JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 July 2019 (*)(1)

(Competition — Agreements, decisions and concerted practices — Market for optical disk drives — Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Collusive agreements relating to bidding events concerning optical disk drives for notebook and desktop computers — Infringement by object — Rights of the defence — Obligation to state reasons — Principle of good administration — Fines — Single and continuous infringement — 2006 Guidelines on the method of setting fines)

In Case T−762/15,

Sony Corporation, established in Tokyo (Japan),

Sony Electronics, Inc., established in San Diego, California (United States),

represented by R. Snelders, lawyer, N. Levy and E. Kelly, Solicitors,

applicants,

v

European Commission, represented initially by M. Farley, A. Biolan, C. Giolito, F. van Schaik and L. Wildpanner, and subsequently by M. Farley, F. van Schaik, L. Wildpanner and A. Dawes, acting as Agents,

defendant,

ACTION under Article 263 TFEU seeking, principally, annulment in part of Commission Decision C(2015) 7135 final of 21 October 2015 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives), or, in the alternative, a reduction of the amount of the fine imposed on the applicants,

THE GENERAL COURT (Fifth Chamber),

composed of D. Gratsias, President, I. Labucka and I. Ulloa Rubio (Rapporteur), Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 2 May 2018,

gives the following

Judgment

Background to the dispute

1 According to Decision C(2015) 7135 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives) (‘the contested decision’), concerning collusive agreements relating to bidding events concerning optical disk drives for notebook and desktop

computers organised by two computer manufacturers, the Sony group manufactures audio, video, communications and information technology products for the consumer and professional markets and is a provider of entertainment content, products and services (contested decision, recital 15).

2 The first applicant, Sony Corporation, which is a stock corporation governed by Japanese law, is the group's ultimate parent company. The second applicant, Sony Electronics, Inc., is a wholly-owned indirect subsidiary of Sony Corporation and is established in the United States. Sony Electronics, which is governed by the laws of Delaware (United States), carries out research and development, design, engineering, sales, marketing, distribution, and customer service activities (contested decision, recital 16).

3 Sony Corporation and Sony Electronics (together 'the applicants' or 'Sony'), are jointly referred to as 'Sony' in the contested decision (contested decision, recital 17).

4 Sony Electronics was, together with Sony Corporation, the legal entity participating on behalf of Sony in the procurement events organised by Dell and continued to do so until 1 April 2007 (contested decision, recital 18).

5 Sony Optiarc, Inc., is a stock corporation governed by Japanese law. It was established on 3 April 2006 as a joint venture of Sony Corporation and NEC Corporation under the business name Sony NEC Optiarc Inc. Each parent company contributed its respective optical disk drive ('ODD') business to Sony NEC Optiarc. Sony Corporation acquired 55% of the voting shares of the joint venture, and NEC Corporation the remaining 45% (contested decision, recital 19).

6 Between May 2003 and March 2007, Lite-On designed and manufactured ODD products ultimately sold under the Sony brand on the basis of revenue-sharing arrangements. Under the arrangements, sales responsibility was in general conferred upon Sony, while Lite-On was responsible for quality and engineering issues (contested decision, recital 26).

7 The infringement concerns ODDs used in personal computers (desktops and notebooks) ('PCs') produced by Dell and Hewlett Packard ('HP'). ODDs are also used in a wide range of other consumer appliances such as compact disc ('CD') or digital versatile disc ('DVD') players, game consoles and other electronic hardware devices (contested decision, recital 28).

8 ODDs used in PCs differ according to their size, loading mechanisms (slot or tray) and the types of discs that they can read or write. ODDs can be split into two groups: 'half-height' ('HH') drives for desktops and slim drives for notebooks. The slim drive sub-group includes drives that vary by size. Both HH and slim drives differ by type depending on their technical functionality (contested decision, recital 29).

9 Dell and HP are the two most important original equipment manufacturers on the global market for PCs. Dell and HP use standard procurement procedures carried out on a global basis which involve, inter alia, quarterly negotiations over a worldwide price and overall purchase volumes with a limited number of pre-qualified ODD suppliers. Generally, regional issues did not play any role in ODD procurement other than that related to forecasted demand from regions affecting overall purchase volumes (contested decision, recital 32).

10 The procurement procedures included requests for quotations, electronic requests for quotations, internet negotiations, e-auctions and bilateral (offline) negotiations. At the close of a procurement event, customers would allocate volumes to participating ODD suppliers (to all or at least most of them, unless there was an exclusion mechanism in place) depending on their quoted prices. For example, the winning bid would receive 35 to 45% of the total market allocation for the relevant quarter, the second best 25 to 30%, the third 20% and so on. These standardised procurement procedures were used by customers' procurement teams with the purpose of achieving efficient procurement at competitive prices. To this end, they used all possible practices to stimulate the price competition between the ODD suppliers (contested decision, recital 33).

11 As regards Dell, it mainly carried out bidding events by internet negotiation. That negotiation could last for a specific period of time or end after a defined period, for example 10 minutes after the last bid, when no ODD supplier continued bidding. In certain circumstances, internet negotiations could last several hours if the bidding was more active or if the duration of the internet negotiation was extended in order to incentivise ODD suppliers to continue bidding. Conversely, even where the length of the internet negotiation was indefinite and depended on the final bid, Dell could announce at some point that the internet negotiation had closed. Dell could decide to change from a 'rank-only' to a 'blind' procedure. Moreover, Dell could cancel the internet negotiation if the bidding or its result were found to be unsatisfactory and run a bilateral negotiation instead. The internet negotiation process was monitored by Dell's responsible Global Commodity Managers (contested decision, recital 37).

12 With respect to HP, the main procurement procedures used were requests for quotations and electronic requests for quotations. Both procedures were carried out online using the same platform. As regards (i) the requests for quotations, they were quarterly. They combined online and bilateral offline negotiations spread over a period of time, usually two weeks. ODD suppliers were invited to a round of open bidding for a specified period of time to submit their quote to the online platform or by email. Once the first round of bidding had elapsed, HP would meet with each participant and start negotiations based on the ODD supplier's bid to obtain a better bid from each supplier without disclosing the identity or the bid submitted by any other ODD supplier. As regards (ii) the electronic requests for quotations, they were normally run in the format of a reverse auction. In that format, bidders would log onto the online platform at the specified time and the auction would start at a price set by HP. Bidders entering progressively lower bids would be informed of their own rank each time a new bid was submitted. At the end of the allotted time, the ODD supplier having entered the lowest bid would win the auction and other suppliers would be ranked second and third according to their bids (contested decision, recitals 41 to 44).

Administrative procedure

13 On 14 January 2009, the Commission received a request for immunity under its Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17) ('the 2006 Leniency Notice') from Philips. On 29 January and 2 March 2009 that request was supplemented to include, alongside Philips, Lite-On and their joint venture Philips & Lite-On Digital Solutions Corporation ('PLDS') (contested decision, recital 54).

14 On 29 June 2009, the Commission sent a request for information to undertakings active in the ODD sector (contested decision, recital 55).

15 On 30 June 2009, the Commission granted conditional immunity to Philips, Lite-On and PLDS (contested decision, recital 56).

16 On 18 July 2012, the Commission sent a statement of objections to 13 suppliers of ODDs, including the applicants ('the statement of objections'). It stated that those companies had infringed Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) by participating in a cartel concerning ODDs from 5 February 2004 until 29 June 2009 consisting in orchestrating their behaviour in bidding events organised by two computer manufacturers, Dell and HP.

17 On 29 October 2012, in reply to the statement of objections, the applicants submitted their written comments.

18 On 23 November 2012, Dell replied to the request for information that the Commission had addressed to it (contested decision, recital 61).

19 An oral hearing was held on 29 and 30 November 2012, in which all the addressees of the statement of objections participated (contested decision, recital 60).

20 On 14 December 2012, the Commission requested all the parties to provide the relevant documents received from Dell and HP. All the parties replied to those requests and each was granted access to the replies provided by the other ODD suppliers (contested decision, recital 62).

21 On 21 October 2015, the Commission adopted the contested decision.

Contested decision

22 In the contested decision, the Commission considered that the cartel participants had coordinated their competitive behaviour, at least between 23 June 2004 and 25 November 2008. It specified that that coordination took place through a network of parallel bilateral contacts. It stated that the cartel participants sought to accommodate their volumes on the market and ensure that the prices remained at levels higher than they would have been in the absence of those bilateral contacts (contested decision, recital 67).

23 The Commission specified, in the contested decision, that the coordination between the cartel participants concerned the customer accounts of Dell and HP, the two most important original equipment manufacturers on the global market for PCs. According to the Commission, in addition to bilateral negotiations with their ODD suppliers, Dell and HP applied standardised procurement procedures, which took place at least on a quarterly basis. The Commission stated that the cartel members used their network of bilateral contacts to manipulate those procurement procedures, thus thwarting their customers' attempts to stimulate price competition (contested decision, recital 68).

24 According to the Commission, regular exchanges of information in particular enabled the cartel members to possess a very complex knowledge of their competitors' intentions even before they had entered the procurement procedure, and therefore to foresee their competitive strategy (contested decision, recital 69).

25 The Commission added that, on a regular basis, the cartel members exchanged pricing information regarding specific customer accounts as well as information unrelated to pricing, such as existing production and supply capacity, inventory status, the qualification status, and timing of the introduction of new products or upgrades. The Commission stated that, in addition, the ODD suppliers monitored the final results of closed procurement events, that is the rank, the price and the volume (contested decision, recital 70).

26 The Commission further stated that, whilst taking into account that they must keep their contacts secret from customers, to contact each other suppliers used the means they deemed sufficiently appropriate to achieve the desired result. The Commission specified that in fact an attempt to convene a kick-off meeting to hold regular multilateral meetings between ODD suppliers had failed in 2003 after having been revealed to a customer. According to the Commission, instead, there were bilateral contacts, mostly via phone calls and, from time to time, also via emails, including private (hotmail) addresses and instant messaging services, or meetings, mostly at the level of global account managers (contested decision, recital 71).

27 The Commission found that the cartel participants contacted each other regularly and that the contacts, mainly by telephone, became more frequent around the procurement events, amounting to several calls per day between some pairs of cartel participants. It stated that, generally, contacts between some pairs of cartel participants were significantly higher than between other pairs (contested decision, recital 72).

28 When calculating the amount of the fine imposed on the applicants, the Commission relied on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines').

29 First of all, in order to determine the basic amount of the fine, the Commission considered that, in view of the considerable differences in the duration of the suppliers' participation and in order better to reflect the actual impact of the cartel, it was appropriate to use an annual average calculated on the basis of the actual value of sales made by the undertakings during the full calendar months of their respective participation in the infringement (contested decision, recital 527).

30 The Commission thus explained that the value of sales was calculated on the basis of sales of ODDs for notebooks and desktops and invoiced to HP and Dell entities located in the EEA (contested decision, recital 528).

31 The Commission further considered that, since the anticompetitive conduct with regard to HP had begun later and in order to take the evolution of the cartel into account, the relevant value of sales would be calculated separately for HP and for Dell, and that two duration multipliers would be applied (contested decision, recital 530).

32 As regards the applicants, as it had not been established that Sony had participated in the contacts concerning HP, the Commission found them liable only for their coordination with respect to Dell (contested decision, recital 531).

33 Next, the Commission decided that, since price coordination agreements are by their very nature among the worst kind of infringements of Article 101 TFEU and Article 53 of the EEA Agreement, and since the cartel covered at least the whole of the EEA, the percentage for gravity used in this case would be 16% for all addressees of the contested decision (contested decision, recital 544).

34 Furthermore, the Commission stated that, given the circumstances of the case, it had decided to add an amount of 16% for deterrence (contested decision, recitals 554 and 555).

35 In addition, the Commission reduced the amount of the fine imposed on the applicants by 3% in order to take into account the fact that they had not been aware of the part of the single and continuous infringement concerning HP, in order to reflect in an adequate and sufficient manner the less serious nature of their conduct (contested decision, recital 561).

36 Lastly, the Commission considered that, as Sony had had a worldwide turnover of EUR 59 252 000 000 during the business year preceding the adoption of the contested decision, it was appropriate to apply a multiplier of 1.2 to the basic amount (contested decision, recital 567).

37 The operative part of the contested decision, in so far as it concerns the applicants, reads as follows:

‘Article 1

The following undertakings infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement, which consisted of several separate infringements, in the optical disk drives sector covering the whole of the EEA, which consisted of price coordination arrangements:

...

(f) [the applicants] from 23 August 2004 to 15 September 2006, for their coordination with regards to Dell.

...

Article 2

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

...

(f) [the applicants], jointly and severally liable: EUR 21 024 000’.

Procedure and forms of order sought

38 By application lodged at the Court Registry on 31 December 2015, the applicants brought the present action.

39 The Commission lodged its defence on 25 May 2016.

40 On a proposal from the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 91 of its Rules of Procedure, requested the Commission to lodge certain documents relating to confidential statements. The Commission stated that it was unable to produce the transcripts of those confidential statements, which had been lodged in the context of its leniency programme.

41 By order of 23 April 2018, adopted pursuant (i) to the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and (ii) to Article 91(b) and Article 92(3) of the Rules of Procedure, the Court (Fifth Chamber) ordered the Commission to produce those transcripts, which could be consulted by the applicants' lawyers at the Court Registry before the hearing.

42 The Commission produced those transcripts on 24 April 2018 and the applicants' representatives consulted them at the Court Registry on 30 April 2018.

43 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 2 May 2018.

44 The applicants claim that the Court should:

– annul the contested decision in so far as it concerns them;

– in the alternative, reduce the amount of the fine imposed on them;

– order the Commission to pay the costs.

45 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

46 The applicants raise two pleas in support of this action, the first relating, in essence, to the existence of an infringement of Article 101(1) TFEU, and the second, raised in the alternative, to the calculation of the fine imposed on them.

The first plea, alleging the existence of errors of fact and of law in relation to the finding of an infringement of Article 101(1) TFEU

47 In essence, the arguments developed by the applicants in the context of the first plea may be broken down into four parts. First, they maintain that the contested decision is vitiated by errors of fact and of law in that the Commission concluded that Sony had committed an infringement 'by object' of Article 101 TFEU and Article 53 of the EEA Agreement. The Commission does not adduce, in the contested decision, any evidence capable of proving that, unlike several other addressees of that decision, the applicants participated in 'rigging' of bids or any agreements to undermine competition. Second, the Commission was wrong to find, in the contested decision, that Sony had participated in a 'single and continuous infringement'. Third, the Commission failed, in the contested decision, to take proper account of exculpatory evidence. Fourth, the finding in the contested decision that Sony participated in 'separate

infringements' constitutes a breach of Sony's rights of defence, is not proved and is vitiated by a failure to state reasons.

First part: failure to prove that the applicants participated in a restriction of competition 'by object'

48 As a preliminary point, it should be borne in mind that it follows from Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), and from settled case-law that, in the area of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement. In that regard, it must produce sufficiently precise and coherent proof to establish that the alleged infringement took place (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 90 and the case-law cited).

49 Where, in establishing an infringement of Articles 101 and 102 TFEU, the Commission relies on documentary evidence, the burden is on the undertakings concerned not merely to put forward a plausible alternative to the Commission's view, but to show that the evidence relied on in the contested decision is insufficient to establish the existence of an infringement. It must be considered that, where the Commission relies on direct evidence, the burden is on the undertakings concerned to show that such evidence is insufficient. Such a reversal of the burden of proof does not infringe the principle of the presumption of innocence (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 91 and the case-law cited).

50 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 92 and the case-law cited).

51 Indeed, the items of evidence on which the Commission relies in the decision in order to prove the existence of an infringement of Article 101(1) TFEU by an undertaking must not be assessed separately, but as a whole (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 93 and the case-law cited).

52 It is also necessary to take account of the fact that anticompetitive activities take place clandestinely, and accordingly, in most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 94 and the case-law cited).

53 The only relevant criterion for assessing freely adduced evidence relates to its credibility. According to the generally applicable rules on evidence, the credibility and, therefore, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliable nature of its contents. In particular, great importance must be attached to the fact that a document has been drawn up in close connection with the events or by a direct witness of those events. Furthermore, it should be noted that the mere fact that the information has been provided by undertakings which sought to benefit from the 2006 Leniency Notice does not call its probative value into question (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 95 and the case-law cited).

54 It is settled case-law that no provision or any general principle of EU law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Articles 101 and 102 TFEU, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application

of those provisions which is entrusted to it by the FEU Treaty (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 96 and the case-law cited).

55 Some caution as to the evidence provided voluntarily by the main participants in an unlawful cartel is understandable, since those participants might tend to play down the importance of their contribution to the infringement and maximise that of others. Nonetheless, in view of the inherent logic of the procedure provided for in the 2006 Leniency Notice, the fact of seeking to benefit from its application in order to obtain a reduction of the fine does not necessarily create an incentive to submit distorted evidence as to the other participants in the cartel. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the undertaking, and thereby jeopardise its chances of benefiting fully under the Leniency Notice (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 97 and the case-law cited).

56 In particular, where a person admits that he committed an infringement and thus admits the existence of facts going beyond those whose existence could be directly inferred from the documentary evidence, that implies, a priori, in the absence of special circumstances indicating otherwise, that that person has resolved to tell the truth. Thus, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 98 and the case-law cited).

57 Nonetheless, statements made by the undertakings concerned in the context of an application for leniency pursuant to the 2006 Leniency Notice must be assessed with caution and, in general, cannot be regarded as particularly reliable evidence if they have not been corroborated by other evidence (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 99 and the case-law cited).

58 According to settled case-law, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (see judgment of 8 September 2016, *Goldfish and Others* v *Commission*, T−54/14, EU:T:2016:455, paragraph 100 and the case-law cited).

59 As regards, as in the present case, the case of an exchange of information between competitors, such an exchange is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings (judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C−8/08, EU:C:2009:343, paragraph 43).

60 Subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C−8/08, EU:C:2009:343, paragraph 51).

61 Moreover, in deciding whether a concerted practice is prohibited by Article 101(1) TFEU, there is no need to take account of its actual effects once it is apparent that its object is to prevent, restrict or distort competition within the European Union. The distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition (judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C−8/08, EU:C:2009:343, paragraph 29).

62 Accordingly, there is no need to consider the effects of a concerted practice where its anticompetitive object is established (judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C−8/08, EU:C:2009:343, paragraph 30).

63 In that regard, the essential legal criterion for ascertaining whether an agreement involves a restriction of competition ‘by object’ is the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects (see judgment of 27 April 2017, *FSL and Others* v *Commission*, C−469/15 P, EU:C:2017:308, paragraph 104 and the case-law cited).

64 In that connection, regard must be had to the content of the provisions of the agreement at issue, the objectives which it seeks to attain and the economic and legal context of which it forms part (see judgment of 27 April 2017, *FSL and Others* v *Commission*, C−469/15 P, EU:C:2017:308, paragraph 105 and the case-law cited).

65 In respect of price-fixing agreements, which represent particularly serious restrictions of competition, the analysis of the economic and legal context of which the practice forms part may therefore be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object (see judgment of 27 April 2017, *FSL and Others* v *Commission*, C−469/15 P, EU:C:2017:308, paragraph 107 and the case-law cited).

66 Lastly, it should be borne in mind that an information exchange system relating to sales made by competitors, disseminated systematically and at short intervals, reduces or removes the degree of uncertainty as to the operation of the market and is therefore liable to have an adverse influence on competition (see, to that effect, judgment of 28 May 1998, *Deere* v *Commission*, C−7/95 P, EU:C:1998:256, paragraphs 89 and 90).

67 It is in the light of that case-law that it is appropriate to analyse whether the contacts set out in the contested decision are sufficient to establish the existence of an infringement by object.

68 In that regard, the applicants maintain that at least half of the 12 instances of information sharing alleged against Sony (contacts 8, 10, 14, 16, 21 and 22) are not substantiated by evidence showing that Sony was involved in any sharing of information. Moreover, 5 of the 12 cases of information sharing alleged against Sony (contacts 8, 10, 14, 16 and 22) relate to old information which, in the light of the ‘real conditions of the functioning and structure of the market’, was incapable of materially reducing uncertainty or of otherwise harming future competition. Lastly, the other seven allegations against Sony (contacts 7, 39, 25. 30, 3, 6 and 21) relate to communications which pertain in a way to the future. None of those allegations concerns information which might reasonably be regarded as capable of removing or appreciably reducing uncertainty as to the conduct that would subsequently be adopted on the market.

69 Moreover, the applicants claim that the contested decision merely refers, in a footnote, to a merger decision in order to assert the existence of an oligopoly on the market in question.

70 As regards the issue of the existence of an oligopoly on the market in question, it should be pointed out that the Commission stated, in recital 446 of the contested decision, that the requirement of independence precludes any direct or indirect contact by which an undertaking influences the conduct on the market of its competitors or discloses to them its decisions or deliberations concerning its own conduct on the market. In that recital, it specified that such a requirement applies all the more when the exchange of information concerns a highly concentrated oligopolistic market such as the ODD market.

71 In footnote 818 to that recital, reference is made to the Commission’s Decision of 2 March 2004 (Case COMP/M.3349 — Toshiba/Samsung/JV) stating that, following the Commission’s authorisation of a joint undertaking between Toshiba and Samsung in the ODD sector, 80% of total ODD production will be supplied by four major producers.

72 That decision was adopted during a period of time corresponding to that relating to the facts of the present case. It was therefore permissible for the contested decision simply to refer to that decision. The applicants are therefore wrong to claim that the contested decision contains no assessment of the factors constituting an oligopoly between the ODD suppliers.

73 As regards the contacts, the Court considers it appropriate to examine them in the order in which they appear in Annex I to the contested decision.

– *Recital 166 of the contested decision (contact 3)*

74 Recital 166 of the contested decision deals with the contact regarded by the Commission as marking the starting point of the infringement period so far as concerns the applicants.

75 According to this recital, in August 2004 Sony had contacts with Hitachi LG Data Storage ('HLDS') and Lite-On had contacts with Toshiba Samsung Storage Technology Corporation ('TSST') concerning a decision taken by Dell to replace rails with screws in the 'Chassis 05' drives. Specifically, Sony sent an email to Lite-On on 24 August 2004, in which it states: 'I was able to confirm that one of Dell's key suppliers did quote [USD] 0.05' and that 'they only quoted screws with no labor, but are not going to go back to Dell with a higher price, they will stick with [USD 0.05]'. The recital states that Lite-On then confirmed to Sony by email, on the same day, that '[TSST quoted USD] 0.10 to Dell for the screws'. Moreover, according to that recital, Lite-On's internal email of 24 August 2004, stating 'Here is what I gather for Dell chassis 05 screw pricing; HLDS: [USD] 0.05; TSST: [USD] 0.10; Lite-On/Sony: [USD] 0.12', shows that Dell provided inaccurate information in order to drive the prices down, having regard to Sony's email to Lite-On the previous day, cited in a footnote to that recital and stating that: '[Dell] has been asking for [USD] 0.05 total, and claims that the other suppliers have already offered such pricing' and that '[Sony has] not been able to confirm this price but continue[s] to check'.

76 The applicants maintain that it cannot be precluded that Dell was the source of all the information, because the source of the information is not explicit. In addition, they claim that it is clear that Sony was trying to encourage Lite-On to lower prices in response to Dell's request to that effect. Accordingly, any information sharing was only likely to encourage competition. The applicants emphasise that alleged contact 3 relates to an offer that had already been submitted to Dell and the only future information seems to be contained in the passage 'one of Dell's key suppliers … but are not going back to Dell with a higher price'. Yet, as 'one of Dell's key suppliers' was not identified, that imprecise information could not meaningfully reduce uncertainty, since it related to only one unnamed competitor out of several competitors.

77 The Commission disputes the applicants' arguments.

78 In that regard, it should be pointed out that the applicants do not dispute that the contact between Sony and HLDS referred to in that recital took place, but submit, first, that the discussions related to an offer that had already been submitted to Dell, second, that the information could have been given by Dell, third, that the information was imprecise in that the supplier is not identified and, fourth, that any information sharing was only likely to encourage competition.

79 First, it should be noted that the offer had indeed already been submitted to Dell, but what is important is that the offer was still being negotiated. It was not a price that had already been set.

80 It is stated in Sony's email to Dell of 25 May 2004, provided by the applicants in annex to the application, that Sony was offering a price of USD 0.12. Sony's first email to Lite-On of 23 August 2004 at 14:43 states that Dell 'has been asking for [USD] 0.05 total', that is a price 60% lower than the initial proposal. That email of 23 August 2004 indicates that Sony did not accede to Dell's request and that it was first of all making enquiries: 'We have not been able to confirm this price but continue to check'.

81 The exchanges go on to show that, several hours later, Sony obtained the information regarding one of the suppliers, because its second email to Lite-On of that day, sent at 19:02, states that it is able to 'to confirm that one of Dell's key suppliers did quote [USD] 0.05' and that they 'are not going to go back to Dell with a higher price, they will stick with [USD] 0.05'.

82 It is therefore clearly a case of an exchange of information concerning a future price, and price-fixing agreements represent particularly serious restrictions of competition (see paragraph 65 above).

83 It should moreover be pointed out that, as the Court of Justice has held, if supply on a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it (judgment of 23 November 2006, *Asnef-Equifax and Administración del Estado*, C−238/05, EU:C:2006:734, paragraph 58).

84 In the present case, the market was particularly concentrated, since, as was just noted, there was an oligopoly.

85 Second, contrary to the applicants' submission, the information that Dell would not receive a better price than USD 0.05 cannot have come from Dell, since it is information relating to the future strategy of a competitor.

86 In that regard, it should be noted that Sony had doubts as to the veracity of the information given by Dell, since it states that Dell 'claimed' that the other suppliers had already also offered a price of USD 0.05. That information was in fact wrong, since, as is apparent from the information given by Lite-On to Sony by email of 24 August 2004, TSST was offering a price of USD 0.10.

87 Third, as regards the expression 'one of Dell's key suppliers', an expression which does not make it possible to know the identity of that supplier, it must be stated that that identity is of no consequence. In the oligopoly situation characterising the market in question, the fact of knowing that one of the several suppliers offers a certain price, and that it will not change its proposal, has the obvious consequence of reducing uncertainty.

88 Fourth, although the applicants submit that the exchange of information might ultimately be beneficial to competition, it must be stated that they do not demonstrate such a benefit.

89 Consequently, the applicants' arguments relating to recital 166 of the contested decision must be rejected.

– *Recital 170 of the contested decision (contact 6)*

90 According to recital 170 of the contested decision, on around 21 September 2004 Sony had contacts with HLDS in relation to the negotiations with Dell for the pricing of lead-free products. That recital states that, according to the Sony internal reports of 21 and 24 September 2004, also addressed to Lite-On, Sony obtained information about 'lead-free cost proposals being made by one of [our] competitors' and states that this 'was confirmed with our other HH CDRW competitor'. That recital also states that on 24 September 2004 Sony wrote to Lite-On asking whether it could 'check [this point] with [TSST] and HLDS', observing that 'HLDS has already agreed to cost parity for lead-free, HLDS confirmed, as did [Dell]', and Lite-On replied that it 'will try to check with TSST & HLDS'. According to the recital, that correspondence concerned 'on-going' negotiations with Dell.

91 According to the applicants, there is some doubt as to whether or how much of that information was obtained from other suppliers when Dell was clearly providing input on the issue ('HLDS confirmed, as did [Dell]'). In addition, the applicants submit, as the contested decision recognises, the mobile phone records of the contact at Dell do not show any communications with Sony. The evidence cited shows at most that Sony sought to gather some information after it had made its proposal to Dell ('that is why [Dell] looked so surprised when I proposed [USD] 0.22 for HH and over [USD] 1 for Slim') in order to address Dell's concerns about variations in price, not with the objective of fixing or increasing prices. The email of 24 September 2004 shows that Dell did not regard that information as particularly sensitive, since Dell confirmed that HLDS had 'already agreed to cost parity for lead-free'. According to the applicants, in that specific case, Sony believed that other ODD suppliers had a different system for calculating costs, because

they offered different technology to Dell, which explains the differences between their pricing and Sony's and makes their pricing irrelevant to Sony's pricing. In the particular context, the information at issue, which relates only to small adjustments to independently negotiated ODD prices for lead-free, was therefore not of such a kind as to harm competition.

92 The Commission disputes the applicants' arguments.

93 It should be pointed out that the applicants do not dispute the existence of the contact between Sony and HLDS referred to in that recital of the contested decision, but submit, in essence (i) that the information at issue relates only to small adjustments and (ii) that that information could have been provided by Dell.

94 As regards Sony's internal email of 21 September 2004, which was also sent to Lite-On, it should be observed that Sony explains in that email that it spoke with several persons and that it obtained information concerning pricing proposals for lead-free products of one of their competitors. In that email, it is stated that that competitor proposes lower additional costs for slim drives than for HH drives, on account of a technical difference. Similarly, it is stated in that email that, for that reason, that competitor proposes USD 0.5 for slim drives and USD 1 for HH drives. The email also states that that is the reason why Dell '[was] so surprised when [Sony] proposed [USD] 0.22 for HH and over [USD] 1 for Slim'. The fact that Dell was 'so surprised' indicates that it was not the source of the information. It must be assumed that Dell expected Sony to know the first competitor's proposal and to make it proposals commensurate with those of the first competitor.

95 In the email, it is added that that was also confirmed by another HH CDRW competitor. That therefore confirms that Sony checked with its competitors.

96 The applicants are therefore wrong to claim that the information at issue might have come from Dell.

97 Moreover, it must be stated that that information was significant. The prices that Sony had proposed to Dell without knowing the prices of that first competitor are very different from those proposed by the first competitor: whereas Sony had proposed USD 0.22 for HH drives and over USD 1 for slim drives, that first competitor had proposed USD 0.5 for slim drives and USD 1 for HH drives. Given that it was an ongoing negotiation, it was still open to Sony, at the time of the exchange in question, to change its proposal.

98 The significance of that information is confirmed by Dell's reaction, as was reported (see paragraph 94 above).

99 The applicants are therefore also wrong to claim that the information related only to small adjustments.

100 Such a conclusion must also be drawn in relation to Sony's email to Lite-On of 24 September 2004 asking it whether it could 'check [this point] with [TSST] and HLDS'. Sony considers that that information is sufficiently important that it be checked with the competitors.

101 Contact 6 was therefore capable of contributing to a body of evidence.

– *Recitals 171 to 174 of the contested decision (contact 7)*

102 According to recitals 171 to 174 of the contested decision, prior to the internet negotiations organised by Dell on 3 and 4 November 2004, Sony discussed with HLDS the strategy to be followed for the internet negotiation concerning HH DVD-ROMs. Thus, an internal Lite-On email states that Lite-On had discussions with Sony ('Talked to [Sony]') and obtained the following information: '(1) HLDS has stated that they are willing to be [number] 1 in the DVD [internet negotiation]. [(2)] As for TSST, they will keep the ranking in [number] 1 [or] [number] 2. Note: based on the information on hand that means TSST & HLDS [will compete against] each other again on pricing if Lite-On does not go [aggressively] on the DVD [internet negotiation] on 3 [November]'. In addition, an internal HLDS email of 3 November 2004 concerning the 'competitors' status update report for HH DVD-ROM which will be held on [3 November]

at 7:30 am … Austin time' states that 'since the current price is already lowered, Sony/Lite-On will stay at this price rather than decrease it more to get more quantity'.

103 According to the applicants, first, as regards the internal Lite-On email of 2 November 2004, there is nothing untoward in Lite-On discussing with Sony, since Sony and Lite-On were cooperating closely. Nor is there any reason to think that the information referred to came from Sony. Second, as regards the HLDS email of 3 November 2004, the applicants maintain that Sony/Lite-On did not behave in the manner described in the HLDS email ('Sony/Lite-On will stay at this price rather than decrease it more to get more quantity'), which undermines any inference that any communication was intended to reduce competition. The applicants explain that, following the internet negotiation of 3 November 2004, Lite-On sent an internal email containing rankings and pricing for HLDS, TSST and Lite-On. Third, the applicants maintain that no email had a negative effect on competition, since it seems that Sony/Lite-On thwarted any agreements between TSST and HLDS by doing the opposite of what HLDS expected and submitting aggressive bids. According to the explanations provided by HLDS, 'Sony/Lite-On undercut the prices quoted by TSST and HLDS and took the first rank for February 2005'. The applicants state that HLDS subsequently wrote, in an internal email of 4 November 2004, that 'the price itself was at the bottom in the auction, and Dell had to admit this', confirming that the internet negotiation was competitive. The applicants add that, contrary to what the Commission asserts in the contested decision that the bidding was not aggressive, Dell's procurement records show that, in the internet negotiation held on 3 November 2004, Lite-On, as the designer and manufacturer of the ODDs nominally being sold by Sony, took first place, dropping the price by almost 60 cents by comparison with the previous day. TSST also reduced its price by 40 cents.

104 The Commission disputes the applicants' arguments.

105 It should be pointed out that, with respect to Lite-On's internal email of 2 November 2004, the applicants submit that there is no reason to think that the information about HLDS that was contained in that email came from Sony. However, as the Commission contends, the wording of that email shows that that information came from Sony ('[I] talked to [Sony]'). It is not plausible that Lite-On would have referred to Sony in one single sentence together with the information gathered about competitors' intended future rankings if the information stemmed from a source other than Sony. It also seems clear that Sony obtained the information from HLDS ('HLDS has stated').

106 Moreover, it cannot be denied that the information, given on 2 November 2004, revealing the ranking intentions of TSST and of HLDS and according to which 'TSST & HLDS [will compete against] each other again on pricing if Lite-On does not go [aggressively] on the DVD [internet negotiation] on 3 [November]' was capable of removing uncertainties concerning the intended conduct of its competitors.

107 As was noted in paragraph 59 above, according to the case-law, an exchange of information is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

108 In that regard, the Court has already held that the mere disclosure of commercially sensitive information to competitors amounts to a prohibited practice since it removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information (see judgment of 16 September 2013, *Wabco Europe and Others* v *Commission*, T−380/10, EU:T:2013:449, paragraph 124 and the case-law cited).

109 As regards HLDS's internal email of 3 November 2004, in relation to which the applicants submit that the information that 'Sony/Lite-On will stay at this price rather than decrease it more to get more quantity' is incorrect in the light of what emerges from Lite-On's internal email of 3 November 2004, it should be noted that the applicants do not explain why that information should be considered to be incorrect. It should be borne in mind that it is not for the Court to seek and identify, in the annexes, the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and

instrumental function (judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T−111/08, EU:T:2012:260, paragraph 68 and the case-law cited).

110 Lastly, as regards the applicants' third argument, in respect of which the references to the annexes are moreover also not very enlightening, according to which the internet negotiation was competitive because Sony/Lite-On and TSST dropped their prices from January to February, it must be stated, in any event, that, in the contested decision, the Commission relied not on the fact that bids did not come down, but on the fact that competitor contacts reduced uncertainty and that the ODD suppliers involved, by not acting independently, reduced the competitive risk. Through the contacts, they had an indication of the price level of their competitors.

111 Moreover, the finding, in recital 174 of the contested decision, that the internet negotiation was not aggressive, contrary to the applicants' submission, is confirmed by HLDS's internal email of 4 December 2004, produced by the Commission in its defence, according to which '[the] DVD-ROM price had gone down in advance, so the auction closed without any significant price decrease'. In that regard, it should be pointed out that the applicants adduce no evidence to dispute that email.

112 Lastly, it should be observed that, even if the exchanges referred to in recitals 171 to 174 of the contested decision included information that was not definitive, or not genuine, they were intended to reduce uncertainty as to the competitors' future conduct. Moreover, it is apparent from oral statements transcripts of which were provided by the parties ('the oral statements') that Sony regularly passed on to Lite-On pricing information that it had obtained from competitors.

113 Thus, it must be concluded that contact 7 is also capable of contributing to a body of evidence.

– *Recital 176 of the contested decision (contact 8)*

114 According to recital 176 of the contested decision, on 26 February 2005, after the internet negotiation opened by Dell on 24 February 2005 for the period April and May 2005 for HH Combo drives, HLDS stated in an internal email the ranks and prices of TSST, HLDS and Sony for April and May 2005, adding that it had 'confirmed [the result] with each company via phone'. The Commission stated, in that recital, that, although HLDS's phone records show only calls with TSST, and not with Sony or Lite-On, the internal email of 26 February 2005 mentions Sony and TSST as sources of information and states that HLDS must have contacted Sony by other means, for example by fixed line.

115 In the first place, the applicants maintain that the assertion in that recital that 'the missing entry for the call with Sony only means that [HLDS] contacted Sony by different means, for example from his fixed line' is speculative and cannot be upheld. It must no doubt be assumed that HLDS obtained that information from Lite-On, or indeed from Dell. In that regard, there is nothing in the file to indicate that Sony was aware of the contacts between Lite-On and HLDS. In the second place, the applicants maintain that the information alleged to have been communicated was historic and it cannot be reasonably inferred from the evidence that the information contributed to any anticompetitive objective: on the contrary, it unambiguously shows that competition by Sony led to what HLDS described as an 'unexpected result', namely to Sony's being ranked first for May.

116 The Commission disputes the applicants' arguments.

117 It should be pointed out that, by its internal email of 26 February 2005, provided by the applicants in annex to the application, HLDS gave the final result of the internet negotiation opened by Dell for HH Combo in the following terms: 'This is what I confirmed with each company via phone regarding yesterday's final [internet negotiation] result; April: TSST [USD] 25.99; HLDS [USD] 26.45; Sony [USD] 26.88; May: Sony [USD] 25.97; TSST [USD] 25.99; HLDS [USD] 26.00'. HLDS further states that, 'since Sony/Lite-On was 3rd rank in April, we expected its goal to be 2nd rank in May. TSST [is] also surprised [by] this unexpected result, [that] Sony took 1st rank in May'. That email goes on to state that 'the one thing obvious is that HLDS is not a cost leader anymore' and that 'if [HLDS] cannot take any 1st rank in

other products like HH, in [the] Slim [internet negotiation] next week, it might be an excessive disadvantage to us in [the] SATA 16X DVD+W selection'.

118 The applicants submit (i) that there is no proof of the existence of a contact between Sony and HLDS and (ii) that information that might have been passed on at that alleged contact did not contribute to any anticompetitive objective.

119 First, as regards proof of the existence of a contact between Sony and HLDS, it should be pointed out that, whereas it is stated in the latter's internal email that there was a telephone contact between Sony and HLDS ('I confirmed [the result] with each company via phone'), that alleged contact does not appear in the available phone records.

120 As the Commission observes, the most credible explanation is that HLDS and Sony were in contact on a telephone line other than that the records of which were provided to the Commission. Moreover, contrary to the applicants' premiss, it is unlikely that the information came from Dell, since it was not in its interest to distort competition.

121 The applicants' other premiss is that the information came not from Sony, but from Lite-On. The statement that 'Sony/Lite-On was 3rd rank in April' indicates that HLDS did not distinguish clearly between Sony and Lite-On. It should be pointed out that there was a high degree of overlap between the activities and interests of Sony and Lite-On.

122 According to the explanations provided by the applicants in their application, Sony and Lite-On were associated by a strategic, profit-sharing venture. Under these arrangements, Lite-On designed and manufactured certain ODD products ultimately sold under the Sony brand. Customer contracts and purchase orders were formally concluded with Sony, and the buyer paid Sony in the first instance, but the vast majority of these revenues were allocated to Lite-On. Sony retained only a small, pre-set percentage of revenues generated from the sale of products designed and manufactured by Lite-On. Pricing (the opening price and bottom price) and strategy for drives manufactured and designed by Lite-On were therefore usually set in conjunction with Lite-On.

123 Thus, there is only one product marketed under the Sony brand, namely the 'Sony/Lite-On' product. It is therefore normal that HLDS's email refers to 'Sony/Lite-On' as if it was a single entity.

124 In addition, those two entities did not merely share revenue, but also information on competitors' prices (see paragraphs 75, 90 and 102 above). In particular, in an email from Sony to Lite-On of 24 September 2004, Sony, after stating that it had already obtained information from HLDS concerning prices for slim drives and HH drives, requested Lite-On to contact HLDS and TSST for confirmation. There were similar exchanges in 2006 (see paragraphs 158, 172, 184 and 189 below). It is therefore probable that, in 2005, Sony and Lite-On did not behave differently.

125 Accordingly, even if the information regarding the price of Sony/Lite-On's Combo HH was given to HLDS by Lite-On, it is highly probable that that information was not passed on without Sony's knowledge.

126 Second, as regards the usefulness of information on the rankings and prices of an internet negotiation that had already been completed, it must first of all be stated that HLDS found that information useful: 'if [HLDS can no longer] take any 1st rank in other products like HH, in [the] Slim [internet negotiation] next week, it might be an excessive disadvantage to us in [the] SATA 16X DVD+W selection'. It is clearly apparent from that passage that HLDS, on learning of its rank and the prices of some of its competitors, understood that it would have to make an improved proposal for the negotiation which was to take place the following week for another product.

127 That email appears, indeed, to confirm the Commission's assertion that knowledge of past results was highly relevant information for competitors, both for monitoring purposes and with a view to future contracts.

128 Next, it should be pointed out that it is apparent from recital 36 of the contested decision that the participants in the negotiation were not aware of the bids or rankings of the other participants before the negotiation had been completed.

129 In recital 37 of the contested decision, it is explained that, even when an internet negotiation was completed, Dell could cancel it if it found the result unsatisfactory and run a bilateral negotiation instead.

130 It must therefore be stated that knowledge of the results of an internet negotiation that had already been completed might have been immediately useful. If the completed internet negotiation was cancelled, the participants could make a proposal to Dell taking account of the price, which had been considered unsatisfactory, proposed by its competitors.

131 Accordingly, contact 8, in relation to which Sony's involvement must be assumed, is capable of contributing to a body of evidence.

– *Recital 178 of the contested decision (contact 10)*

132 According to recital 178 of the contested decision, between 27 and 29 April 2005 an anticompetitive contact took place between Sony and HLDS concerning the procurement event for HH DVD-ROMs held on 27 April 2005. An internal HLDS email of 29 April 2005 refers to a communication with the '[product managers]' for 'Sony/Lite-On' and TSST, mentioning their respective rankings and prices. There is also a reference to the fact that 'TSST and Sony/LT stated that they included [the] warranty price in [the internet negotiation]' and that 'Sony and TSST both [stated that] their price is middle of [USD] 16.00'.

133 In the first place, the applicants explain that the references to Sony in the chain of email are ambiguous, as they mostly refer to Sony as 'Sony/Lite-On' or 'Sony/LT'. They submit that, as Sony entered that internet negotiation using a Lite-On drive, some information may have come from Lite-On or Dell. Thus, the assertion in that recital that 'the missing entry in the phone records only means that [HLDS] must have contacted Sony by different means, for example from [its] fixed line', is speculative and cannot be upheld. In the second place, the applicants submit that the information alleged to have been communicated related exclusively to past ranking and generalised pricing information, often provided by Dell employees.

134 The Commission disputes the applicants' arguments.

135 First, as regards the origin of the information given to HLDS, it should be noted that, although HLDS states that 'Sony' indicated a price of around USD 16.00, it mentions 'Sony/Lite-On' at all other times in its email.

136 As was stated in relation to recital 176 of the contested decision (see paragraph 114 et seq. above), since Sony and Lite-On sell the same products and share profits from those products, and also share information on their competitors, it may be considered that the reference 'Sony/Lite-On' either designates Sony as the direct source of the information received by HLDS, or suggests that the source was Lite-On, and that Sony could not have been unaware of the exchange between Lite-On and HLDS.

137 Second, as regards the usefulness of information on a completed negotiation, it also follows from what was observed in relation to recital 176 of the contested decision that knowledge of past results may be highly relevant information for competitors (see paragraph 127 et seq. above).

138 Accordingly, contact 10, in relation to which Sony's involvement must be assumed, is also capable of contributing to a body of evidence.

– *Annex I to the contested decision (contact 14)*

139 The applicants submit that the 'actual body' of the contested decision does not contain the slightest description or explanation relating to the 14th contact alleged in Annex I to that decision and thus breaches

Sony's rights of defence, as Sony is required to guess the nature of the allegation. Moreover, in their submission, the documents on which the Commission relies do not substantiate the inference that Sony provided the information in HLDS's email of 29 September 2005, which forms the subject matter of the 14th allegation.

140 The Commission disputes the applicants' arguments.

141 It must be stated, in any event, that, in the contested decision, the Commission did not draw any conclusion relating to contact 14. Accordingly, the applicants' line of argument in relation to contact 14 must be rejected as ineffective.

– *Recital 180 of the contested decision (contact 16)*

142 According to this recital, an internal HLDS email of 12 December 2005 concerning 'the Slim Combo [internet negotiation held this morning]' revealed the ranks and prices of both TSST and 'Sony/[Lite-On]' for bare drives and four other module adders for February and March 2006. In addition, an oral statement by HLDS confirms that HLDS had contacts with competitors not only before but also after the negotiation. Lastly, HLDS's phone records show that telephone contacts took place with TSST and Sony on the actual day on which the email was sent. In the case of Sony, a telephone conversation took place on 12 December 2005 between 7.48 a.m. and 10.28 a.m., that is to say, before the email was sent by HLDS. The recital states that the call lasted only one minute, which might mean that the call did not take place.

143 The applicants dispute the assertion that Sony provided information to HLDS about its results for internet negotiations, which had already been completed, of December 2005. They state that HLDS's leniency statement does not identify Sony as a source of information and, furthermore, there was a single telephone call between HLDS and Sony and it lasted only for one minute. As regards the second internet negotiation held on 14 and 15 December 2005, HLDS's reference to 'competitors' is not sufficient either.

144 The Commission disputes the applicants' arguments.

145 As was already observed, the fact that HLDS's internal email of 12 December 2005 mentions the ranking of 'Sony/[Lite-On]', and not of Sony, is not necessarily significant. With regard to the telephone conversation between HLDS and Sony of 12 December 2005, which took place before HLDS sent the email of the same day, the Commission itself observed, in recital 180 of the contested decision, that, given the brevity of the call, it was not certain that a conversation had taken place.

146 It must however be pointed out that the telephone call preceding the internal email took place on the same day. It may thus be reasonably assumed that there was a connection between the two exchanges in question or that they related to the same subject.

147 As regards the usefulness of that information, as was observed above, exchanges regarding prices and former rankings are capable of reducing the uncertainty related to the competitors' future conduct.

148 Contact 16 therefore appears to be capable of contributing to a body of evidence.

– *Recital 184 of the contested decision (contact 21)*

149 According to recital 184 of the contested decision, in its internal email of 19 April 2006 Philips stated that it had had contacts with competitors concerning Dell's request to reduce prices for the Slim Combo internet negotiation to be held later that day: 'I have talked with my friends and they are all pushing back. I have already spoken with [Dell] and told [it] we would not participate if it was [USD] 0.80'. The recital states that, according to its oral statements, Philips recalls having talked to Sony, TSST and possibly HLDS, and would not have threatened Dell not to participate in the internet negotiation had there not been coordination among all internet negotiation participants. The recital adds that Dell's bidding records

confirm that the competitors which participated in that Slim Combo internet negotiation were the same as the undertakings contacted by Philips, namely Sony, TSST and HLDS.

150 The applicants emphasise that the Philips email does not state the identity of its 'friends' and that its phone records show no communication with Sony between 4 and 19 April 2006. The applicants also observe that in its second leniency statement, of 3 February 2009, PLDS observed, with respect to allegation 21, that the expression 'my friends' referred to 'contacts at competitors', but did not mention Sony. It was only in PLDS's seventh leniency statement, of 13 April 2010, that Philips recalled having spoken with Sony about its 'thoughts on this rule', which is inconsistent with the fact that there is no reference to that conversation in the phone records. Furthermore, the alleged contact does not relate to specific future pricing or quantities for ODDs but simply to a change in the internet negotiation rules proposed with the aim of reducing the duration of those negotiations. There is no evidence that that contact may have had a sufficiently negative effect on competition. Thus, the Dell bidding records not only do not show any coordination involving Sony, but reflect aggressive price reductions with varying final results among competitors.

151 The Commission disputes the applicants' arguments.

152 As regards whether contact 21 took place, it is irrelevant, contrary to the applicants' submission, that the identity of the 'friends' was not provided promptly by HLDS as of its second oral statement. Moreover, the applicants adduce no evidence capable of calling into question the identification of Sony as one of those 'friends', and the lack of identification in Philips' phone records cannot suffice in that regard.

153 Moreover, according to the oral statement of a participant in the cartel, Sony regularly exchanged information with competitors during the infringement period.

154 As regards the usefulness of contact 21, it is clearly apparent from the wording of Philips' email that it discussed future pricing and not merely, as the applicants claim, a change in the internet negotiation rules. The discussion was triggered by Dell's request to significantly lower the starting price of the bid to USD 0.80. That email states that the ODD suppliers acted in concert and agreed that they would not participate in the bid if Dell maintained that starting price.

155 It must therefore be stated that, by that cartel, the suppliers concerned did not determine independently the commercial policy which they intended to adopt on the market for the purposes of the case-law (judgment of 28 May 1998, *Deere* v *Commission*, C−7/95 P, EU:C:1998:256, paragraph 86).

156 It should also be noted that, according to that email, following the reaction of those suppliers, Dell reduced those price requirements by USD 0.30. This is clearly a question of price.

157 Accordingly, contact 21 appears capable of contributing to a body of evidence.

– *Recital 184 of the contested decision (contact 22)*

158 According to recital 184 of the contested decision, Sony stated in an internal email, also addressed to Lite-On, dated 20 April 2006, at 8.34 p.m., after an internet negotiation for Slim DVDRWs held at 6.00 p.m. on the same day, that it had had contacts with TSST. In that email, Sony provides TSST's prices for June and July and explains that TSST was very upset at having lost the July contract: 'They were very upset they lost July … they wanted [to be number] 1 in both months'. According to this recital, the wording of Sony's email, with reflections inherently internal to TSST immediately after the internet negotiation, clearly show that Sony was in contact with TSST. The recital refers to oral statements according to which Sony obtained pricing information from competitors and passed it on to Lite-On.

159 First, the applicants submit that there is no direct evidence of any communication between Sony and TSST. In addition, the email of 20 April 2006 shows that Dell spoke to Sony on the same day, before the internet negotiation: '[Dell] said that it is important for Sony to do well tonight, it will position us well for

the [internet negotiation] next Monday'. It is therefore plausible that TSST expressed its disappointment to Dell about the internet negotiation results and that Dell then told Sony. Second, the applicants claim that the Commission provides no basis on which to conclude that the mere fact of reporting that a competitor was upset or disappointed at the results of a bid would constitute an infringement 'by object'.

160 The Commission disputes the applicants' arguments.

161 As regards whether contact 22 took place, as the Commission observes, the sentence 'they were very upset they lost July… they wanted [to be number] 1 in both months' seems to indicate confidential information coming from TSST itself.

162 That interpretation is moreover borne out by the oral statements mentioned in that recital, stating that Sony obtained pricing information from competitors and generally passed it on to Lite-On.

163 The applicant's explanation that it was Dell which might have given Sony information on TSST does not appear very convincing, given that Dell had no interest a priori in disclosing to Sony TSST's prices and attitude once the procurement event in question had closed. When Dell contacted its suppliers, it was probably with the purpose of encouraging them to make an attractive bid. Thus, in the email to which the applicants refer, which appears in a chain of internal Sony emails, in which Lite-On is still in copy, it is stated that Dell had contacted Sony prior to the bid in an attempt to receive an attractive bid from Sony: '[Dell] has pointed out that based on last night['s] results, there is severe pressure on Sony/Lite-On to perform well tonight … [It] is expecting a competitive bidding tonight. [It] said that it is important for Sony to do well tonight, it will position us well for the [internet negotiation] next Monday for either Q-3, or Q-4 slot for Slim DVDRW refresh.'

164 As regards the usefulness of that contact, contrary to what the applicants suggest, if Sony contacted TSST, it was not in order to know whether or not it was 'disappointed', but to have information on TSST's bidding prices.

165 In that regard, a price relating to a past negotiation could be useful. As was explained in recitals 136 and 137 of the contested decision, the bidding rules almost always required the opening bid to be the lowest priced bid in the previous negotiation for the same product, as documents submitted by the Commission in annex to its pleadings show. This removed a great deal of uncertainty regarding the course of the bidding, especially because the knowledge about the past prices and rankings could be combined with other information that was exchanged, such as desired ranking and bidding intentions in upcoming events.

166 Thus, it is stated in Dell's procurement rules published in February 2006 that '[the o]pening bid will be you[r] price from the previous month', and, in capital letters, 'you must enter your previous month's price as your first bid before each … auction starts'. Dell also stated, in a reply of 30 September 2009 to a request for information from the Commission, that invitations to bid were normally sent to the suppliers before bidding events, and that it was almost always stated therein that the required opening bid was the lowest priced bid in the previous negotiation for the same product.

167 Moreover, as the Commission observes, several items of evidence in the file also show that the competitors would often maintain previous prices for further bids.

168 Thus, an internal PLDS email, dated 6 November 2007, indicates a price proposed by Sony Optiarc for a certain product for January 2008 and specifies that '[it] will most likely not move … [in February 2008 and March 2008]'. According to HLDS's internal email of 4 December 2004, Dell complained about the price for CD-RWs proposed by HLDS in 'February …, which was [the] same as [the] January one'. HLDS's internal email of 3 November 2004 states that 'Sony/Lite-On will stay at this price rather than decrease it more to get more quantity'. Recital 336 of the contested decision notes that an internal HLDS email from October 2007 states, in relation to DVD-ROMs, that 'the current initial price ([USD] 13.70) is likely to be maintained without adjustment during the auction'. Recital 208 of the contested decision notes that an internal HLDS email from August 2007 states lastly that, 'since [the] first round will be closed this week,

we ask that the price … be adjusted to the price that PLDS bid at the previous auction'. In an internal email of 18 April 2006, Philips states that 'it could be very likely that everyone's position in June/July would remain as May's where we are at ranking 4'. Recital 186 of the contested decision notes that an internal HLDS email states that the CD-ROM price 'has not changed … for over 8 months'. An HLDS internal email of 23 June 2008 states that it would offer the same price for a certain product for September and October 2008. Similarly, an internal PLDS email of 30 October 2008 states: 'Here [are] the results for the 12.7 mm Slim Tray DVDRW: PLDS: [USD] 24.60 [number] 4, TSST: [USD] 24.19 [number] 1 (same price as [December 2008]), HLDS: [USD] 24.23 [number] 2 (same price as [December 2008]), Optiarc: [USD] 24.25 [number] 3 (same price as [December 2008])'.

169 The applicants cannot therefore maintain that information on a price from an auction that had already closed is not capable of removing a great deal of uncertainty regarding the course of the bidding.

170 Contact 22 thus appears to be capable of contributing to a body of evidence.

– *Recital 187 of the contested decision (contact 25)*

171 According to recital 187 of the contested decision, Sony had anticompetitive contacts in May and June 2006.

172 This recital refers first of all to an email from Sony to Lite-On dated 23 May 2006, describing a meeting which it had with Dell concerning a new Dell proposal for a tender. The email states that the proposal would not be sent to all ODD suppliers and that Sony had succeeded by exchanging with its competitors in confirming that 'at least TSST, and Philips have been approached with this proposal. I am trying to confirm others'. The recital then cites an email from Lite-On to Sony, dated 24 May 2006, asking it to 'provide NEC's pricing', since 'this will help us plan for Sony/Lite-On's pricing strategy'. The recital also cites an internal Sony email of 25 May 2006, in response to that request, stating that: 'I believe both NEC and HLDS will go around the [internet negotiation] price — as they bid for Q3 as well'. The recital further cites two Lite-On emails of 25 May 2006. The first is an internal email, which expresses thanks 'for this valuable information' and the other, addressed to Sony, contains the following request: '[please] collect all possible prices [information] if [that] is necessary for another prices [negotiation]'. The recital refers, lastly, to an internal Lite-On email of 1 June 2006 confirming that Lite-On asked Sony for information about competitors, including about prices, and that Sony provided that information: ['Here is the information that I received from Sony … Note: according to Sony, NEC was behind HLDS each quarter by USD 0.10'.]

173 The applicants submit that the only information that apparently relates to prospective pricing consists in a general speculation by Sony: 'I believe both NEC and HLDS will go around the [internet negotiation] price'. According to the applicants, the information thus provided was not attributed to any contact with NEC or HLDS, was not specific and was rapidly superseded by subsequent negotiations with Dell. The documents relied on also confirm that Dell employees supplied Lite-On with information about competition in connection with those negotiations ('the price I input [is] based on the feedback from [Dell] stating that most of the supplier[s] are [around] USD 0.10 from each other') and that other suppliers were at times unwilling to share information (Lite-On wrote, without copying in Sony: 'I am not able to get the price [be]cause [NEC's sales] account manager is not willing to share information').

174 The Commission disputes the applicants' arguments.

175 It must be stated that, contrary to the applicants' submission, the actual wording used in the emails to which recital 187 of the contested decision refers suggests that the information is not speculative and that it is useful.

176 Thus, the expression used by Lite-On, expressing thanks for the 'valuable information' after asking to know 'NEC's pricing', proves that that information was not speculative, but useful.

177 Armed with that ‘valuable information’, Lite-On then asked Sony to collect other ‘possible prices [information] if [that] is necessary for another prices [negotiation]’, which confirms the value of the initial information received. It should be noted that Sony replied to that request, as Lite-On’s email of 1 June 2006 shows.

178 In that regard, it should be pointed out that the latter exchange between Sony and Lite-On supports the oral statements according to which it was usual for Sony to obtain pricing information from competitors and to pass it on to Lite-On.

179 According to the case-law, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market. Such a concerted practice is caught by Article 101 TFEU, even in the absence of anticompetitive effects on the market (judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C−286/13 P, EU:C:2015:184, paragraph 127). It may therefore be presumed that Sony took account of the information exchanged with its competitors in determining its conduct on the market.

180 Moreover, although the applicants argue that the information could also have been obtained from Dell because Dell had also provided Lite-On with other feedback in connection with the negotiations (namely that most of the suppliers were USD 0.10 from each other), they provide no plausible explanation as to why Dell would have communicated the bidding prices of other ODD suppliers to Sony, all the more so because, according to recital 313 of the contested decision, Dell had established a policy of not disclosing sensitive information, in particular the prices of the participants in the internet negotiations. It should further be borne in mind that, if Dell contacted ODD suppliers, it did so in its own interest in order to receive attractive offers (see paragraph 163 above).

181 Lastly, although, as the applicants submit, not all ODD suppliers were always willing to share pricing information with Sony (‘[NEC’s sales] account manager is not willing to share information’), the non-systematic nature of those intentions cannot call into question the fact that Sony had anticompetitive contacts with other suppliers, sometimes on its own initiative, as its email of 23 May 2006 illustrates: ‘I am trying to confirm others’.

182 Contact 25 therefore appears to be capable of contributing to a body of evidence.

– *Recital 187 of the contested decision (contact 3)*

183 According to recital 187 of the contested decision, Sony had a contact of an anticompetitive nature with TSST and HLDS on 1 June 2006 concerning a cost reduction request from Dell.

184 According to this recital, in an internal email of 1 June 2006, Lite-On stated that: ‘[Sony] also mentioned that TSST stated [that Dell is also disappointed with TSST’s cost proposal] but TSST did not state the ranking they are position[ed in] now’ and that, ‘as for Hitachi-LG, [Sony] is still not able to reach HLDS account manager due to long week end holiday’ and that ‘[it] will try to contact HLDS account manager today to get more information from him’. The recital also cites the passage from that email stating that Lite-On concluded, on the basis of the information received from TSST, that Dell ‘is trying to bluff on this situation to push supplier to further cost reduction’.

185 The applicants maintain that this communication is limited to vague expressions indicating that Dell was not content with TSST’s current pricing, suggesting that the prices would continue to decline and would be likely, if it had any relevance at all, to encourage Sony and Lite-On to look for other ways to lower costs and compete. In their submission, there is no evidence that Sony acted in a coordinated manner in connection with those ongoing discussions with Dell or made any effort to limit competition in any other way.

186 The Commission disputes the applicants' arguments.

187 It should be noted that that Lite-On email indicates that Sony was in contact with TSST ('TSST stated') and that it sought to connect with HLDS to obtain information on Hitachi-LG ('As for Hitachi-LG, [Sony] is still not able to reach HLDS account manager'). Whilst that contact does not appear to reveal directly relevant information, it is at least evidence of Sony's desire to obtain information on its competitors in order to reduce uncertainty in terms of future strategy and, on that basis, appears to be capable of contributing to a body of evidence.

– *Recital 194 of the contested decision (contact 39)*

188 According to recital 194 of the contested decision, Sony, before submitting a bid to Dell for HH Combo, had anticompetitive contacts with HLDS and TSST in September 2006.

189 According to that recital, in an internal email of 15 September 2006, in which Lite-On was copied, Sony states: 'I have heard from our 2 key competitors that they will be aggressive to keep the [total available market] they have in Q-3. This combined with a new supplier fighting for a slot makes this offer out of line. We need to get close to the Dell requested price of [USD] 18.65 by at least January'.

190 The applicants submit that the email in question did not disclose any specific intention as regards future pricing or rankings. At most it indicates general statements of aggressiveness. The full exchange between Sony and Lite-On shows that Sony was pressing Lite-On, Sony's partner, in order to obtain lower prices.

191 The Commission disputes the applicants' arguments.

192 In that email, Sony clearly states that it had had contact with its two key competitors ('I have heard from our 2 key competitors that they will be aggressive'). Moreover, the information derived from that contact was useful, since Sony draws from it the conclusion that the price that it was going to propose in conjunction with Lite-On would have to be revised.

193 Accordingly, contrary to the applicants' submission, it must be stated that that information, which was obtained from competitors, was useful information. In that regard, the applicants' argument that Sony put pressure on Lite-On to change the price cannot call into question that finding.

194 The applicants' arguments relating to recital 194 of the contested decision must therefore be rejected.

195 It follows that the Commission was entitled, without committing any errors and without infringing its obligation to state reasons, to find, in the light of the evidence and indicia which could be taken into account, considered as a whole, that the applicants had participated in an infringement 'by object' of Article 101 TFEU.

196 Consequently, the first part of the first plea must be rejected.

Second part: lack of evidence of a 'single and continuous' infringement

197 In essence, the applicants state, first, that, according to the case-law, the Commission is required to assess specifically whether the period separating two manifestations of infringing conduct is sufficiently proximate to establish that those manifestations constitute an infringement that is truly continuous in nature. However, the Commission did not carry out that assessment. Second, the Commission did not demonstrate that Sony was aware of the existence of a common objective and intended to contribute to it. Third, there is no evidence that Sony took part 'in nearly every auction' in a 'systematic' sharing of future intentions (contested decision, recitals 109 and 110). Fourth, unlike the other ODD suppliers, Sony made no attempt to conceal its conduct, and, on the contrary, sometimes bid aggressively in the auctions. Fifth, the Commission fails to take account of the fact that, for the same period, only 12 contacts are alleged against Sony, whereas 34 contacts are alleged against HLDS, 26 against TSST, and 30 against Lite-On.

198 The Commission disputes the applicants' arguments.

199 It should be recalled that the fact that there is a single and continuous infringement does not necessarily mean that an undertaking participating in one or more aspects can be held liable for the infringement as a whole. The Commission still has to establish that that undertaking was aware of the other undertakings' anticompetitive activities at European level or that it could reasonably have foreseen them. The mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice for a finding that the undertaking participated in the overall cartel. Article 101(1) TFEU does not apply unless there exists a concurrence of wills between the parties concerned (judgments of 10 October 2014, *Soliver* v *Commission*, T−68/09, EU:T:2014:867, paragraph 62, and of 9 September 2015, *Toshiba* v *Commission*, T−104/13, EU:T:2015:610, paragraph 52).

200 Accordingly, it is only if the undertaking knew or should have known when it participated in an agreement that in doing so it was joining in the overall cartel that its participation in the agreement concerned can constitute the expression of its accession to that cartel (judgments of 20 March 2002, *Sigma Tecnologie* v *Commission*, T−28/99, EU:T:2002:76, paragraph 45; of 16 November 2011, *Low & Bonar and Bonar Technical Fabrics* v *Commission*, T−59/06, not published, EU:T:2011:669, paragraph 61; and of 30 November 2011, *Quinn Barlo and Others* v *Commission*, T−208/06, EU:T:2011:701, paragraph 144). In other words, the Commission must show that the undertaking intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the unlawful conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk (judgments of 10 October 2014, *Soliver* v *Commission*, T−68/09, EU:T:2014:867, paragraph 63, and of 9 September 2015, *Toshiba* v *Commission*, T−104/13, EU:T:2015:610, paragraph 53).

201 The undertaking concerned must therefore be aware of the general scope and the essential characteristics of the cartel as a whole (judgments of 10 October 2014, *Soliver* v *Commission*, T−68/09, EU:T:2014:867, paragraph 64, and of 9 September 2015, *Toshiba* v *Commission*, T−104/13, EU:T:2015:610, paragraph 54).

202 Where that is the case, the fact that an undertaking did not take part in all the constituent elements of a cartel or that it played only a minor role in the elements in which it did participate must be taken into consideration only when the gravity of the infringement is assessed and, as the case may be, in determining the amount of the fine (judgment of 10 October 2014, *Soliver* v *Commission*, T−68/09, EU:T:2014:867, paragraph 65; see, to that effect, judgments of 8 July 1999, *Commission* v *Anic Partecipazioni*, C−49/92 P, EU:C:1999:356, paragraph 90, and of 14 May 1998, *Buchmann* v *Commission*, T−295/94, EU:T:1998:88, paragraph 121).

203 In the present case, it is apparent from the contested decision that, according to the Commission, the cartel consisted of a regular and clearly distinguishable network of collusive, largely bilateral contacts forming an overall plan. All addressees shared their future intentions about strategy as to the price or ranking in the impending procurement events. The parties further coordinated their behaviour during the procurement events and regularly and systematically monitored the results of past procurement events. As a result, the parties were able to determine in advance the parameters of their competition in bidding events and did not necessarily need to bid as aggressively to achieve a certain desired position (contested decision, recital 354). Accordingly, in the contested decision, the Commission found that the addressees of that decision pursued a single aim, namely to distort the normal operation of competition for ODD procurement events organised by Dell and HP with respect to defining parameters such as price and ranking dictating volume allocation as well as with respect to other commercially sensitive information (contested decision, recital 355).

204 Moreover, the Commission observed, in the contested decision, that the individual collusive contacts concerned the same product, had similar content, were applied throughout the cartel period, involved largely the same parties, had a global character and pursued the same objective, to distort the normal operation of competition for ODD procurement for Dell and HP. The Commission concluded, in the

contested decision, that such circumstances clearly display a link of complementarity and represent objective indicia of an overall plan put into effect by a uniform group of undertakings (contested decision, recital 354).

205 It should be noted at the outset that, as was established in the examination of the first part of this plea, the Commission was entitled, without committing any errors and without infringing its obligation to state reasons, to find, in the light of the evidence and indicia which could be taken into account, considered as a whole, that the applicants had participated in an infringement 'by object' of Article 101 TFEU.

206 First, as regards the applicants' argument that the Commission did not assess whether the periods separating the contacts were sufficiently short to establish a continuous infringement, it should be borne in mind that the fact that the evidence of the existence of a continuous infringement was not adduced for certain specific periods does not preclude the infringement from being regarded as having been established during a more extensive overall period than those periods, provided that such a finding is based on objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that a cartel reveals itself at different periods, which may be separated by more or less lengthy intervals, has no impact on the existence of that cartel, provided that the various actions which form part of the infringement pursue a single aim and come within the framework of a single and continuous infringement (judgment of 21 September 2006, *Technische Unie* v *Commission*, C−113/04 P, EU:C:2006:593, paragraph 169).

207 In the present case, it should be pointed out that it is apparent from the foregoing that the intervals between the contacts were generally not more than two or three months. Sony appears even to have had two contacts in the same month, in April 2016 (see paragraphs 149 and 158 above, contacts 21 and 22).

208 Second, as regards the applicants' argument that the Commission did not demonstrate in the contested decision that Sony was aware of the existence of a common objective and intended to contribute to it, it must first of all be stated, in relation to that awareness, that it is apparent from emails sent to Sony cited in recital 369 of the contested decision, namely Lite-On's email to Sony of 24 August 2004 stating '[TSST quoted USD] 0.10 to Dell for the screws' (see paragraph 75 above) and Lite-On's email of 25 September 2004 to Sony indicating to Sony, at its request, that it 'will try to check with TSST & HLDS' (see paragraph 90 above) that Sony knew that Lite-On had contacts with TSST and HLDS, and that those competitors exchanged pricing information with each other.

209 It may also be noted that the applicants never publicly distanced themselves from the cartel, nor reported it to the administrative authorities, which effectively encouraged the continuation of the infringement and compromised its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C−204/00 P, C−205/00 P, C−211/00 P, C−213/00 P, C−217/00 P and C−219/00 P, EU:C:2004:6, paragraph 84).

210 It must therefore be held that the arguments put forward by the applicants are not sufficient to call into question the Commission's finding that Sony was aware of competitors' involvement, and knew or could have reasonably foreseen that these contacts were not isolated, but were united by the same objective and constituted part of a larger ODD cartel consisting of a network of parallel contacts (see contested decision, recital 369).

211 Next, as regards the intention to contribute to that objective, it is also apparent from the foregoing, as is noted in recital 370 of the contested decision, that Sony itself passed on information on its own practices or information relating to its competitors obtained in bilateral contacts.

212 That recital thus cites Lite-On's emails of 2 November 2014 (see paragraph 102 above) and of 1 June 2006 (see paragraph 172 above), the latter stating that Lite-On asked Sony for information about competitors, including about prices, and that Sony provided that information: ['Here is the information that I received from Sony … Note: according to Sony, NEC was behind HLDS each quarter by USD 0.10'].

213 Recital 370 also cites a Sony internal email of 15 September 2006, in which Lite-On was in copy (see paragraph 189 above), stating: ‘I have heard from our two key competitors that they will be aggressive’. That exchange adduces proof of Sony’s contacts with HLDS and TSST.

214 It should also be noted that Sony sometimes took the initiative to seek information, as its emails of 23 and 24 May 2006 prove (see paragraph 172 above). Lite-On’s email of 1 June 2006 also shows that Sony passed on information from HLDS and TSST to Lite-On.

215 It should further be noted that HLDS’s email of 26 February 2005 suggests that Sony discussed with HLDS rankings and pricing in relation to HH Combo (see paragraph 114 above), as does HLDS’s email of 29 April 2005 regarding HH DVD-ROMs (see paragraph 132 above). Sony, moreover, had telephone contacts with HLDS on 12 December 2005 (see paragraph 142 above) and Philips in April 2006 (see paragraph 149 above). It also appears to follow from Sony’s internal email of 20 April 2006 that it was in contact with TSST (see paragraph 158 above).

216 Thus, the applicant’s line of argument cannot suffice to call into question the Commission’s finding that the applicants, inter alia, intentionally contributed to the single anticompetitive and economic aim to distort the normal operation of competition for ODD procurement events organised by Dell with respect to defining parameters such as price and ranking (contested decision, recitals 355 and 357).

217 Third, as regards the applicants’ argument that the Commission produced no evidence that Sony had taken part ‘in nearly every auction’ in a ‘systematic’ sharing of future intentions, given that it is apparent from the foregoing that the applicants intended to contribute to the common objective of the infringement and were aware of the general scope and the essential characteristics of the cartel or could have reasonably foreseen them, it was not for the Commission to prove that Sony had participated in all the auctions. In that regard, the fact that Sony might not have participated in certain discussions cannot suffice to exonerate it.

218 Fourth, as regards the applicants’ argument that Sony, unlike the other competitors, made no attempt to conceal its conduct, it should first be pointed out that that argument is incorrect. It must be stated, on the contrary, that Sony’s emails, even its internal emails, are generally unclear, often not revealing the identity of competitors with which it indicates that it had discussions, which leads to the assumption that it was aware that those contacts were unlawful. Next, in any event, the fact that Sony may not have tried or managed to conceal its conduct to the same extent as the other cartel participants can have no impact on the classification of its conduct as anticompetitive.

219 As regards Sony’s sometimes aggressive conduct in the context of certain auctions, it should be recalled that an undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit (judgment of 28 February 2002, *Cascades* v *Commission*, T−308/94, EU:T:2002:47, paragraph 230). Thus, it must be held that the fact that Sony might have tried to exploit the cartel for its own benefit does not mean that it did not participate in the single and continuous infringement.

220 Fifth, as regards the applicants’ argument that the Commission does not take account, in the contested decision, of the fact that it alleges only 12 contacts against Sony, it must be pointed out that it is apparent from Annex I to the contested decision that the Commission established 24 contacts in relation to Dell during the period of Sony’s participation in the cartel. According to that annex, HLDS and TSST participated in 19 contacts, Philips in 5 contacts and Lite-On in 13 contacts. Even if account is taken of the fact that some of the 12 contacts are not absolutely proved, the number of Sony’s contacts, contrary to what the applicants claim, cannot be classified as minor.

221 It follows that none of the applicants’ arguments is capable of calling into question the Commission’s finding that the infringement in which the applicants participated is a single and continuous infringement.

222 The second part of the first plea must therefore be rejected.

Third part: failure to take exculpatory evidence into account

223 The applicants submit that the Commission ignored or failed to take proper account of the evidence showing that Sony disrupted other suppliers' attempts to rig bids in some of the procurements at issue, as in the context of contact 7 (contested decision, recitals 171 to 174) or in the context of contact 21. The Commission also wrongly ignored evidence such as Sony's requests to Lite-On to reduce prices in order to meet Dell's objectives in the context of the procurement to which contact 39 related. The Commission also ignored or did not sufficiently take into account the evidence proving that competing suppliers had not succeeded in obtaining information from Sony, that they were clearly unaware of its plans or intentions and that Sony frequently engaged in aggressive, unpredictable and disruptive conduct inconsistent with an anticompetitive agreement.

224 The Commission disputes the applicants' arguments.

225 The applicants' arguments, which amount in essence to submitting that the Commission did not take account of the fact that Sony sometimes sought to act only for its own benefit, must be rejected. As was just pointed out, the fact that Sony might have tried to exploit the cartel for its own benefit does not mean that it did not participate in the single and continuous infringement (see paragraph 219 above). Accordingly, the third part of the first plea must be rejected.

Fourth part: breach of the rights of the defence, lack of proof and failure to state reasons

226 According to the applicants, the finding made in the contested decision that Sony participated in 'separate infringements' breaches the rights of the defence, is unproven and is vitiated by a failure to state reasons.

– *Breach of the rights of the defence*

227 The applicants submit that the assertion in recital 352 of the contested decision that each aspect of conduct in respect of the customers concerned or each set of bilateral contacts has as its object the restriction of competition and therefore constitutes an infringement of Article 101(1) TFEU is novel and was not raised by the Commission during the administrative procedure. According to the applicants, since the Commission intended to amend its assessment of the anticompetitive nature of Sony's conduct, it ought to have afforded Sony an opportunity to exercise its right to be heard by addressing a supplementary statement of objections to Sony, thus enabling it to submit its views on the Commission's new legal characterisation of the facts. As it failed to do so, the Commission cannot now rely on that legal characterisation and, by doing so in spite of everything, the contested decision breaches Sony's rights of defence.

228 The Commission disputes the applicants' arguments.

229 In all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings (judgments of 29 June 2006, *SGL Carbon* v *Commission*, C−308/04 P, EU:C:2006:433, paragraph 94, and of 24 September 2009, *Erste Group Bank and Others* v *Commission*, C−125/07 P, C−133/07 P and C−137/07 P, EU:C:2009:576, paragraph 270).

230 In that regard, Regulation No 1/2003 provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the proceedings. That statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law, which requires observance of the rights of the defence in all proceedings capable of leading to the imposition of a penalty. That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see judgment of

2 February 2012, *Dow Chemical* v *Commission*, T−77/08, not published, EU:T:2012:47, paragraph 110 and the case-law cited).

231 However, that may be done summarily and the final decision is not necessarily required to be an exact replica of the statement of objections (judgment of 7 June 1983, *Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 14), since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see, to that effect, judgment of 17 November 1987, *British American Tobacco and Reynolds Industries* v *Commission*, 142/84 and 156/84, EU:C:1987:490, paragraph 70).

232 Thus, the rights of the defence are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the decision was not set out in the statement of objections in a manner sufficient to enable the addressees to defend their interests (see judgment of 8 July 2004, *Mannesmannröhren-Werke* v *Commission*, T−44/00, EU:T:2004:218, paragraph 98 and the case-law cited).

233 In that regard, the Commission's obligation, in the context of a statement of objections, is limited to setting out its objections and describing clearly the facts on which it relied and the classification attributed to them, so that its addressees can properly defend themselves (see judgment of 8 July 2004, *Mannesmannröhren-Werke* v *Commission*, T−44/00, EU:T:2004:218, paragraph 99 and the case-law cited).

234 The legal classification of the facts made in the statement of objections can, by definition, be only provisional, and a subsequent Commission decision cannot be annulled on the sole ground that the definitive conclusions drawn from those facts do not correspond precisely with that intermediate classification. The Commission is required to hear the addressees of a statement of objections and, where necessary, to take account of their observations made in response to the objections by amending its analysis specifically in order to respect their rights of defence (see judgment of 8 July 2004, *Mannesmannröhren-Werke* v *Commission*, T−44/00, EU:T:2004:218, paragraph 100 and the case-law cited).

235 It is necessary to examine, in the light of those principles, whether Sony was clearly informed, in the statement of objections, that the Commission considered that the single and continuous infringement consisted of different bilateral agreements.

236 It must first be noted that there were a number of elements, in the statement of objections, indicating to Sony that the Commission considered that the cartel consisted of different agreements. Thus, in particular, recitals 300 and 301 of that statement state that '[the orchestration of bids] ... ultimately resulted in some instances in outright agreements [for the purposes of] Article 101 TFEU' and observes that the bilateral contacts 'constitute at least concerted practices' for the purposes of that article. Recital 308 of the statement of objections mentions the 'complex of infringements in this case'. Recital 353 of the statement of objections refers to the principal aspects of 'the complex of agreements and concerted practices which can be characterised as restrictions of competition'. Recital 354 of the statement of objections states that that 'complex of concerted practices and/or agreements' had as its object the restriction of competition.

237 It should next be recalled that, according to the case-law, an infringement of Article 101 TFEU may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 101 TFEU (judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C−49/92 P, EU:C:1999:356, paragraph 81).

238 The concept of a single and continuous infringement presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim (see, to that effect, judgments of 24 October 1991, *Rhône-Poulenc* v *Commission*, T−1/89, EU:T:1991:56, paragraphs 125 and 126).

239 It is therefore apparent from the very concept of a single and continuous infringement that it presupposes a complex of practices. The applicants cannot therefore claim that the Commission changed its conclusions

by finding, in addition to a single and continuous infringement, several bilateral contacts, given that those bilateral contacts are precisely what constitute that single infringement.

240 There was therefore no inconsistency, in recital 352 of the contested decision, in so far as the Commission stated therein that the contacts constitute individual infringements and at the same time meet the criteria for a single and continuous infringement.

241 Moreover, all the bilateral contacts in which the applicants were found to have engaged were mentioned in the statement of objections. In that regard, a list setting out those contacts is given in recital 275 of that statement.

242 Indeed, as the Commission contends, without being contradicted in this respect by the applicants, the latter contested each contact separately and at length in their reply to the statement of objections and were successful in persuading the Commission not to pursue its allegations in relation to certain bilateral contacts.

243 Accordingly, the applicants cannot claim that the contested decision contains an infringement additional to or separate from that found in the statement of objections.

244 The applicants' arguments relating to a breach of the rights of the defence must therefore be rejected.

– *Lack of evidence*

245 The applicants submit that none of the alleged contacts constitutes an infringement 'by object', either because the source of the information said to have been shared is unclear or uncorroborated or because the findings reached in the contested decision are based on speculation or inferences that cannot be sustained or because the information in question was incapable in the circumstances of having an anticompetitive effect.

246 In that regard, it should be pointed out that it is apparent from the first and second parts of this plea that the applicants participated in a 'single and continuous' infringement 'by object'. In the light of the definition of the concept of a 'single and continuous' infringement set out in paragraph 238 above, the Commission was not required to establish that each contact constitutes an infringement 'by object'.

– *Failure to state reasons*

247 According to the applicants, the contested decision is vitiated by a failure to state reasons, because the Commission does not state therein why it took the view that Sony had participated in several separate infringements. The reasons that led the Commission to adopt, in the contested decision, the classification of a single and continuous infringement are inconsistent with the assertion in Article 1 of that decision that the single and continuous infringement consisted of several separate infringements. Nor is that inconsistency resolved by the cursory reference in recital 352 of the decision to separate infringements. In particular, the Commission failed to explain, in the contested decision, for each aspect of conduct deemed to have constituted a separate infringement, its nature and scope and, in particular, whether it constituted an agreement or a concerted practice within the meaning of Article 101 TFEU and the reasons and evidence that supported each characterisation.

248 The Commission disputes the applicants' arguments.

249 According to settled case-law, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the

addressees of the measure, or other parties to whom it is of concern, for the purpose of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 14 July 2016, *Parker Hannifin Manufacturing and Parker-Hannifin* v *Commission*, T−146/09 RENV, EU:T:2016:411, paragraph 82 and the case-law cited).

250 The fact remains that, in stating the reasons for a decision which it takes to enforce the rules on competition, the Commission is required under Article 296 TFEU to set out at least the facts and considerations having decisive importance in the context of the decision in order to make clear to the competent court and the persons concerned the circumstances in which it has applied EU law (see, to that effect, judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, T−83/08, not published, EU:T:2012:48, paragraph 91).

251 In addition, the statement of the reasons must be logical and, in particular, contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see, to that effect, judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C−413/06 P, EU:C:2008:392, paragraph 169, and of 29 September 2011, *Elf Aquitaine* v *Commission*, C−521/09 P, EU:C:2011:620, paragraph 151).

252 Furthermore, it should be borne in mind that the principle of effective judicial protection, a general principle of EU law which is now enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and which corresponds, in EU law, to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (see judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C−295/12 P, EU:C:2014:2062, paragraph 57 and the case-law cited), requires that the operative part of a decision adopted by the Commission, finding infringements of the competition rules, must be particularly clear and precise and that the undertakings held liable and penalised must be in a position to understand and to contest that imputation of liability and the imposition of those penalties, as set out in the wording of that operative part.

253 It should be borne in mind that it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it penalises. In principle, as regards in particular the scope and nature of the infringements penalised, it is the operative part, and not the statement of reasons, which is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision. As the European Union Courts have held, for the purpose of determining the persons to whom a decision finding an infringement applies, only the operative part of the decision must be considered, provided that it is not open to more than one interpretation (judgments of 16 December 1975, *Suiker Unie and Others* v *Commission*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, EU:C:1975:174, paragraph 315, and of 11 December 2003, *Adriatica di Navigazione* v *Commission*, T−61/99, EU:T:2003:335, paragraph 43).

254 In the present case, as was just noted, there is no inconsistency, in recital 352 of the contested decision, in so far as the Commission stated therein that the contacts constitute individual infringements and at the same time meet the criteria for a single and continuous infringement (see paragraph 240 above).

255 As is apparent from the foregoing, the Commission explained clearly and unequivocally the scope and nature of the applicants' conduct that it considered to constitute an infringement of Article 101 TFEU, as well as the evidence underpinning those conclusions.

256 In addition, while Article 101 TFEU distinguishes between 'concerted practices', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibitions of that article catch different forms of coordination and collusion between undertakings. Accordingly, a precise

characterisation of the nature of the cooperation at issue in the main proceedings, consisting in an exchange of information between competitors, is not liable to alter the legal analysis to be carried out under Article 101 TFEU (see, to that effect, judgment of 23 November 2006, *Asnef-Equifax and Administración del Estado*, C−238/05, EU:C:2006:734, paragraph 32).

257 The applicants were thus in a position to understand the reasons underlying the decision and, as is apparent from the foregoing, were able to submit before the Court detailed arguments in respect of each contact in which the Commission found the applicants to have been involved.

258 It must therefore be held that the Commission satisfied its obligations under Article 296 TFEU and the fourth part of the first plea must therefore be rejected.

259 In the light of all the foregoing, it must be held that the applicants have not established that the Commission erred in finding that they participated in a single and continuous infringement by object and, consequently, the first plea must be rejected in its entirety.

Second plea, raised in the alternative: the setting of the fine is vitiated by errors of fact and of law and by an insufficient statement of reasons

260 In the alternative, the applicants maintain, in the first place, that the contested decision, by applying 'double counting' to Sony's detriment in the contested decision, breached the principles of equal treatment and proportionality and the Guidelines. In the second place, the Commission breached the principles of equal treatment and proportionality, infringed Article 23(3) of Regulation No 1/2003 and breached the Guidelines by failing to acknowledge Sony's substantially more limited participation by comparison with the other addressees of the decision. In the third place, the Commission breached the principles of equal treatment, fairness and proportionality by applying to the applicants, in the contested decision, a deterrence multiplier in spite of Sony's more limited participation, while failing to apply such multipliers to other addressees.

First part: the application of 'double counting' to Sony's detriment

261 In essence, the applicants submit that the Commission imposed on Sony a fine based on revenues obtained from Dell that had been passed on to Lite-On under the revenue-sharing arrangements in force between Sony and Lite-On. Those revenues accounted for at least 92% of the annual value of sales to Dell, namely a minimum of around EUR 34 677 437 out of a total of EUR 37 631 108. The applicants maintain that the fine imposed on them was thus set at around EUR 19 379 976 more than it would have been if those revenues had been excluded from the annual value of Sony's sales. By double counting a very significant amount of the revenues, the contested decision runs counter to the principles of equal treatment and proportionality, and also to the Guidelines. The applicants further submit that the judgments of 8 December 2011, *KME Germany and Others* v *Commission* (C−389/10 P, EU:C:2011:816), and of 19 May 2010, *KME Germany and Others* v *Commission* (T−25/05, not published, EU:T:2010:206), cited by the Commission in the contested decision, are inapplicable, first, because the *KME Germany* case addressed the determination of the amount of the fines by applying a method that predated the Guidelines at issue in the present case and, second, because the *KME Germany* case did not involve the double counting of affected revenues for two participants in the same alleged infringement. Lastly, the applicants maintain that, in an earlier decision, the Commission used a calculation method designed to avoid any risk of double-counting of the sales made by the participants in the cartel in question.

262 The Commission disputes the applicants' arguments.

263 According to the explanations provided by the applicants, in the context of the agreements concluded between Lite-On and Sony, Lite-On designed and manufactured ODD products which were then sold under the Sony brand. Customer contracts and purchase orders were formally concluded with Sony, and it was Sony which was paid by customers.

264 Accordingly, the applicants' argument that the Commission double counted sales made to Dell is difficult to understand, given that it was Sony which received revenues from Dell.

265 In any event, it should be borne in mind that, according to point 13 of the Guidelines, in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates.

266 In determining the amount of fines for infringements of competition law, the Commission must take into account not only the gravity of the infringement and the particular circumstances of the case but also the context in which the infringement was committed and must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the European Union (see judgment of 5 April 2006, *Degussa* v *Commission*, T−279/02, EU:T:2006:103, paragraph 272 and the case-law cited).

267 The gravity of infringements must be assessed in the light of numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C−189/02 P, C−202/02 P, C−205/02 P to C−208/02 P and C−213/02 P, EU:C:2005:408, paragraph 241).

268 In addition, the Court has already stated that the Commission is not obliged in each case to ascertain the individual sales which were affected by the cartel. An obligation of that kind has never been imposed by the Courts of the European Union and there is no indication that the Commission intended to assume such an obligation in the Guidelines (judgment of 16 June 2011, *Team Relocations and Others* v *Commission*, T−204/08 and T−212/08, EU:T:2011:286, paragraph 64).

269 Lastly, it should be recalled that the fact of not benefiting from an infringement cannot constitute a mitigating circumstance, since otherwise the fine would cease to have any deterrent effect (see judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T−259/02 to T−264/02 and T−271/02, EU:T:2006:396, paragraph 489 and the case-law cited).

270 In the present case, when the Commission sought to establish the value of the sales of goods to which the infringement directly or indirectly related for the purposes of point 13 of the Guidelines, it was logical for it to use the applicants' direct sales to Dell as the basis for calculating the amount of the fine.

271 In that regard, the method advocated by the applicants, consisting in deducting from the revenues received by Sony from Dell the revenues passed on to Lite-On under the revenue-sharing arrangements in force between Sony and Lite-On during the relevant period in order to avoid 'double counting', despite the fact that the applicants explain that they are unable to provide exact figures in that regard, would undermine the effectiveness of the prohibition on cartels, since it would then be sufficient for undertakings to associate themselves with a participant in the cartel in order to reduce the amount of their fine.

272 Moreover, it is apparent from the first plea that the applicants' conduct did not fundamentally differ from that of the other addressees of the contested decision both as regards the fact of having exchanged information in particular on prices and as regards the frequency of those exchanges.

273 In that regard, the contested decision did not therefore undermine the principles of equal treatment and of proportionality, or the Guidelines.

274 With respect to the applicants' argument relating to the judgments of 8 December 2011, *KME Germany and Others* v *Commission* (C−389/10 P, EU:C:2011:816), and of 19 May 2010, *KME Germany and Others* v *Commission* (T−25/05, not published, EU:T:2010:206), it should be pointed out that, contrary to the applicants' submission, the Commission did not seek to rely, in recital 539 of the contested decision, on those judgments to justify its choice to use the applicants' direct sales to Dell as the basis for calculating the amount of the fine. The reasons justifying the choice to use direct sales of ODDs invoiced to Dell

entities are set out in recitals 527 to 531 of the contested decision. The reference to those judgments in recital 539 of the contested decision was only a response to specific arguments raised by the applicants during the administrative procedure, in which they claimed that the fine imposed on them should be calculated solely by reference to the revenues that they kept, and that the revenues passed on to Lite-On should be excluded.

275 Lastly, as regards the applicants' argument that, in an earlier decision, the Commission used a calculation method designed to avoid any risk of double-counting of the sales made by the participants in the cartel in question, it is sufficient to recall that the Commission is entitled to address to each undertaking against which an infringement is found a decision recording that infringement and imposing a penalty on it. Arguments based on a comparison of the situation of the addressee of such a decision with the situation of other undertakings (whether or not addressees of the same decision) cannot in any circumstances call into question the legality of the decision in so far as it finds and penalises a duly established infringement (judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T−259/02 to T−264/02 and T−271/02, EU:T:2006:396, paragraph 139). That applies all the more, in the present case, given that the decision to which the applicants refer has no direct link with this case.

276 Accordingly, all the applicants' arguments relating to the first part of the second plea must be rejected.

Second part: failure to take Sony's substantially more limited participation in the infringement into account

277 The applicants maintain that, in so far as the contested decision failed to acknowledge Sony's substantially more limited conduct by comparison with that of certain other addressees, it breached the principles of equal treatment and proportionality, infringed Article 23(3) of Regulation No 1/2003 and breached the Guidelines. First, the Commission was wrong not to apply a lower multiplier for gravity, or a greater reduction for mitigating circumstances, in order to take account of the fact that Sony had not participated in the alleged infringement with respect to HP. The applicants emphasise that, although the decision applied a reduction of 3% to Sony in respect of mitigating circumstances in order to take account of its non-participation in the alleged infringement with respect to HP, that reduction corresponds to the equivalent at most of a reduction of 0.48% of the multiplier for gravity and of the additional amount, that is to say, to an extremely small differentiation and one that is insufficient to take account of non-participation in one of the two aspects of the alleged single infringement. Second, the Commission was wrong not to apply a lower multiplier for gravity or a greater reduction for mitigating circumstances in order to take account of the fact that Sony's participation in the alleged infringement with respect to Dell had been more limited. In fact, close examination of the evidence shows that Sony did not participate in all the aspects of the anticompetitive conduct.

278 The Commission disputes the applicants' arguments.

279 In the first place, as regards the applicants' argument that the Commission failed to apply a lower multiplier for gravity, or a greater reduction for mitigating circumstances, in order to take account of the fact that Sony had not participated in the alleged infringement with respect to HP, it must be stated that, in calculating the value of sales, the Commission took into account only the applicants' Dell-related sales and excluded its HP-related sales.

280 When the amounts of fines are set, each undertaking is assessed in relation to the infringement in which it participated. In the present case, the 16% multiplier for gravity relates to the gravity of the applicants' conduct with respect to sales of ODDs to Dell, and is unconnected to the fact that the Commission did not establish that the applicants participated in, or were aware of, the HP-related contacts.

281 In addition, the Commission reduced the amount of the fine imposed on the applicants by 3% in order to take into account, according to the wording of recital 561 of the contested decision, of the fact that they had not been aware of the part of the single and continuous infringement concerning HP, in order to reflect in an adequate and sufficient manner the less serious nature of their conduct.

282 In that regard, the applicants' claim that the 3% reduction is the equivalent of an effective reduction of 0.48% of the multiplier for gravity applied to the value of sales and the additional amount is unfounded. The multiplier for gravity and the additional amount relate to the gravity of the applicants' conduct with respect to sales to Dell and is unrelated to the fact that the Commission did not establish the applicants' liability in respect of the contacts with HP.

283 If the applicants had been found liable for having participated in a cartel in respect of the products sold to HP, the basis of the value of sales would have been much higher and, consequently, the final amount of the fine imposed would have been much higher.

284 In the second place, as regards the applicant's argument that the Commission failed to apply a lower multiplier for gravity or a greater reduction for mitigating circumstances in order to take account of the fact that Sony's participation in the alleged infringement with respect to Dell had been more limited, the applicants submit, first, that they did not participate in any bid-rigging or price-fixing agreements, second, that they participated in significantly fewer instances of alleged anticompetitive conduct than other addressees of the contested decision, third, that they did not act clandestinely and, fourth, that they were viewed by other participants as being an aggressive competitor on price.

285 First, it is apparent from the foregoing that the applicants participated in exchanges of sensitive information relating in particular to prices or price ranges, volumes of goods and the rankings of certain participants in the auctions. According to point 23 of the Guidelines, horizontal price-fixing agreements are, by their very nature, among the most harmful restrictions of competition and will be heavily fined.

286 Second, it is also apparent from the foregoing that the applicants' participation in those exchanges was no less frequent than that of the other addressees. In any event, the fact that other addressees might have had more bilateral contacts than the applicants does not in any way reduce the gravity of the applicants' infringement.

287 Third, the fact that the Commission did not find that the applicants acted clandestinely is irrelevant to the gravity of the infringement that was committed and cannot serve as justification for a reduction in the amount of the fine.

288 Fourth, it must be stated that, at no point during their participation in the cartel did the applicants seek to distance themselves openly from the cartel. As was pointed out in paragraph 219 above, the fact that Sony might have tried to exploit the cartel for its own benefit does not mean that it did not participate in the single and continuous infringement.

289 Accordingly, all the applicants' arguments relating to the second part of the second plea must be rejected.

Third part: a multiplier for deterrence was imposed only on Sony

290 The applicants submit that, by imposing on Sony a multiplier of 1.2 of the starting amount of its fine in order to ensure a sufficiently deterrent effect, the Commission breached the principles of equal treatment, fairness and proportionality. According to the applicants, Sony's financial capacity is not significantly different from that of the parent companies of certain other addressees of the contested decision.

291 The Commission disputes the applicants' arguments.

292 It should be recalled that the need to ensure that the fine has a sufficient deterrent effect requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the other hand excessive, notably by reference to the financial capacity of the undertaking in question, in accordance with the requirements resulting from, first, the need to ensure that the fine is effective and, second, respect for the principle of proportionality (see judgment of 13 July 2011, *General Technic-Otis and Others* v *Commission*, T−141/07, T−142/07, T−145/07 and T−146/07, EU:T:2011:363, paragraph 239 and the case-law cited).

293 The size and overall resources of an undertaking are relevant criteria in view of the objective pursued, namely ensuring that the fine is effective by adjusting its amount having regard to the overall resources of the undertaking and its capacity to raise the funds necessary to pay that fine. The setting of the rate of increase of the starting amount in order to ensure that the fine has a sufficiently deterrent effect is intended more to ensure the effectiveness of the fine than to reflect the harmfulness of the infringement to normal competition and thus the gravity of the infringement (see judgment of 13 July 2011, *General Technic-Otis and Others* v *Commission*, T−141/07, T−142/07, T−145/07 and T−146/07, EU:T:2011:363, paragraph 241 and the case-law cited).

294 In the present case, the applicants do not dispute the amount, indicated in recital 567 of the contested decision, of the worldwide turnover generated by Sony during the business year preceding the adoption of that decision, namely EUR 59 252 000 000.

295 The applicants' only argument is that the turnover of the parent companies of some of the other addressees of the contested decision is comparable to or higher than that of Sony, which recorded heavy losses in 2014, at a time when parent companies, such as Samsung, TSST's parent company, and Hitachi, HLDS's parent company, were allegedly recording significant profits.

296 It should be pointed out that, although Sony Corporation was held liable for the infringement of its subsidiary, Sony Electronics (recitals 507 and 569 of the contested decision), to the extent that the Commission refers to them jointly as 'Sony' in the contested decision (see paragraph 3 above), the infringement in which TSST and HLDS participated was not imputed to Samsung and Hitachi, respectively (recitals 11 to 14 and 569 of the contested decision).

297 The Commission cannot therefore be criticised for having applied a multiplier for deterrence to the applicants whereas it did not increase the amount of the fines imposed on TSST and HLDS in the light of the turnover and profits generated by Samsung and Hitachi.

298 It is therefore necessary to reject that argument of the applicants as well as the third part of the second plea and, therefore, the second plea in its entirety.

299 In the light of all of the foregoing, all the claims made in the present action must be rejected.

Costs

300 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the applicants have been unsuccessful, the latter must be ordered to bear their own costs and to pay those incurred by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders Sony Corporation and Sony Electronics, Inc. to bear their own costs and pay the costs incurred by the European Commission.

Gratsias Labucka Ulloa Rubio

Delivered in open court in Luxembourg on 12 July 2019.

E. Coulon D. Gratsias

Registrar President

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Costs

* Language of the case: English.

1 This judgment is published in extract form.