this Decision participated in the infringement, or bear liability for such participation, at least during the following periods:

(a) ABB Ltd: from 9 June 1999 until15 May 2003

(b) AREVA T&D SA: from 9 June 1999 until 15 May 2003

(c) ALSTOM (Société Anonyme): from 9 June 1999 until 15 May 2003

(d) Siemens AG: from 9 June 1999 until 15 May 2003

(e) Siemens Aktiengesellschaft Österreich: from 29 May 2001 until 15 May 2003

(f) Fuji Electrics Holdings Co., Ltd: from 9 June 1999 until 15 May 2003

(g) Hitachi Ltd: from 9 June 1999 until 15 May 2003

(h) Hitachi Europe Ltd from 9 June 1999 until 15 May 2003

(i) Toshiba Corporation from 9 June 1999 until 15 May 2003

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

4. The alleged anti-competitive behaviour relates to power transformers, autotransformers and shunt reactors with a voltage range of 380 kV and above. For the purpose of this Decision, the term "power transformers" refers to power transformers, autotransformers and shunt reactors with a voltage range of 380 kV and above.

5. A power transformer is a major electrical component whose function is to reduce or to increase the voltage in an electrical circuit. A high level of tension is required in the transmission of an electrical current to ensure the lowest loss of energy during such transmission. The level of tension produced by power stations is such

that if electricity were to be transported at this level of tension the loss of energy would be substantial. This is why it is necessary to raise the tension levels of the electricity produced by power stations in order to then transport the electrical current over long distances. The tension level is then lowered once the current nears the place of consumption, in order to allow for its use by the end user.

6. Power transformers are sold as stand-alone equipment or as part of turnkey power substations. The Commission Decision in Case COMP/F/38.899 – Gas Insulated Switchgear[4] (hereinafter "GIS") concerned gas-insulated switchgear which is heavy electrical equipment used as a major component for turnkey power substations and is the most expensive part accounting for ca. 30 to 60% of the total price of this substation. In addition to control systems, relays, batteries and chargers, another essential component for substations is a power transformer. The function of the gas-insulated switchgear in the substation is to protect the transformer from overload and/or to insulate the circuit and the faulted transformer. The GIS Decision covered both (i) GIS sold as a stand alone product and (ii) GIS based turnkey power substations, including GIS and other parts of the substations, such as transformers.

7. Given the character and the material scope of the anticompetitive practice described below, this Decision covers all power transformers (as defined in recital 4) sold by the respective parties to the infringement, whether sold as a stand-alone product or included in turnkey projects, but excludes power transformers sold as part of GIS based substations, the sales of which have already been subject to the GIS Decision.

2.2. The undertakings subject to these proceedings

2.2.1. ABB

8. ABB Ltd. is a publicly quoted Swiss company. The company was formed in January 1988 following the merger of ASEA AB and BBC Brown Boveri Ltd.

9. ABB Ltd's two main divisions are the Power Technologies division and the Automation Technologies division. The power transformer business is included in the Power Technologies division which is involved in producing transformers, medium-voltage products, high-voltage products, power systems and utility automation.

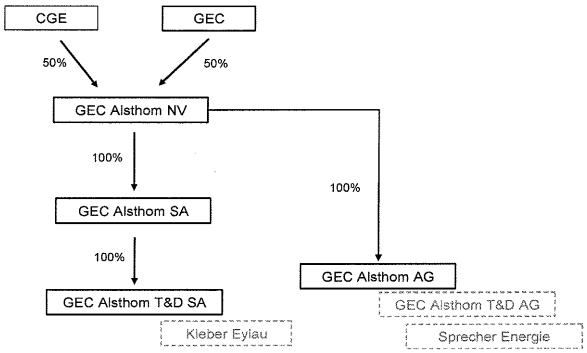
[4] Decision adopted on 24 January 2007.

10. ABB's world-wide sales of power transformers (as defined in recitals 4 and 7) amount to ca. EUR […] in business year 2001. ABB's EEA wide sales of power transformers amounted to ca. EUR […] in business year 2001. ABB's total world-wide turnover in business year 2008 was ca. EUR 23 737 million.

2.2.2. ALSTOM

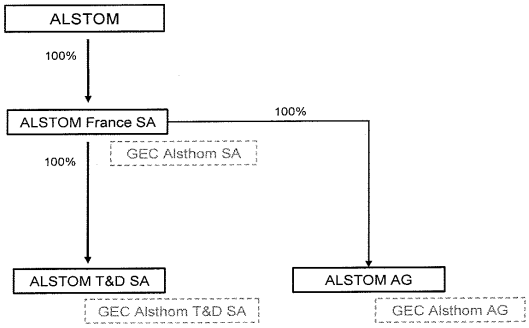
11. ALSTOM (Société Anonyme), which was originally named ALSTHOM was established in France in 1928 with its activities organised in divisions. The Transport and Distribution of Energy (T&D) division was the division carrying out amongst others the power transformer business. The two main companies of the ALSTOM group involved in the T&D activities were the French company ALSTOM T&D SA and the Swiss company ALSTOM AG (these two being the names of the companies before the sale to AREVA).

12. In 1989 Compagnie Générale Electrique (CGE) and General Electric Company plc (GEC) formed the group GEC ALSTHOM with the joint venture GEC ALSTHOM NV grouping the activities of both companies in the energy and transport business. The French activities of the GEC ALSTHOM group were carried out by GEC ALSTHOM SA which was a 100% subsidiary of GEC ALSTHOM NV. With effect on 1 April 1992 GEC ALSTHOM SA transferred its entire French units of the T&D business to its 100% subsidiary Klèber Eylau which was then renamed GEC ALSTHOM T&D SA in 1993. ALSTOM's Swiss T&D activities were carried out by Sprecher Energie AG which changed name to GEC ALSTHOM AG.

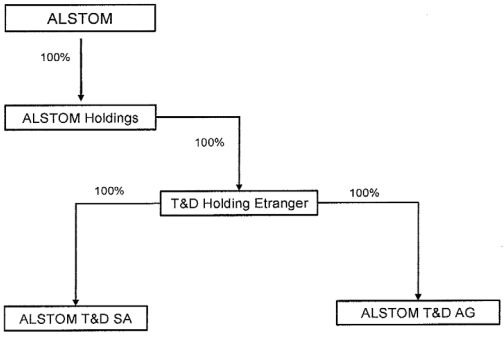


13. In June 1998 GEC ALSTHOM was floated on the stock exchange and was named ALSTOM. GEC ALSTHOM NV's assets were transferred to GEC ALSTHOM SA which was then renamed ALSTOM France SA. GEC ALSTHOM NV was put into

liquidation. The entire assets of ALSTOM France SA were transferred to the new company ALSTOM. The assets of GEC ALSTHOM AG were transferred to ALSTOM France SA which also held the total assets of GEC ALSTHOM T&D SA. GEC ALSTHOM T&D SA and GEC ALSTHOM AG both changed their names and were renamed ALSTOM T&D SA and ALSTOM AG.



14. In August 1999 ALSTOM FRANCE SA was renamed ALSTOM Holdings. Following a share purchase agreement between ALSTOM and AREVA, the activities of ALSTOM T&D (including power transformers) were sold to AREVA on 9 January 2004. For the purposes of that sale, the T&D Holding Etranger was created in August 2003. In December 2003 the entire assets of ALSTOM T&D SA and ALSTOM T&D AG (this company was a special vehicle in which ALSTOM's T&D activities in Switzerland were transferred on 22 December 2003) were transferred to T&D Holding Etranger.

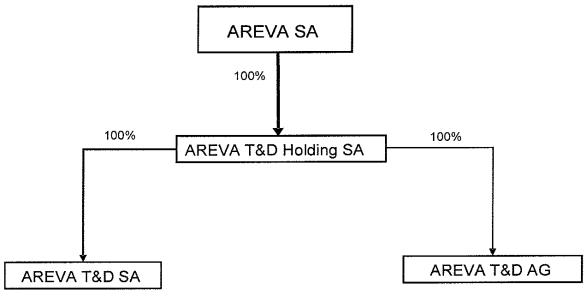


15. ALSTOM's world-wide sales of power transformers (as defined in recitals 4 and 7) amounted to EUR […] in business year 2001. ALSTOM's EEA wide sales of

power transformers amounted to EUR […] in business year 2001. ALSTOM's total world-wide turnover in business year 2008 was ca. EUR 16 908 million.

2.2.3. AREVA

16. The AREVA group is active in the energy sector and is organised in four divisions, three of which cover the nuclear power cycle and the Transmission and Distribution (T&D) division, which includes the power transformer business. AREVA only became active in the T&D business on 9 January 2004 after the purchase of ALSTOM's T&D activities. To date, the power transformer business is carried out by AREVA T&D SA (formerly ALSTOM T&D SA) and AREVA T&D AG (formerly ALSTOM T&D AG) which are both indirectly wholly owned subsidiaries of AREVA SA.



2.2.4. Siemens

17. Siemens AG is a publicly traded multinational company active in electrical engineering and electronics (information and communications, automation and control, energy, transportation, medical and lighting). The business field energy consists of Power Generation (PG) and Power Transmission and Distribution (PTD). PTD comprises five lines of business: High Voltage (PTD H), Medium Voltage (PTD M), Transformers (PTD T), Energy Automation (PTD EA) and Services (PTD SE). The power transformer activities are grouped in the line of business: Transformers (PTD T) at Siemens Power Transmission and Distribution (PTD). There is no separate legal entity in which the transformer business was or is concentrated.

18. In 2005 Siemens acquired the VA TECH group (for more detail see below).

19. Siemens' world-wide sales of power transformers (as defined in recitals 4 and 7) amounted to EUR […] in business year 2001. Siemens' EEA wide sales of power transformers amounted to ca. EUR […] in business year 2001. Siemens' total world-wide turnover in business year 2008 was ca. EUR 77 327 million.

2.2.5. VA Technologie (VA TECH) / Siemens Aktiengesellschaft Österreich

20. VA Technologie AG was founded in 1993 following a merger between Austria Energy, VAI, ELIN Energieanwendung, ELIN Energieversorgung, EBG and VOEST-ALPINE MCE.

21. Since 2000, the T&D business of the former VA TECH group, which included power transformers, had been carried out by VA TECH Transmission & Distribution GmbH & Co KEG (VAGK), which was a wholly owned subsidiary of VA Technologie AG.

22. With effect from 1 January 2001, the joint venture VA TECH Schneider High Voltage GmbH (VAS) was founded, pooling the T&D businesses (including power transformers) of VA TECH and Schneider, another undertaking also active in the power transformer business. VAGK held a 60% share and Schneider Electric Industries SA held a 40% share of VAS. In August 2004, VA TECH took over Schneider's share in VAS, which was subsequently renamed VA TECH T&D GmbH.

23. In 2005, the VA TECH group was acquired by Siemens AG[5] and on 22 July 2006, VA TECH T&D GmbH (formerly VAS) ceased to exist as a legal entity when it was absorbed by Siemens Aktiengesellschaft Österreich (SAG). VA Technologie AG was merged into SAG with effect from 27 May 2006 and ceased to exist as a legal entity. Finally VAGK was absorbed by SAG in July 2008 and also ceased to exist.

24. VA TECH's world-wide sales of power transformers (as defined in recitals 4 and 7) amounted to EUR […] in business year 2001. VA TECH's EEA wide sales of power transformers amounted to […] in business year 2001.

[5] Commission Decision of 13 July 2005 in Case COMP/M.3653 – Siemens/VA TECH.

2.2.6. Fuji

25. Fuji Electric Co., Ltd. (FE) is a Japanese company established in 1923. From its establishment until 30 September 2003, FE manufactured and sold electrical equipment. On 1 October 2003, FE became a pure holding company and changed its name to Fuji Electric Holdings Co. Ltd (FEH).

26. As regards Fuji's power transformer business, this was carried out by FE. On 1 October 2002, this business was transferred to Japan AE Power Systems Corporation (JAEPS), a joint venture in which FEH has a 30% stake, Hitachi Ltd has a 50% stake and Meidensha Corporation has a 20% stake. However, as is indicated in recital 78, contemporaneous evidence shows that Fuji would remain an independent member of the cartel until the meeting in Zurich on 15-16 May 2003.

27. Fuji's world-wide sales of power transformers (as defined in recitals 4 and 7) amounted to ca. EUR […] in business year 2001. Fuji's EEA wide sales of power transformers amounted to EUR […] in business year 2001. Fuji's total world-wide turnover in business year 2008 was ca. EUR 5 347 million.

2.2.7. Hitachi

28. Hitachi Ltd is the ultimate parent company of the Hitachi group and was created in 1910. From the date the infringement started until October 2002, the following 100% subsidiaries were active in the production and/or sale of power transformers: Hitachi America Ltd., Hitachi Asia Ltd. and Hitachi Australia Ltd. Hitachi Europe Ltd, another 100% subsidiary of Hitachi Ltd, was involved in the power transformer business being the contact point for receiving enquiries in relation to the Transmission & Distribution business.

29. In October 2002, Hitachi transferred its power transformer business to JAEPS, a joint venture in which it has a 50% stake, Fuji a 30% stake and Meidensha Corporation a 20% stake. However, as indicated in recital 78, contemporaneous evidence shows that Hitachi would remain an independent member of the cartel until the meeting in Zurich on 15-16 May 2003.

30. Hitachi's world-wide sales of power transformers (as defined in recitals 4 and 7) amounted to EUR […] in business year 2001. Hitachi's EEA wide sales of power transformers amounted to EUR […] in business year 2001. Hitachi's total world-wide turnover in business year 2008 was ca. EUR 69 470 million.

2.2.8. Toshiba

31. Toshiba Corporation is a Japanese corporate group and was founded in 1875. Toshiba is primarily active in three key domains: digital products, electronic devices and components and infrastructure systems.

32. Toshiba's activities in power transformers are carried out by the Transmission & Distribution Systems Division within Toshiba Corporation's internal Power Systems Company. From 1 October 2002 until 30 April 2005, Toshiba and Mitsubishi Electric (Melco) operated a joint venture called TM T&D into which both parent companies transferred their respective transformer business. For the period of the joint venture, TM T&D was responsible for the production and sale of transformers. However, as indicated in recitals 78, contemporaneous evidence shows that Toshiba would remain an independent member of the cartel until the meeting in Zurich on 15-16 May 2003.

33. Toshiba's world-wide sales of power transformers (as defined in recitals 4 and 7) amounted to EUR […] in business year 2001. Toshiba's EEA wide sales of power transformers amounted to EUR […] in business year 2001. Toshiba's total world-wide turnover in business year 2008 was ca. EUR 46 944 million.

2.3. The description of the sector

2.3.1. The supply

34. In 2001, the major global producers of power transformers were ABB, ALSTOM, Siemens, VA TECH, Fuji, Hitachi, Toshiba and Melco. There were a number of smaller producers active in the European power transformer sector including Pauwels (Belgium), SGB (Germany) and EFACEC (Portugal).

35. The major power transformer producers do not only sell power transformers in their own home markets but also all over the world. The European and Japanese suppliers sell power transformers, amongst other markets, in South East Asia, the Middle East, North Africa and Latin America. Moreover, European suppliers sell power transformers in most European countries.[6]

[6] Commission Decision of 13 July 2005 in Case No COMP/M.3653 – Siemens/ VA TECH.

2.3.2. The demand

36. Power transformers are sold as stand alone equipment or as part of turnkey power substations. Customers normally specify their needs and ask potential suppliers to make a bid. The main customers are public utility companies, regional governments, and also private companies active in the field of transmitting and distributing electricity.

37. The value of sales of power transformers in the EEA (as defined in recitals 4 and 7) by the parties to these proceedings amounted to ca. EUR […] in business year 2001 […] the EEA.

2.4. Interstate trade

38. 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 production plants for example in Austria, Germany, Portugal (Siemens/VA TECH), Switzerland, Spain (ABB) and Switzerland, France (AREVA).

3. PROCEDURE

3.1. The Commission's investigation

39. On 11/12 May 2004, the **Commission** carried out inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003 in case COMP/38.899 – Gas Insulated Switchgear (the GIS case). […], **Hitachi** in the framework of the GIS case applied for leniency pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (hereinafter "the 2002 Leniency Notice")[7] […].

40. **[Recitals (40) – (44) have been deleted, including any cross references to these Recitals and relevant footnotes].**

45. On 7/8 February 2007, the **Commission** carried out inspections in the present case pursuant to Article 20(4) of Regulation (EC) No 1/2003 […].

46. […]

[7] OJ C 45, 19.2.2002, p. 3.

47. […], **Siemens** supplemented its application […] under the 2002 Leniency Notice, […]. Subsequently, Siemens provided additional submissions.

48. […]

49. On 7 March 2007, the **Commission** carried out an inspection pursuant to Article 20(3) of Regulation (EC) No 1/2003 at the premises of […].

50. **[Recitals (50) – (53) have been deleted, including any cross references to these Recitals and relevant footnotes].**

54. […], **Hitachi** […] claimed that throughout the course of the GIS investigation, it did not know whether the scope of the Commission proceedings was limited to the activities that related to the sales of GIS products or whether those proceedings also concerned the activities relating to power transformers. […], Hitachi supplemented its submission.

55. […]

56. […], **Fuji** submitted an application under the 2002 Leniency Notice […].

57. […]

58. […]

59. On 6 December 2007, the **Commission** granted Siemens conditional immunity concerning the GA.

60. On 6 December 2007, the **Commission** rejected Hitachi's immunity application (see recitals 39 and 50).

61. […]

62. On 30 September 2008, the **Commission** initiated proceedings within the meaning of Article 11(6) of Regulation (EC) No 1/2003 and Article 2(1) of Regulation (EC) No 773/2004 vis-à-vis the addressees of this Decision. On 1 October 2008, the Commission informed the addressees of this Decision of the initiation of such proceedings and explored the possibility of settlement discussions without then proceeding with this type of procedure.

63. […]

64. […]

65. On 20 November 2008, the **Commission** adopted a Statement of Objections against ABB Ltd, AREVA T&D SA, ALSTOM (Société Anonyme), Siemens AG, Siemens Aktiengesellschaft Österreich, VA TECH Transmission & Distribution GmbH & Co KEG, Fuji Electrics Holdings Co. Ltd, Hitachi Ltd, Hitachi Europe Ltd and Toshiba Corporation.

66. All **parties** to these proceedings had access to the Commission's investigation file in the form of a copy on CD-ROM. With the CD-ROM, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the CD-ROM gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information. Additionally, all parties had access to parts of the file 'accessible at Commission premises'.

67. All **parties** replied to the Statement of Objections and requested an Oral Hearing which was held on 17 February 2009. […]

68. […]

69. […]

70. By letters dated 7 May 2009, the **Commission** addressed requests for information under Article 18 of Regulation (EC) No 1/2005 to all parties to these proceedings requesting information on turnover figures and further company details.

3.2. Arguments by the parties to these proceedings and assessment by the Commission

71. Hitachi claims that the Commission did not sufficiently define the scope of its investigation in the GIS Case and that this uncertainty adversely affected the rights of defence. Hitachi also claims violation of the principle of legitimate expectations, as it expected power transformers to be included in the GIS case. Thus, in its view, the Commission should be barred from opening a separate investigation into power transformers.

72. The scope of the Commission's investigation in the GIS Case became clear at the latest when Hitachi received the Statement of Objections in that case on 24 April 2006. Under Community law, a person may entertain legitimate expectations only if he has been given precise, unconditional and consistent assurances, from authorized, reliable sources, by the administration.[8] However, Hitachi could not rely on legitimate expectations as the Commission never expressly confirmed and did not give assurances that power transformers would be included in the GIS case. Hitachi's claims in that respect should therefore be rejected.

73. Hitachi further claims that it was discriminatory to disclose the scope of the investigations to the European producers on 20 August 2007 but not to all parties to these proceedings. The Commission informed the European addressees of this Decision on that date that it would deal only with the GA whereas the Japanese addressees did not receive this information until the Statement of Objections was notified to them in November 2008. […].

74. Toshiba and Hitachi claim that it was illegal and discriminatory for the Commission to disclose some documents […].However, it should be pointed out that under the 2002 Leniency Notice, immunity applicants are under an obligation to cooperate and to give a swift response to any request that may contribute to the establishment of the facts concerned. Hence, the Commission may meet immunity applicants to discuss their applications. Accordingly, the Commission may show single documents to applicants in order to obtain a better understanding of a case and to facilitate an investigation. This is exactly what has happened in this case and it should not be considered to be illegal and discriminatory.

4. DESCRIPTION OF THE EVENTS

75. […]

76. The GA was an oral agreement between the Japanese and the European manufacturers of power transformers that each group would refrain from entering

[8] See Judgment of the Court of First Instance in Case T-223/00, Kyowa Hakko Kogyo Co. Ltd and Kyowa Hakko Europe GmbH v Commission, ('the *Amino Acid case')* [2003] ECR II-2553, paragraph 38 and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon Co. Ltd and Others v Commission ('the *Graphite Electrodes case')*, [2004] ECR II-1181, paragraph 152.

the other group's market, namely that the Japanese members would not sell power transformers in Europe and the European members would not sell power transformers in Japan.

77. […]

78. Further changes in membership were planned in the last year of the infringement, […]. However, these changes are not deemed to have materialized as that meeting marked the end of the infringement.

79. The last meeting known to the Commission took place on 15-16 May 2003, when all addressees of this Decision met at the Arabella Sheraton Hotel in Zurich, Switzerland and marked the end of the infringement.

80. **[Recitals (80) – (87) have been deleted, including any cross references to these Recitals and relevant footnotes].**

88. According to the GA, the European group and the Japanese group agreed not to enter each other's markets. In other words, European producers agreed not to sell power transformers in Japan and Japanese producers agreed not to sell power transformers in Europe. […].

89. **[Recitals (89) – (105) have been deleted, including any cross references to these Recitals and relevant footnotes].**

106. The parties implemented the anti-competitive arrangements. […].

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

5.1. The relevant competition rules

107. Article 81(1) of the Treaty and Article 53 of the EEA Agreement are applicable in this Case.

5.2. The nature of the infringement

5.2.1. Agreements and concerted practices

5.2.1.1. Principles

108. Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anti-competitive *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.[9]

109. An 'agreement' may be considered 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 does not have to be in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The existence of an agreement may be express or implicit in the behaviour of the parties. In addition, 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. The concept of 'agreement' within the meaning of Article 81(1) of the Treaty applies to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

110. In its judgement in the PVC II case,[10] the Court of First Instance of the European Community stated that: *"It is well established in the case-law that for there to be an agreement within the meaning of Article [81(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way"*.

111. If, for instance, an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed. It is

[9] The case-law of the Court of Justice of the European Communities and the Court of First Instance of the European Communities in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals 4 and 15 as well as Article 6 of the EEA Agreement and Article 3(2) of the EEA Surveillance and Court Agreement. Accordingly, in this Decision reference is only made to Article 81 of the Treaty on the understanding that the same considerations apply to Article 53 of the EEA Agreement.

[10] 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 *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

also well-settled case-law that *"the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*".[11] Such distancing should take the form of an announcement by the company, for example, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

112. An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract under civil law. In addition, in the case of a complex cartel of long duration, the term "agreement" may 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. As the Court of Justice of the European Community has pointed out, it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[12]

113. Although Article 81(1) of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of "*concerted practices*" and "*agreements between undertakings"*, the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[13]

114. The criteria of co-ordination and co-operation laid down by the case-law, 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

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11 Case T-334/94 *Sarrió SA* v *Commission* [1998] ECR II-01439, paragraph 118; See, inter alia, also Case T-141/89 *Tréfileurope Sales* SARL *v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 SA *Hercules Chemicals* NV v *Commission* [1991] ECR II-1711, paragraph 232; and Case T-25/95 *Cimenteries CBR and others v Commission* [2000] ECR II-491, paragraph 1389.

12 See Case C-49/92P *Commission v Anic Partecipazioni SpA,* [1999] ECR I-4125, paragraph 81.

13 See Case 48/69, *Imperial Chemical Industries ltd v Commission* [1972] ECR 619, paragraph 64.

whereof 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 market.[14]

115. Thus, conduct may fall under Article 81(1) of the Treaty 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 behaviour.[15]In addition, 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.

116. Although in terms of Article 81(1) 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 of time. Such concerted practice falls under Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market.[16]

117. In addition, it is established case-law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81(1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that Article.[17]

118. In the case of a *complex infringement* of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of those forms of illegal behaviour. The concepts of agreement and concerted practice are fluid

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14 Joined Cases 40 to 48 50, 54 to 56, 111, 113 and 114-73. Coöperatieve Vereniging "*Suiker Unie" UA and others v Commission* [1975] ECR 1663.

15 See also Case T-7/89 *Hercules Chemicals NV v Commission* [1991] ECR II-1711, paragraph 256.

16 See also Case C-199/92 *P Hüls AG v Commission,* [1999] ECR I-4287, paragraphs 158 to166.

17 See, in this sense, Cases T-147/89 *Société Métallurgique de Normandie v Commission [1995]* ECR II-01057*;* T-148/89 *Trefilunion SA v Commission [1995]* ECR II-01063 and T-151/89 *Société des treillis et panneaux soudés v Commission [1995] ECR II-01191,* respectively, paragraph 72.

and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when 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 different 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 the present type.[18]

119. In its PVC II judgement,[19] 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 Treaty"*. This approach has been confirmed by the Court of Justice.[20]

120. According to the case-law, the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 81 of the Treaty. It is, however, not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. It is in fact normal that agreements and concerted practices prohibited by Article 81 of the Treaty assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, when taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.[21]

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18 See Case T-7/89 *Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraph 264.

19 See 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, *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 696.

20 For example Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraphs 132-133.

21 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v. Commission*, [2004] ECR I-123, paragraphs 53-57.

5.2.1.2. Application to this case

121. As demonstrated by the facts referred to in Section 4, the undertakings subject to these proceedings entered into multilateral contacts and concluded an oral GA that the Japanese undertakings would not sell power transformers in Europe and the European undertakings would not sell power transformers in Japan. […]. It constituted a typical home market protection rule, limiting the commercial freedom of the Japanese and European parties with respect to their conduct in each other's territories. […].

122. The behaviour of the undertakings concerned may be characterised as an infringement consisting of various actions which may be classified as an agreement and/or concerted practice, whereby competitors knowingly substituted practical co-operation between them for the risks of competition. In addition, the participating undertakings in such concertation may be considered to have used 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. The behaviour in this case should therefore be considered as presenting all the characteristics of an agreement and/or concerted practice within the meaning of Article 81 of the Treaty as well as Article 53 of the EEA Agreement.

5.2.1.3. Arguments by the parties

123. Toshiba, ABB, AREVA and ALSTOM generally claim that the evidence in the Commission's possession is not sufficient to establish the existence of the GA to the requisite standard of proof. In addition, Toshiba and ABB dispute their participation in such an infringement.

124. Several undertakings have questioned the probative value of the available evidence, particularly the corporate statements of the leniency applicants. They also point to instances of alleged inconsistencies in such statements stating that the Commission has based its case on self serving, contradictory and unreliable statements of leniency applicants with hardly any contemporaneous documents.

5.2.1.4. Assessment by the Commission

125. Taking into account the principles described above it should be pointed out that the overall participation of all addressees of this Decision in the cartel is established […].

126. The Commission has assessed the available evidence according to its respective probative value. Inconsistencies between different pieces of evidence were taken into account when the evidence was evaluated. […].

127. […]

128. The statements in the Commission's possession are not the only source of evidence of the GA infringement. […].

129. Despite claims by Toshiba and ABB that the documentary evidence relating to the GA is not convincing and claims by other parties that the meetings were mainly of a social nature, these arguments cannot be accepted.

130. Several parties claim that the documentary evidence is not sufficient to prove that the alleged meetings were in fact cartel meetings. […].

131. […]

132. […]

133. As regards the documentary evidence, the parties also claim that there a lack of contemporaneous evidence for the period between 1999 and 2002. While it is true that documentary evidence is only available for 2002 onwards, it should be noted that the case-law does not require the Commission to rely on documentary evidence to prove the infringement. The Court of First Instance has ruled that not only documents, but also information, may serve as evidence to establish the existence of an infringement and that such information does not have to be provided in documentary form.[22] In this case, the corporate statements and the documentary evidence in the Commission's file are mutually corroborating and thus constitute a "body of consistent inculpatory evidence" in the sense of the case-law.[23] The evidence referred to in Section 4 establishes to the required legal standard the existence of the anti-competitive practice.

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22 Judgment of the Court of First Instance in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others v Commission*, [2004] ECR-II-1181, paragraphs 430 f. (judgement 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).

23 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. and others v. Commission* [2004] ECR II-2501, paragraphs 201 to 204, 323, 330, 334 and 335.

5.2.2. Single and continuous infringement

5.2.2.1. Principles

134. A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The Court of First Instance pointed out, inter alia, in the *Cement* cartel case that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.[24] 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.

135. It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which would progressively manifest itself in both agreements and concerted practices.

136. Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. Some participants may be more active than others and internal conflicts and rivalries, or even cheating may occur, but such divergences will not, however, prevent the arrangement from constituting an agreement and/or concerted practice for the purposes of Article 81 of the Treaty where there is a single common and continuous objective.

137. 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

[24] Joined Cases T-25/95, *Cimenteries and others v Commission*, ECR [2000] II-491, paragraph 3699.

the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk.[25]

138. As the Court of Justice stated in its judgement in Case C-49/92P *Commission v Anic Partecipazioni*, 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, as reiterated by the Court in the *Cement* cases that an infringement of Article 81 of the Treaty may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation may not be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves, and taken in isolation be, an infringement of Article 81 of the Treaty. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission may impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[26]

5.2.2.2. Application to this case

139. The agreement and/or concerted practice described in Section 4 may be considered to form part of an overall scheme which laid down the lines of action of the participating parties in all the geographic areas, including the EEA, which were subject to the GA, and restricted their individual commercial conduct in order to pursue a single anti-competitive economic aim, namely the distortion of normal competitive conditions in the market for power transformers.

140. In pursue of that aim, the parties, who are major European and Japanese power transformer producers agreed on the geographical allocation of their respective home markets, Europe and Japan, reserving Europe for the European producers and Japan for the Japanese producers by means of the GA. All parties were directly involved in the anti-competitive agreement and/or concerted practice.

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25 See Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 83.

26 See Joined cases C-204/00 and others, *Aalborg Portland et al. v Commission*, [2004] ECR I-123, paragraph 258. See also Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraphs 78-81, 83-85 and 203.

141. It should be concluded that this single infringement constituted a continuous infringement from 9 June 1999 until 15 May 2003 (see recital 79). During that period (i) the object of the cartel remained the same […]. and it manifested itself in the form of a geographical market allocation throughout the whole duration of the infringement, (ii) contacts between the cartel members continued without interruption, (iii) the parties continued the organisational structure of the cartel and (iv) the undertakings involved in the cartel were the same, […].

142. **[Recitals (142) – (162) have been deleted, including any cross references to these Recitals and relevant footnotes].**

5.3. Restriction of competition

5.3.1. Principles and application to this case

163. All undertakings subject to these proceedings agreed upon the allocation of markets agreeing upon such parameters restricts, prevents or distorts competition by its very nature as the quintessential aspects of competitive behaviour are eliminated. By engaging in such conduct, the undertakings aimed at eliminating or at least reducing the risk involved in competing freely on the market place. Therefore, the object of their behaviour was the restriction of competition.

164. 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 and/or concerted practice 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 proved.[27]

5.3.2. Arguments by the parties and assessment by the Commission

165. Hitachi, Toshiba, ABB, ALSTOM and AREVA claim that the GA was not implemented, as in their view an entry into each other's respective markets did not make sense due to high market-entry barriers. They argue that the parties were neither actual nor potential competitors on each other's markets and hence the GA had no impact at all on competition.

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

166. That argument cannot be accepted as Article 81 of the Treaty prohibits agreements between undertakings which have an anti-competitive object, regardless of their effect. The GA was a market allocation scheme which had as its object the prevention, restriction or distortion of competition. It is clear from the evidence set out in this Decision that the object of the arrangements described above was to restrict competition and this in itself is sufficient to support the conclusion that Article 81 of the Treaty and Article 53 of the EEA Agreement apply.

167. Nevertheless, in the present case it should also be taken into account that the above agreement and/or concerted practice was implemented by the parties and in effect throughout the whole duration of the infringement: […].

168. In addition, there is evidence in the Commission's file that contrary to the parties' statements the alleged market entry barriers are not insurmountable. […]. In addition, throughout the entire period of the infringement, Japanese producers (such as Fuji, Toshiba) had considerable sales in the United States of America. The parties have not submitted any evidence that suggests that the barriers to the US market differ significantly from the barriers to the EEA market. The GA has contributed to the absence of competition between European and Japanese producers of power transformers in the EEA.

169. Therefore, it should be concluded that the parties' arguments are unfounded and that the evidence available is sufficient to confirm that the cartel arrangements had the restriction of competition as their object, as well as the fact that the agreement and/or concerted practice was implemented in practice.

5.4. Non-applicability of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement

170. 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. According to Article 2 of Regulation (EC) No 1/2003 the burden of proving that the conditions of Article 81(3) of the Treaty are met is on the undertakings seeking to benefit from that provision. None of the participants in the infringement in this case have claimed that the conditions of Article 81(3) are met or provided evidence to that effect. Accordingly, it may be concluded that the conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement are not fulfilled.

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

171. The Court of Justice and Court of First Instance have consistently held that: *"In order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States"*.[28] In any event, whilst Article 81 of the Treaty *"does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect"*.[29]

172. The arrangements which are subject of this Decision should be regarded as having had an appreciable effect on trade between Member States and the contracting parties of the EEA Agreement. As shown in Section 2.4 of this Decision, the power transformers business is characterised by substantial trade between Member States, as well as between the Community and the EFTA countries of the EEA.

173. The application of Article 81 of the Treaty and Article 53 of the 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 States.[30]

174. In this case the existence of market allocation, virtually insulating the EEA from Japanese power transformers producers, must have resulted or was likely to result in the automatic diversion of trade patterns from the course they would otherwise have followed.[31]

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[28] See Case 56/65 *Société Technique Minière (L.T.M.) v Maschinenbau Ulm GmbH (M.B.U.).* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries* CBR v Commission [2002] ECR II-491.

[29] Joined Cases C-215/96 and C-216/96 *Bagnasco and others [*1999] ECR I-135, paragraph 48; see also Case T-374/94, *European Night Services (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v Commission,* [1998] ECR II-3141, paragraph 136.

[30] See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

[31] See Joined Cases 209 to 215 and 218/*78 Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

6. ADDRESSEES OF THESE PROCEEDINGS

6.1. General principles

175. 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 concept of corporate legal personality in national commercial, company or tax 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.

176. In principle, subsidiaries bear sole liability if they were able to determine autonomously their behaviour on the market at the time when they committed the infringement.[32] However, it is established case-law that the mere fact that the subsidiary has a separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company,[33] 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*".[34] Hence, if a subsidiary does not determine its own conduct on the market independently, its parent company 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.

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

33 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)* [1999], ECR II-0931.

34 Judgment of the Court of Justice in case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR 2999, paragraph 11, and Court of First Instance in Case T-102/92 *Viho Europe BV v Commission* [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Manufacture française des pneumatiques Michelin* v *Commission* [2003] ECR II-4071 *at paragraph 290.*

177. Parent companies exercising a decisive influence on a subsidiary's commercial conduct may 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 subsidiary.[35] According to established case-law,[36] when a parent company owns, directly or 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 may be presumed that the subsidiary follows the policy laid down by the parent company 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*".[37] In those circumstances, it is

[35] 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-5425, 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-314/01, *Coöperatieve Verkoop- en Productievereninging van Aardappelmeel en Derivaten Avebe BA v. Commission*, [2006] ECR II-3085.

[36] Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraphs 50 and 51; Case C-310/93P, *BPB Industries & British Gypsum v. Commission* [1995] ECR I-865, paragraph 11; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, paragraph. 80; Case T-43/02, *Jungbunzlauer AG*, [2006] ECR II-3435, paragraph 125; Case T-330/01, *Akzo Nobel NV v Commission*, [2006] ECR II-3389 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, paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 paragraph 290; Joined cases T-71/03, 74/03, 87/03 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, [2005] ECR II-10 at paragraphs 59-60; and Case T-325/01, *DaimlerChrysler AG v Commission*, judgment of 15 September 2005 [2005] ECR II-3319, paragraphs 217-221.

[37] See the judgment of the Court of First Instance of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 60; in the same sense see the Court of First Instance in case T-354/94, *Stora Kopparbergs Bergslags AG* v *Commission* [1998] ECR II-2111, paragraph 80, upheld by the European Court of Justice in case C-286/98P, *Stora Kopparbergs Bergslags AG* 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*, [2006] ECR II-3085 the Court of First Instance stated at paragraph 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*". See also the very recent judgment of the Court of Justice in Case C-97/08 P *Akzo and Others v. Commission* delivered on 10 September 2009 - after the adoption of the Statement of Objections in this Case- paragraphs 60-61, not yet reported, which reiterates this position by stating that *" where a parent company has a 100% shareholding in a subsidiary which has infringed the Community*

for the parent company to reverse that presumption by adducing sufficient evidence[38]. 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 anti-competitive practices in which it participated. Any responsibility on the part of the parent company, by reason of the influence and control it exercises over its subsidiary, is additional.

178. Accordingly, 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 in that respect.

179. Legal entities within an undertaking which 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 subsidiaries[39] (that is to say they retain their legal personality). In such a case, the acquirer may only be liable for the conduct of the subsidiary from the moment of its acquisition, if the subsidiary persists in the infringement and

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competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary.…"

38 See case T-314/01 *Avebe v Commission*, [2006] ECR II-3085, paragraph 136: "*In that situation, it is for the parent company to reverse that presumption by adducing evidence to establish that its subsidiary was independent*".

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

liability of the new parent company can be established.[40] 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 assets.[41]

180. 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 committed.[42] 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.[43] 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 absorbed.[44] 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 liability.[45]

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

41 See Commission Decision 94/599/EC of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865, *PVC*), 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"*.

42 Case C-49/92 *Commission v. Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 145.

43 Case T-95/89 *Enichem Anic SpA v. Commission* (Polypropylene), ECR II-1623, paragraphs 237-238.

44 See the judgment of 16 November 2000 in case C-279/98P *Cascades SA* 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"*.

45 See the judgment of the Court of First Instance of 20 April 1999, joined Cases T-305/94, 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**,.**

181. 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 latter company being held liable by the Commission for the infringement committed by the former.[46]

6.2. Application to this case

6.2.1. ABB Ltd

182. It is established by the facts referred to in Section 4, that ABB Ltd. was involved in the infringement that is the subject of in this Decision from 9 June 1999 until 15 May 2003 and should be held liable for the infringement during this period.

6.2.2. ALSTOM (Société Anonyme)

183. ALSTOM (Société Anonyme) was the 100% owner of ALSTOM T&D SA (now AREVA T&D SA) which participated in the collusive behaviour described in this Decision.

184. In the Statement of Objections, the Commission announced its intention to hold ALSTOM (Société Anonyme) and AREVA T&D SA (formerly ALSTOM T&D SA) jointly and severally liable for ALSTOM's involvement in the infringement.

6.2.2.1. Arguments by ALSTOM

185. In its reply to the Statement of Objections, ALSTOM argues that it cannot be attributed liability because the ALSTOM group was based on a network of subsidiaries, each being globally responsible for activity in their respective sector. Thus, the practical organisation of the T&D sector prevented ALSTOM's parent company from being informed or being able to take part in the business activities of the T&D division/sector or of its own subsidiaries in that sector.

186. ALSTOM denies having been directly active in the power transformer business or involved in the power transformer cartel because the T&D sector (to which ALSTOM T&D SA belonged) has always behaved as an autonomous undertaking

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Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II), ECR [1999] p II-00931, at paragraph 953.

[46] 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 and others v Commission*, [2004], paragraphs 356 to 359, p. I-123 and case T-43/02, *Jungbunzlauer AG v Commission,* [2006] ECR II-3435, paragraph 132.

on the market. It also claims that the T&D sector (as with all other sectors within ALSTOM) would implement the global strategy and objectives decided by ALSTOM's executive committee in their decentralised, autonomous commercial activities. 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. It claims that the managers of the ALSTOM parent company would only need to approve envisaged bids for contracts and tenders exceeding a certain threshold or involving certain substantial risks for the ALSTOM group. 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.

187. ALSTOM argues that only employees of ALSTOM T&D SA attended the cartel meetings and were thus involved in the cartel. In addition, it argues that the fact that some individuals held simultaneous or consecutive senior positions in the parent company of ALSTOM's T&D SA and in ALSTOM T&D SA itself does not show that they could have influenced the subsidiaries' behaviour on the market.

188. ALSTOM finally claims that, by holding ALSTOM (Société Anonyme) jointly and severally liable with AREVA`s current subsidiary, the Commission violates the case-law on joint liability and general principles of Community law, such as the principles of legal certainty, individual liability, motivation of decisions by the Commission, as well as the presumption of innocence. ALSTOM argues that the fact of holding it and its former subsidiary jointly and severally liable would presuppose uniform action by the legal entities held liable and the existence of a single economic entity at the point of time when the Commission's decision is adopted.

6.2.2.2. Assessment by the Commission

189. The Commission relied in the Statement of Objections on established case-law 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) participated in the infringement by exercising a direct influence on its former subsidiary. ALSTOM has not

provided arguments to reverse that presumption by demonstrating that the subsidiary acted independently.

190. In its response to the Statement of Objections and relying on case-law,[47] ALSTOM argues that 100% ownership does not, of itself, create a presumption and that additional elements are required to create such a presumption. In the Commission's view, as already stated in recital 177, the attribution of liability to the parent company may be sufficiently based on a rebuttable presumption that a parent company with all or almost all the shares exercises a decisive influence over the subsidiary company.[48] However, additional criteria may be used to corroborate the presumption. Very recent case-law has explicitly confirmed that *"in the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary…, and that they therefore constitute a single undertaking within the meaning of Article 81 EC"* and that *"it is sufficient for the Commission to show that the entire capital of a subsidiary is held by the parent company in order to conclude that the parent company exercises decisive influence over its commercial policy"*.[49] It is thus clear that no additional proof is needed. Consequently, a 100% parent company such as ALSTOM at the time of the infringement is liable unless the presumption is rebutted by the parent company by proving that the subsidiary acted autonomously. As shown, the arguments put forward by ALSTOM to demonstrate an alleged autonomy of its subsidiary are not sufficient in this regard.

191. With regard to the argument that the management of the parent company could not have been aware of the subsidiary's infringement, the Court of First Instance ruled that the *"attribution of an infringement by a subsidiary to the parent company does not require proof that the parent company influences its subsidiary's policy in the*

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47 In particular Case T-325/01 *DaimlerChrysler v Commission* [2005] ECR II-3319, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and others v Commission* [2007] ECR II-947; judgements of 8 July 2008 in Case T-54/03 *Lafarge v Commission*, and Case T-52/03 *Knauf Gips v Commission*, not yet reported.

48 See judgement of 18 December 2008 in Case T-85/06 *General Quimica v Commission*, not yet reported, paragraphs 59-62, 65, judgement of 8 October 2008 in Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH* v C*ommission*, not yet reported, paragraphs 56-57 and Case T-112/05 *Akzo Nobel and others v Commission* [2007] ECR II-5049, paragraphs 60-62, 65.

49 See judgement of 18 December 2008 in Case T-85/06 *General Quimica, SA, Repsol Química, SA and Repsol YPF, SA v Commission*, not yet reported, paragraphs 59 and 62 as well as judgement of 8 October 2008 in Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v Commission*, not yet reported, paragraphs 56-57.

specific area in which the infringement occurred, in the present case distribution and pricing. On the other hand, the economic and legal organisational links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore that they can be viewed as a single economic entity."[50]

192. In addition, ALSTOM alleges in its reply to the Statement of Objections that the Commission's position, namely holding the parent company and the subsidiary liable, would constitute a fundamental contradiction. In this respect, however, ALSTOM misinterprets the settled case-law of the Court of Justice and the Court of First Instance. It should be pointed out that the Commission is able to address the decision imposing fines to the parent company of a group of companies *"not because of a relationship between the parent company and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking"* at the time of the infringement.[51] In other words, the parent company is held individually liable for an infringement *"which it is deemed to have committed itself"* on account of its legal and economic links with its subsidiary.[52] Thus, the decisive point on joint liability of the parent company and its subsidiary is the fact that they constitute a single undertaking within the meaning of Article 81 Treaty at the time of the infringement. This being the case, *"the Commission will then be able to hold the parent company jointly and severally liable for the payment of the fine imposed on the subsidiary"* even if the parent company has not participated directly in the agreement and/or concerted practice.[53]

193. It should be noted that the fact of holding ALSTOM jointly and severally liable together with AREVA T&D SA does not infringe general principles of Community law or violate the case-law of the Court of Justice and the Court of First Instance.

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50 Case T-112/05 *Akzo Nobel and others v Commission* [2007] ECR II-5049, paragraph 83.

51 See Case T-112/05 *Akzo Nobel and others v Commission* [2007] ECR II-5049, paragraph 58; see also Case C-279/98 P *Cascades SA v Commission* [2000] ECR I-9693, paragraph 78: "It falls, in principle, to the legal or natural 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."

52 See judgement of 8 October 2008 in Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v Commission*, not yet reported, paragraph 74; Case C-294/98 P *Metsä-Serla and Others v Commission* [2000] ECR I-10065, paragraph 34.

53 See judgement of 18 December 2008 in Case T-85/06 *General Quimica v Commission*, not yet reported, paragraphs 62 and Case T-112/05 *Akzo Nobel and others v Commission* [2007] ECR II-5049, paragraph 62.

As regards the alleged violation of general principles of Community law, and the principle of individual liability in particular, it should be noted that ALSTOM was held individually liable for an infringement which it is deemed to have committed itself, due to its legal and economic links with ALSTOM T&D SA (now AREVA T&D SA) and by which it was able to determine its former subsidiary's conduct on the market.[54]

194. In addition, the case-law does not support ALSTOM's allegation that the fact of holding a parent company jointly and severally liable together with its (former) subsidiary presupposes the existence of a single economic unit at the time when the Commission's decision is adopted. On the contrary, according to settled case-law, the Commission is able to hold a parent company and its subsidiary jointly and severally liable for an infringement on the ground that they form an undertaking for the purposes of Article 81 of the Treaty at the time of the infringement.[55] Accordingly, each of the companies may be held jointly and severally responsible for the infringement found to have been committed by a group of companies which itself constitutes the undertaking that committed the infringement for the purposes of Article 81 of the Treaty.[56] In its judgement in the case *Tokai Carbon* the Court of First Instance stated that two companies that form a single undertaking which committed the infringement and *"carried on their business activities until the adoption of the [Commission's] Decision"* can be jointly and severally penalised for their unlawful behaviour.[57] That is what the Commission has done in the present case. ALSTOM and ALSTOM T&D SA (now AREVA T&D SA) formed the single undertaking which committed the infringement and these two companies carried on their business activities until the adoption of the Decision by the Commission. The acquisition of ALSTOM T&D SA by AREVA does not alter this

54 See in this respect judgement of 8 October 2008 in Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik v Commission*, not yet reported, paragraph 74; Case C-294/98 P *Metsä-Serla and Others v Commission* [2000] ECR I-10065, paragraph 34.

55 Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, paragraph 41; Case C-294/98 P *Metsä-Serla and Others v Commission* [2000] ECR I-10065, paragraph 34; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraphs 54, 524, 525; Case T-112/05 *Akzo Nobel and others v Commission* [2007] ECR II-5049, paragraph 62, 90; judgement of 18 December 2008 in Case T-85/06 *General Quimica v Commission*, not yet reported, paragraph 62.

56 See Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 527.

57 Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 387.

finding for ALSTOM T&D SA which continued its activities after being renamed as AREVA T&D SA, as a subsidiary of AREVA.[58]

195. As established by the facts referred to in Section 4 and in light of the above, it is shown that ALSTOM (Société Anonyme) was involved in the infringement that is the subject of this Decision from 9 June 1999 until 15 May 2003 and should be held jointly and severally liable with AREVA T&D SA (formerly ALSTOM T&D) for the infringement during that period.

6.2.3. AREVA

196. In January 2004, after the infringement had ended, AREVA T&D Holding SA (100% owned by AREVA SA) acquired the T&D activities of ALSTOM. AREVA T&D SA (formerly ALSTOM T&D SA) constitutes (since January 2004) a single economic unit, under the control of AREVA T&D Holding SA, which owns a 100% share in the subsidiary and concentrates the T&D activities of the group.

197. As regards the period preceding the acquisition of ALSTOM's power transformers activities by AREVA, the Statement of Objections notified AREVA of the Commission's intention to hold AREVA T&D SA jointly and severally liable with ALSTOM (Société Anonyme) for their involvement in the infringement between 9 June 1999 and 15 May 2003.

6.2.3.1. Arguments by AREVA

198. In its reply to the Statement of Objections, AREVA claims that only ALSTOM should be held liable for the infringement committed before the purchase of the T&D activities from ALSTOM in January 2004, since ALSTOM directly controlled the T&D activities throughout the whole period of the infringement and prior to the acquisition of ALSTOM T&D SA (now AREVA T&D SA) by AREVA.

199. AREVA, like ALSTOM, (see recital 188) claims that in order to impose joint and several liability on two companies they must have formed part of the same economic unit at the time of the decision. AREVA also claims that, by holding

[58] See Case C-279/98 P *Cascades SA v Commission* [2000] ECR I-9693, paragraph 78 as well as paragraph 79: *"[…] 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."*

AREVA's current subsidiary jointly and severally liable with ALSTOM, the Commission: (a) disregards the case-law on succession between undertakings; (b) breaches the principle of individual liability, as well as the principles of proportionality and equal treatment; and (c) implicitly delegates its discretional power to sanction in favour of a judge or an arbitrator, which would be contrary to the Treaty.

6.2.3.2. Assessment by the Commission

200. As shown in recital 194, in order for joint and several liability to be established, the case-law does not require that the parent company and subsidiary form a single economic unit at the time when the Commission's decision is adopted. AREVA T&D SA formed a single economic entity together with its former parent company ALSTOM at the time of the infringement and carries on its business activities under the name AREVA T&D SA and can therefore be penalised for its unlawful behaviour.[59]

201. It should be noted that the subsidiary acquired by AREVA was the result of the successive absorption of assets and the renaming of a legal entity. 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.

202. As to the alleged breach of the principle of individual liability, it should be recalled that the fact that it has been shown that a parent company is responsible for the conduct of its subsidiary does not in any way, according to settled case-law, exonerate the subsidiary of its own responsibility. The subsidiary continues to be individually accountable for the anti-competitive practices in which it participated.[60]

203. Most of the arguments and information put forward by AREVA regarding the period before its purchase of the T&D activities from ALSTOM in January 2004 were relevant to establish that AREVA T&D SA used to form an economic unity

[59] Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 387.

[60] See for example judgement of 18 December 2008 in Case T-85/06 *General Quimica v Commission*, not yet reported, paragraphs 62 and Case T-112/05 *Akzo Nobel and others v Commission* [2007] ECR II-5049, paragraph 62.

with ALSTOM, so that it was 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. Yet, this finding as such does not exempt AREVA T&D SA from also being held jointly and severally liable for its direct involvement during the relevant period, since it still existed as a separate legal entity.[61]

204. The principles of proportionality and equal treatment should be respected when calculating the fine.

205. As established by the facts referred to in Section 4 and in light of the above it is shown that AREVA T&D SA (formerly ALSTOM T&D SA) was involved in the infringement which is the subject of this Decision from 9 June 1999 until 15 May 2003 and should be held jointly and severally liable with ALSTOM (Société Anonyme) for the infringement during that period.

6.2.4. Siemens AG

206. It is established by the facts referred to in Section 4 that Siemens AG was involved in the infringement which is the subject of this Decision from 9 June 1999 until 15 May 2003 and should be held liable for the infringement during that period.

6.2.5. VA TECH / Siemens Aktiengesellschaft Österreich

207. The former VA TECH group was acquired by Siemens AG after the end of the infringement and thus the liability of the VA TECH group entities which participated in the infringement is dealt with separately from the liability of Siemens AG.

208. It is established by the facts referred to in Section 4 that VA TECH Transmission & Distribution GmbH & Co KEG (VAGK) was involved in the infringement which is the subject of this Decision from 29 May 2001 until 15 May 2003. During that time, VAGK was a wholly owned subsidiary of VA Technologie AG. VA Technologie AG was merged into Siemens Aktiengesellschaft Österreich (SAG) with effect from 27 May 2006 and ceased to exist as a legal entity. Finally VAGK was absorbed by SAG in July 2008 and also ceased to exist.

[61] Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd. and Others v. Commission*, [2004] ECR-II-1181, paragraphs 279 and 285 (judgment of 29 April 2004 confirmed by the Court of Justice in Case C-308/04P, *SGL Carbon AG v Commission* on 29 June 2006).

209. Consequently, SAG should be held liable for VA TECH's involvement in the infringement from 29 May 2001 until 15 May 2003. For that period, SAG should be held jointly and severally liable with its parent company and 100% share holder Siemens AG.

6.2.6. Fuji Electrics Holdings Co., Ltd

210. It is established by the facts referred to in Section 4 that Fuji Electric Holdings Co., Ltd (formerly Fuji Electric Co., Ltd) was involved in the infringement which is the subject of this Decision from 9 June 1999 until 15 May 2003 and should be held liable for the infringement during that period.

6.2.7. Hitachi Europe Ltd / Hitachi Ltd

211. It is established by the facts referred to in Section 4 that Hitachi Ltd and its 100% subsidiary Hitachi Europe Ltd were involved in the infringement which is the subject of this Decision from 9 June 1999 until 15 May 2003 and should be held jointly and severally liable for the infringement during that period.

212. Hitachi argues that Hitachi Europe Ltd should not be an addressee of this Decision […].

213. That argument cannot be accepted. The involvement of a legal entity in infringing behaviour is established by proving that personnel from the legal entity have taken part in illegal meetings and other contacts. The assessment whether a legal entity is involved in illegal behaviour cannot depend exclusively on purely internal contractual relations between the legal entity and the natural person representing it in meetings.

214. […]

6.2.8. Toshiba Corporation

215. It is established by the facts referred to in Section 4 that Toshiba Corporation was involved in the infringement which is the subject of in this Decision from 9 June 1999 until 15 May 2003 and should be held liable for the infringement during that period.

7. DURATION OF THE INFRINGEMENT

7.1. Start date for each undertaking

216. […], the Commission will […] its assessment under Article 81 of the Treaty and Article 53 of the EEA Agreement and the application of any fines to the period beginning on 9 June 1999. On that date, the first of a series of cartel meetings took place in Malaga in which employees of all addressees of this Decision participated.

217. Consequently, the date of 9 June 1999 is held by the Commission as the relevant starting date as regards ABB, ALSTOM, AREVA, Siemens, Fuji, Hitachi and Toshiba.

218. VA TECH became a member of the cartel on 29 May 2001. On that date, VA TECH attended its first meeting in Lisbon (see recital 22). Consequently, the date of 29 May 2001 is held by the Commission as the relevant starting date as regards Siemens Aktiengesellschaft Österreich as the legal entity that absorbed VA TECH Transmission & Distribution GmbH & Co KEG in July 2008.

7.2. End date for each undertaking

219. The last cartel meeting that the Commission is aware of took place on 15-16 May 2003 in Zurich.

220. […]

221. It should therefore be concluded that the end date of the infringement for all addressees of this Decision is set at 15 May 2003.

8. REMEDIES

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

222. Where the Commission finds that there is an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

223. Given the secrecy in which the cartel arrangements were carried out, it is not possible to determine with absolute certainty that the infringement has ceased. It is

therefore necessary 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 and/or concerted practice which might have the same or a similar object or effect.

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

224. Under Article 23(2) of Regulation (EC) No 1/2003,[62] the Commission may by decision impose fines upon undertakings where, either intentionally or negligently, they have infringed Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Regulation No 17, which was applicable during the infringement period, the fine for each undertaking participating in the infringement could not 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.

225. Pursuant to Article 23(3) of Regulation (EC) No 1/2003 and Regulation No 17 the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and, in particular, 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 a deterrence. In addition, the role played by each undertaking that is a 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.

226. In setting the amount of the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[63] (hereafter, "*the 2006 Guidelines on Fines*"). Finally, the Commission will apply, as appropriate, the provisions of the 2002 Leniency Notice.

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62 Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*". ((OJ L 305, 30.11.1994, p. 6).

63 OJ C 210, 1.9.2006, p. 2.

8.3. The basic amount of the fines

8.3.1. Calculation of the value of sales

227. The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to 'the value of sales',[64] that is to say, the value of the undertaking's sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area within the EEA. The Commission will normally use the sales made by the undertaking during the last full business year of its participation in the infringement. However, the Commission intends to use in this Decision, as already indicated in its Statement of Objections, the sales figures of the year 2001 due to the fact that on 1 October 2002 the Japanese producers Hitachi, Fuji and Toshiba transferred their respective power transformer businesses into the then created joint ventures JAEPS and TM T&D.

228. Fuji and Toshiba claimed that the reference year for the calculation of fines should be the year 2002 as the last full business year of the infringement. The Commission notes that point 13 of the 2006 Guidelines on Fines allows for deviations from the general principle that the sales of the last full business year of the infringement be taken for determining the basic amount of the fine. In this case, the creation of the joint ventures distorts the sales figures of the Japanese parties for the year 2002. Only the year 2001 was for the three Japanese producers the last complete year of sales of power transformers prior to the transfer of their respective business into the then created above mentioned joint ventures. Thus, that claim must be considered to be unfounded.

8.3.2. Relevant sales

229. In the Statement of Objections, the Commission indicated that it would use the undertakings' world-wide sales of power transformers rather than their sales in the territories covered by the infringement namely the EEA and Japan. The reason being that the undertakings' sales in the EEA and Japan do not adequately reflect the weight of each undertaking in the infringement.

8.3.2.1. Arguments by the parties

230. The Japanese addressees of this Decision claim that the Commission should not use the worldwide sales figures for power transformers for the calculation of the basic

[64] Point 12 of the 2006 Guidelines on Fines.

amount of the fines as this would lead to disproportionate higher fines for the Japanese producers. Fuji claims that the Commission should use the sales figures in the territories covered by the infringement namely the EEA and Japan. Hitachi argues that the calculation should be made on a world-wide basis but excluding the sales of power transformers in Japan.

8.3.2.2. Assessment by the Commission

231. The Commission intends to apply point 18 of the 2006 Guidelines on Fines and to apply the parties' worldwide market share to the size of the EEA market for power transformers. Point 18 clearly provides that where the geographic scope of an infringement extends beyond the EEA, the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement.

232. In this case, due to the fact that the GA was a market sharing agreement, the Japanese parties had no sales in the EEA. Thus, if only the sales in the EEA were taken into account for determining the basic amount of the fine, the Japanese parties' fine would be zero and they would be rewarded for having complied with the cartel arrangement not to compete on this market[65].

233. The territory covered by the infringement is wider than the EEA and all cartel members are major producers of power transformers active on a world-wide basis. For this reason, it must be concluded in accordance with the first paragraph of point 18 of the 2006 Guidelines on Fines that their sales in the territories protected by the GA (European producers' sales in Europe and Japanese producers' sale in Japan) do not adequately reflect their respective weight in the infringement.

234. To reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission, for the purpose of setting the basic amount of fine, may assess the total value of sales of goods to which the infringement relates in the geographic area, it may determine the share of the sales of each undertaking party to the infringement on that market and it may apply this share to the aggregate sales within the EEA of the undertakings concerned (see the second paragraph of point 18 of the 2006 Guidelines on Fines).

[65] Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, Tokai Carbon Co. Ltd and Others v Commission (*Graphite Electrodes),* [2004] ECR II-1181, paragraph 198.

235. If, as proposed by Fuji, only sales of power transformers in the EEA and Japan were to be taken into account, the fine for Fuji would be […]. Hitachi, on the contrary, argues for the use of worldwide sales minus sales in Japan as the basis for the calculation of the fine for the year 2001. It should be noted that this approach is motivated by the fact that Hitachi sold more than two thirds of its power transformers in Japan. If Hitachi's argument were accepted, it would have a considerable impact on the amount of fine to be imposed on it and it would fail to take proper account of the fact that Hitachi's sales in Japan were protected by the infringement. In general, the arguments and alternative calculation proposals put forward by the Japanese addressees of this Decision are intended to adapt the relevant sales area to their individual advantage and thus to minimise their sales and as a consequence also their individual fines.

236. To achieve a balanced approach and to ensure deterrence the Commission in accordance with the case-law intends to take account of the effective economic capacity of each party to the infringement and of the real impact on competition of each undertaking's unlawful conduct. By adhering to the GA, the parties deliberately gave up one of the most important parameters of competition, namely the acquisition of market shares. As the parties are major worldwide active producers of power transformers, their agreement not to sell in each others' home markets meant that their overall, that is worldwide, competitive potential, and not only the sales in Japan and the EEA or both combined, was therefore not applied for the benefit of the EEA market[66]. The Commission also relies on point 37 of the 2006 Guidelines on Fines which allows it to depart from the general methodology given the particularities of a case or the need to achieve deterrence. The purely self serving arguments put forward by the parties show that any other method of calculating the basic amount of fine would lead to an arbitrary and unbalanced result and does not provide for deterrence. The Commission will therefore use the parties' worldwide market shares to adequately reflect the relative weight of each undertaking in the infringement and to provide an appropriate evaluation of their capacity to affect free competition.

[66] Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others v Commission*, [2005] ECR II-10, paragraphs 185-188.

8.3.2.3. Application to this case

237. The worldwide market shares of the parties in 2001 were as follows[67]:

ABB	[…]
Siemens	[…]
ALSTOM/AREVA	[…]
Fuji	[…]
Hitachi	[…]
Toshiba	[…]

238. The value of sales of power transformers by the parties in the EEA in 2001 (as defined in recitals 4 and 7) was EUR […].

239. In line with the conclusion reached above, relevant sales must be imputed to the undertakings on the basis of their worldwide market shares applied to the sales of all undertakings inside the EEA, that is to say by multiplying the size of the EEA market of EUR […] by their respective worldwide market shares. The relevant sales of the parties are then as follows:

	EUR
ABB	[…]
Siemens	[…]
ALSTOM/AREVA	[…]

[67] The world wide market shares are calculated on the basis of the parties' worldwide sales of power transformers (as defined in recitals 4 and 7).

Fuji	[…]
Hitachi	[…]
Toshiba	[…]
Total	[…]

8.4. Determination of the basic amount of the fine

240. The basic amount consists of an amount of between 0% and 30% of a company's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the company's participation in the infringement, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.[68]

8.4.1. Gravity

241. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to decide whether the proportion of the value of sales should be at the lower or at the higher end of the scale, regard will be had to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

8.4.2. Nature

242. The addressees of this Decision participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement. The infringement consisted of an agreement whereby they agreed on the sharing of markets. Geographic market sharing is by its very nature among the most harmful restrictions of competition, as this practice distorts competition with regard to the main parameters of competition.

243. According to point 23 of the 2006 Guidelines on Fines, cartels will, as a matter of policy, be heavily fined. The economic importance of the sector is reflected by the

[68] See Points 19 – 26 of the 2006 Guidelines on Fines.

basic amount which is based on the value of sales and does not require further adjustment.

244. […]

8.4.4. Geographic scope

245. As regards the geographic scope under the Treaty and the EEA Agreement, the infringement covered the entire EEA. In fact, the geographic scope of the cartel was more than EEA wide, namely also covering Japan.

8.4.5. Implementation

246. As described in recital 106, the GA was implemented.

8.4.6. Conclusion on gravity

247. Given the specific circumstances of this case, taking into account the criteria discussed in this Section relating to the nature of the infringement and the geographic scope, the proportion of the value of sales to be taken into account should be 16%.

8.4.7. Duration

248. Point 24 of the 2006 Guidelines on Fines provides that: "*In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year*".

249. The application of point 24 of the 2006 Guidelines on Fines leads to the following multipliers for each addressee of this Decision:

Legal entity	Period of liability taken into account for purposes of calculating the fines	Duration	Multipliers
ABB Ltd	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4

AREVA T&D SA	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4
ALSTOM (Société Anonyme)	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4
Siemens AG	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4
Siemens Aktiengesellschaft Österreich	From 29 May 2001 until 15 May 2003	1 year, 11 months and 17 days	2
Fuji Electrics Holdings Co., Ltd	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4
Hitachi Ltd	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4
Hitachi Europe Ltd	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4
Toshiba Corporation	From 9 June 1999 until 15 May 2003	3 years, 11 months and 6 days	4

8.5. The percentage to be applied for the additional amount

250. Point 25 of the 2006 Guidelines on Fines provides that: "*irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales […] in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements*".

251. Given the specific circumstances of this case, taking into account the criteria discussed in Section 8.4.1 relating to the nature of the infringement and the geographic scope, the percentage to be applied for the purposes of calculating the additional amount to be imposed pursuant to point 25 of the 2006 Guidelines on Fines should be 16%.

8.6. Calculation and conclusion on basic amounts of the fines to be imposed

252. Based on the criteria explained above, the basic amount of the fine is calculated as follows for each undertaking:

Legal Entity	Basic amount (rounded):
ABB Ltd	EUR 22 500 000
ALSTOM (Société Anonyme) / AREVA T&D SA	EUR 16 500 000
Siemens AG / Siemens Aktiengesellschaft Österreich	EUR 27 800 000
Fuji Electrics Holdings Co., Ltd	EUR 2 890 000
Hitachi Ltd / Hitachi Europe Ltd	EUR 2 500 000
Toshiba Corporation	EUR 12 000 000

8.7. Adjustments to the basic amount

8.7.1. Aggravating circumstances

8.7.1.1. Recidivism

253. Point 28 of the 2006 Guidelines on Fines provides that *"The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as: - where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100% for each such infringement established."* Recidivism shows that previously imposed sanctions were not a sufficient deterrent and therefore justifies an increase of the basic amount of the fine.[69]

254. 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

[69] See Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 293.

by a previous Commission Decision (Decision 1999/60/EC in Case IV/35691 Pre-Insulated Pipe Cartel[70])

255. It is irrelevant whether this new infringement is committed in a different business sector or in respect of a different product. It is sufficient that the same undertaking has already been found responsible for similar infringements.[71]

256. In view of the above, the basic amount of the fines for ABB should be increased by 50%.

8.7.2. Mitigating circumstances

8.7.2.1. Lack of implementation and limited effects

257. Hitachi, Toshiba, ABB, ALSTOM and AREVA in their replies to the Statement of Objections argue that the GA was not implemented and that the cartel only had limited or negligible effects on the market. In addition Hitachi claims that it is not present in the EEA.

258. Those claims should not be accepted. As already pointed out above, Article 81 of the Treaty prohibits agreements between undertakings which have an anti-competitive object, regardless of their effect. The GA was a market allocation agreement which had the prevention, restriction or distortion of competition as its object. In addition, the GA was implemented by the parties and in effect throughout the whole duration of the infringement (for details see recital 106).

259. As regards Hitachi's argument that it is not present in the EEA, it is noted that this is the consequence of the GA whereby Japanese producers agreed to refrain from selling power transformers in Europe. Thus, this is an intended result of the anti-competitive agreement and can in no circumstances be regarded as a mitigating circumstance for Hitachi.

8.7.2.2. Compliance programme

260. Hitachi claims that it has put in place a compliance programme which should be considered as a mitigating circumstance.

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70 Commission Decision (1999/60/EC) of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: — Pre-Insulated Pipe Cartel), OJ L 24, 30.1.1999, p. 1

71 Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 284. See also Case T-38/02 *Groupe Danone v Commission*, judgment of 25 October 2005, paragraphs 353 to 355.

261. The Commission welcomes measures such as compliance programmes to avoid the recurrence of cartel infringements. However, the mere existence of a compliance programme cannot change the reality and significance of the infringement and the need to sanction it in this Decision, particularly given the very serious nature of the infringement.[72] Consequently, Hitachi's claim must be rejected.

8.7.2.3. Co-operation outside the scope of the 2002 Leniency Notice

262. According to the 2006 Guidelines on Fines, the Commission may reduce the basic amount of the fine on the basis of attenuating circumstances, including effective co-operation by undertakings outside the scope of the 2002 Leniency Notice. In this case, the Commission has assessed whether a reduction of fines is justified, on the grounds that the co-operation of any of the undertakings concerned enabled the Commission to establish the existence of the infringement more easily.

263. […]

264. The Commission has carefully analysed Hitachi's position under the 2002 Leniency Notice […]. As an additional step, the Commission has also analysed if any reduction of fines were applicable under the terms of cooperation outside the scope of the 2002 Leniency Notice.

265. […]

266. […]

267. […]. However, when taking all the facts of the case into account, it is considered that there are exceptional circumstances present in this case that justify granting a reduction for effective cooperation outside the scope of the 2002 Leniency Notice.

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[72] See judgment of the Court of First Instance, Case T-304/94, *Europa Carton* v *Commission*, [1998] ECR 1998 II-869, paragraph 141. See also judgment of the Court of First Instance, Case T-65/99, *Strintzis Lines Shipping SA* v *Commission*, [2003] ECR 2003 II-5433, at paragraph 201 and judgment of the Court of First Instance, Case T-224/00, *Archer Daniels Midland* v *Commission*, [2003] ECR II-2597, paragraphs 280 and following. See also Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co. Ltd and Others v Commission*, [2004] ECR-II-1181, paragraph 343.

268. In consideration of the above, it is concluded that the fine to be imposed on Hitachi should be reduced by 18%.

ii. AREVA

269. The Commission has carefully analysed AREVA's position under the 2002 Leniency Notice […]. Although AREVA has not explicitly asked for it, the Commission has also examined if any reduction of fines were applicable under the terms of cooperation outside the scope of the 2002 Leniency Notice.

270. […]

271. However, AREVA has cooperated fully on a continuous basis throughout the Commission's investigation. In particular it has made its employees available for a meeting with the Commission services where they provided on-the-spot explanations for previous statements.

272. It is also acknowledged that the GA infringement was committed before AREVA had purchased the power transformer business from ALSTOM. Following that purchase in early 2004, AREVA in the same year already reported anti-competitive behaviour […]. This is an element that should also be taken into account when assessing whether AREVA's continued cooperation should be rewarded in order to encourage cooperation in the 'fight' against cartels. Such a spirit of upfront cooperation is an underlying principle of the Commission's leniency programme, even though owing to the very specific factual constellation of the present case AREVA does not qualify for leniency under the 2002 Leniency Notice. However, taking all the facts together into account the Commission considers that there are exceptional circumstances present in this case that justify granting a reduction for effective cooperation outside the 2002 Leniency Notice.

273. […]

274. In consideration of the above, it should be concluded that the fine to be imposed on AREVA should be reduced by 18%. […] by analogy with previous cases COMP/37.773 – MCAA[73] and COMP/38.543 – International Removal Services[74], ALSTOM should not benefit from this reduction.

[73] http://ec.europa.eu/competition/antitrust/cases/decisions/37773/en.pdf
See also judgment of the Court of First Instance, Case T-161/05, *Hoechst v. Commission* of 30.9.2009, paragraph 76, not yet reported.

8.8. Deterrence

275. Particular attention should be paid to the need to ensure that fines have a sufficiently deterrent effect; to that end, the fine to be imposed on undertakings which have a particularly large turnover may be increased beyond the sales of goods or services to which the infringement relates.[75]

276. Hitachi argues that no multiplier for deterrence were necessary as it is no longer active in the power transformer business, it could not cause any significant damage on the European market as it was never active in the EEA, it has a compliance programme in place […]. Hitachi also argues that if a multiplier is to be applied, it should not exceed 2.

277. It should be pointed out that the fact of not being present in the business at the time of adoption of this Decision, cannot be a justifying factor for not using a deterrence multiplier. Hitachi caused damage to the European power transformer market by concluding and implementing the GA which resulted in the absence of competition from Japanese producers. The argument relating to the existence of a compliance programme has already been dealt with above (see recitals 260 and 261). It should also be stressed that the application of a deterrence multiplier as stated in the 2006 Guidelines on Fines is merely linked to a particularly large overall turnover of undertakings. […].

278. In this case, the amount of the fine should be set at a level which ensures sufficient deterrence and it is appropriate to apply a multiplier factor to the fines imposed, based on the size of the undertakings concerned. On that basis, the fine for Siemens (worldwide turnover/sales ca. EUR 77 000 million) and Hitachi (worldwide turnover/sales ca. EUR 69 000 million) is multiplied by 1.2 and the fine for Toshiba (worldwide turnover/sales ca. EUR 47 000 million) is multiplied by 1.1.

8.9. Conclusions on the adjusted basic amounts of the fines to be imposed

279. The adjusted basic amount of the fine to be imposed on each undertaking is as follows:

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74 http://ec.europa.eu/competition/antitrust/cases/decisions/38543/fr.pdf

75 Point 30 of the 2006 Guidelines on Fines.

Legal Entity	Basic amount:
ABB Ltd	EUR 33 750 000
ALSTOM (Société Anonyme) of which AREVA T&D SA is jointly and severally liable for	EUR 16 500 000 EUR 13 530 000
Siemens AG / Siemens Aktiengesellschaft Österreich	EUR 33 360 000
Fuji Electrics Holdings Co., Ltd	EUR 2 890 000
Hitachi Ltd / Hitachi Europe Ltd	EUR 2 460 000
Toshiba Corporation	EUR 13 200 000

8.10. Application of the 10% of turnover limit

280. The second subparagraph of Article 23(2) of Regulation (EC) No 1/2003 provides that: "*For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10 % of its total turnover in the preceding business year*".

281. The adjusted basic amounts set out in Section 8.5 do not exceed 10% of the total turnover for any of the undertakings concerned. Therefore it is not required to adjust the amounts in the light of the undertakings' turnover.

8.11. Application of the 2002 Leniency Notice

282. All parties except Toshiba submitted applications under the 2002 Leniency Notice.

8.11.1. Siemens

283. […], Siemens submitted an application for immunity and/or alternatively a reduction of fines. […].

284. **[Recitals (284) – (288) have been deleted, including any cross references to these Recitals and relevant footnotes].**

289. Under point 8(b) of the 2002 Leniency Notice, the Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if the undertaking is the first to submit evidence which in the Commission's view

may enable it to "find an infringement of Article 81 EC in connection with an alleged cartel" affecting the Community.

290. Siemens was the first undertaking to submit evidence which enabled the Commission to find an infringement relating to the GA. In addition, the other conditions of point 11 of the 2002 Leniency Notice are met.

291. Siemens continued to cooperate fully with the Commission throughout the administrative procedure in accordance with point 11 of the 2002 Leniency Notice. Siemens ended its involvement in the infringement no later than the time when it submitted its first application under that Notice and it has not taken steps to coerce other undertakings to participate in the infringement.

292. Siemens should therefore be granted immunity from any fines that would otherwise have been imposed on it.

8.11.2. Fuji

293. […], Fuji submitted a leniency application relating to the GA cartel. […].

294. […]

295. […]

296. Overall, Fuji […] provided significant added value with respect to the evidence in the Commission's possession at that time […]. Fuji is therefore the first undertaking to meet the requirements of point 21 of the 2002 Leniency Notice.

297. Considering the value of its contribution to this case, the stage at which it provided that contribution and the extent of its cooperation following its submissions, Fuji should be granted a 40% reduction of the fine that would otherwise have been imposed on it.

8.11.3. ABB

298. **[Recitals (298) – (305) have been deleted, including any cross references to these Recitals and relevant footnotes].**

306. In summary, ABB should not be granted any reduction of the fine to be imposed on it, because the Commission was already able to prove the GA infringement in all of

its main elements and the information provided by ABB did not allow the Commission to prove any new significant elements concerning this infringement.

8.11.4. AREVA

307. **[Recitals (307) – (321) have been deleted, including any cross references to these Recitals and relevant footnotes].**

322. On this basis, it should be concluded that the evidence supplied by AREVA does not constitute significant added value within the meaning of the 2002 Leniency Notice. AREVA should therefore not be granted a reduction of fines.

8.11.5. Hitachi

323. On 11/12 May 2004, the Commission carried out inspections at Hitachi's premises pursuant to Article 20(4) of Regulation (EC) No 1/2003 in the GIS case. […], Hitachi applied for leniency in the framework of the GIS case […].

324. **[Recitals (324) – (333) have been deleted, including any cross references to these Recitals and relevant footnotes].**

334. As shown above an applicant can only successfully apply for a reduction of fines in the framework of the 2002 Leniency Notice if he strengthens the Commission's ability to prove the facts in question (see point 22 of the 2002 Leniency Notice). On the basis of the above, it should be concluded that the evidence supplied by Hitachi does not constitute significant added value within the meaning of the 2002 Leniency Notice. Hitachi should therefore not be granted a reduction of fines.

8.11.6. Conclusion on the application of the Leniency Notice

335. As a result of the application of the Leniency Notice, the fine to be imposed on Siemens should be decreased by 100% to EUR zero; the fine to be imposed on Fuji should be decreased by 40% to respectively EUR 1 734 000.

8.12. The amounts of the fines to be imposed in this Decision

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

Legal Entity	Final amount:
ABB Ltd	EUR 33 750 000
ALSTOM (Société Anonyme) of which AREVA T&D SA is jointly and severally liable for	EUR 16 500 000 EUR 13 530 000
Siemens (Siemens AG and Siemens Aktiengesellschaft Österreich)	EUR 0
Fuji Electrics Holdings Co., Ltd	EUR 1 734 000
Hitachi (Hitachi Ltd and Hitachi Europe Ltd)	EUR 2 460 000
Toshiba Corporation	EUR 13 200 000

8.13. Ability to pay

337. None of the addressees of this Decision has argued that it is unable to pay the fine.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by agreeing, for the periods indicated, on the sharing of markets by means of the Gentlemen's Agreement (GA) between European and Japanese producers of power transformers to respect each others' home markets and to refrain from selling in those markets:

(a) ABB Ltd: from 9 June 1999 to 15 May 2003

(b) AREVA T&D SA: from 9 June 1999 until 15 May 2003

(c) ALSTOM (Société Anonyme): from 9 June 1999 until 15 May 2003

(d) Siemens AG: from 9 June 1999 until 15 May 2003

(e) Siemens Aktiengesellschaft Österreich: from 29 May 2001 until 15 May 2003

(f) Fuji Electrics Holdings Co., Ltd: from 9 June 1999 until 15 May 2003

(g) Hitachi Ltd: from 9 June 1999 until 15 May 2003

(h) Hitachi Europe Ltd: from 9 June 1999 until 15 May 2003

(i) Toshiba Corporation: from 9 June 1999 until 15 May 2003

Article 2

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

(a) ABB Ltd: EUR 33 750 000

(b) ALSTOM (Société Anonyme): EUR 16 500 000, of which AREVA T&D SA is jointly and severally liable for EUR 13 530 000

(c) Siemens AG: EUR 0, of which Siemens Aktiengesellschaft Österreich is jointly and severally liable for EUR 0

(d) Fuji Electrics Holdings Co., Ltd: EUR 1 734 000

(e) Hitachi Ltd: EUR 2 460 000, of which Hitachi Europe Ltd is jointly and severally liable for EUR 2 460 000

(f) Toshiba Corporation: EUR 13 200 000

The fines shall be paid in euros, within three months of the date of notification of this Decision, to the bank account held in the name of the European Commission with:

FORTIS BANK S.A.
Rue Montagne du Parc 3
B-1000 BRUXELLES
Code IBAN: BE71 0013 9537 1369
Code SWIFT: GEBABEBB

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 in so far 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:

(a) ABB Ltd ,

Affolternstrasse 44,

CH – 8050 Zürich,

Switzerland

(b) AREVA T&D SA,

Tour AREVA,

1, Place Jean Millier,

F-92084 Paris La Défense,

France

(c) ALSTOM (Société Anonyme),

3, Avenue André Malraux,

Le Sextant,

F-92309 Levallois - Perret

Cedex,

France

(d) Siemens AG,

Freyeslebenstrasse 1,

D-91058 Erlangen,

Germany

(e) Siemens Aktiengesellschaft Österreich,

Siemens-Straße 92,

A-1210 Wien,

Austria

(f) Fuji Electric Holdings Co., Ltd,

Gate City Ohsaki East Tower, 11-2 Osaki 1- chome,

Shinagawa-ku,

JP-Tokyo 141-0032,

Japan

(g) Hitachi Ltd,

6-6, Marounichi 1 Chome,

Chiyoda-ku,

JP-Tokyo 100-8280,

Japan

(h) Hitachi Europe Limited,

Whitebrook Park,

Lower Cookham Road,

Maidenhead, Berkshire,

SL6 8YA

United Kingdom

(i) Toshiba Corporation,

1-1, Shibaura 1-Chome,

Minato-Ku,

JP-Tokyo 105-8001,

Japan

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