

## JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 July 2019 (\*)

(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-763/15,

**Sony Optiarc, Inc.**, established in Atsugi (Japan),

**Sony Optiarc America, Inc.**, established in San Jose, 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 first applicant, Sony Optiarc, Inc. (formerly NEC 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).

- 2 From 2 April 2007, Sony NEC Optiarc, together with its wholly owned subsidiary, Sony NEC Optiarc America, Inc., the second applicant, negotiated and obtained contracts following bidding events and took orders for ODDs, at least from Dell. Sony NEC Optiarc and Sony NEC Optiarc America are referred to jointly as 'Sony Optiarc' in the contested decision. By contrast, in the contested decision 'Sony/Optiarc' refers to both Sony and Sony Optiarc, which have jointly given oral statements and responded to the requests for information from the European Commission. After 1 September 2007, Sony NEC Optiarc continued participating in the procurement events organised by Dell. It was assisted by an employee of Sony Electronics (Singapore) Pte. Ltd, who was acting on behalf of Sony Optiarc and based on its instructions (contested decision, recital 21).
- 3 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 or digital versatile disc ('DVD') players, game consoles and other electronic hardware devices (contested decision, recital 28).
- 4 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).
- 5 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).
- 6 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).
- 7 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. 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).

8 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 2 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*

- 9 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 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).
- 10 On 29 June 2009, the Commission sent a request for information to undertakings active in the ODD sector (contested decision, recital 55).
- 11 On 30 June 2009, the Commission granted conditional immunity to Philips, Lite-On and PLDS (contested decision, recital 56).
- 12 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.
- 13 On 29 October 2012, in reply to the statement of objections, the applicants together submitted their written comments.
- 14 On 23 November 2012, Dell replied to the request for information that the Commission had addressed to it (contested decision, recital 61).
- 15 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).
- 16 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).
- 17 On 21 October 2015, the Commission adopted the contested decision.

### *Contested decision*

- 18 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).

- 19 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).
- 20 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).
- 21 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).
- 22 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).
- 23 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).
- 24 When calculating the amount of the fine imposed on the applicant, 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').
- 25 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).
- 26 The Commission thus explained that the value of sales was calculated on the basis of sales of ODDs for notebooks and desktops invoiced to HP and Dell entities located in the EEA (contested decision, recital 528).
- 27 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).

- 28 As regards the applicants, as it had not been established that Sony Optiarc had participated in the contacts concerning HP, the Commission found them liable only for their coordination with respect to Dell (contested decision, recital 531).
- 29 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).
- 30 Furthermore, the Commission stated that, given the circumstances of the case, it had decided to add an additional amount of 16% for deterrence (contested decision, recitals 554 and 555).
- 31 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).
- 32 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:

...

- (g) Sony Optiarc Inc. from 25 July 2007 to 29 October 2008, Sony Optiarc America Inc. from 25 July 2007 to 31 October 2007, for their coordination with regards to Dell.

Article 2

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

...

- (g) Sony Optiarc Inc.: EUR 9 782 000, of which EUR 5 433 000 jointly and severally with Sony Optiarc America Inc’.

**Procedure and forms of order sought**

- 33 By application lodged at the Court Registry on 31 December 2015, the applicants brought the present action.
- 34 The Commission lodged its defence on 25 May 2016.
- 35 On a proposal from the Judge-Rapporteur, the General Court (Fifth Chamber) decided to open the oral part of the procedure.
- 36 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 2 May 2018.
- 37 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.

38 The Commission contends that the Court should:

- dismiss the action;
- order the applicants to pay the costs.

## Law

39 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*

40 In essence, the arguments developed by the applicants in the context of the first plea may thus 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 Optiarc 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 that Sony Optiarc 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 Optiarc participated in ‘separate infringements’ constitutes a breach of its 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’*

41 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).

42 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).

- 43 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).
- 44 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).
- 45 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).
- 46 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).
- 47 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 TFEU (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).
- 48 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).
- 49 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).
- 50 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).

- 51 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).
- 52 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).
- 53 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).
- 54 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).
- 55 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).
- 56 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).
- 57 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).
- 58 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).
- 59 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).
- 60 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.

- 61 In that regard, the applicants maintain that, as regards seven instances of information sharing out of the seventeen in which Sony Optiarc is alleged to have participated (contacts 66, 67, 70, 73, 76, 78 and 105), the Commission fails to discharge the burden of proof and breaches Sony Optiarc's rights of defence, and the contested decision fails to state reasons. Furthermore, the applicants maintain that at least four of the seventeen instances of information sharing alleged against Sony Optiarc (contacts 73, 76, 78 and 98) are not substantiated by evidence showing that Sony Optiarc was involved in any sharing of information. Moreover, nine of the seventeen cases of information sharing alleged against Sony (contacts 63, 66, 67, 76, 78, 95, 98, 101 and 105) 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. The remaining eight allegations against Sony Optiarc (contacts 62, 65, 70, 73, 88, 89, 100 and 116) relate to communications which pertain in some 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.
- 62 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.
- 63 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.
- 64 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.
- 65 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.
- 66 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 206 of the contested decision (contact 62)*
- 67 Recital 206 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. According to that recital, an internal PLDS email of 25 July 2007 stated that PLDS received information from Hitachi LG Data Storage ('HLDS') and Sony Optiarc concerning HH SATA BD Combos ordered by Dell. That email states, in particular: 'I also confirmed that Sony [Optiarc] is approaching Dell for Q1 HH SATA BD Combo. The pricing they plan to offer is [around USD] 150/Q1'.
- 68 The applicants maintain that, in the statement of objections, that allegation was described as relating to an HH SATA Combo auction held on 17 July 2007. First, the applicants submit that, in making that allegation in the contested decision, the Commission breached Sony Optiarc's rights of defence, because it significantly changed the nature of the allegation as set out in the statement of objections, thus depriving Sony Optiarc of the opportunity to defend itself effectively during the administrative procedure. Secondly, in any event, the Commission does not substantiate its claim, in the contested decision, that that allegation reveals that Sony Optiarc's conduct had an anticompetitive object. The applicants maintain that, even if that information was obtained from Sony Optiarc, there is no ground for regarding that information, which

concerned only a general intention to enter at an approximate price for a single product that Sony Optiarc never actually sold to Dell, as appreciably reducing uncertainty in the market.

69 The Commission disputes the applicants' arguments.

70 The applicants submit that the Commission breached their rights of defence by relying, in the contested decision, on an email of 25 July 2007 relating to HH SATA BD Combos, whereas it relied, in the statement of objections, on an auction held on 17 July 2007 relating to HH SATA Combos. Furthermore, the information according to which Sony Optiarc was trying to compete for Dell's HH SATA BD Combos business with pricing in the region of USD 150 is vague, for a product that Sony Optiarc did not ultimately sell to Dell, and, accordingly, that information could not have appreciably reduced market uncertainty.

71 In that regard, it should be recalled that, 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).

72 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).

73 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).

74 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).

75 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).

76 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).

77 In the present case, it follows from the explanations given by the Commission, which are not contradicted by the applicants on that point, that the Commission referred, in the statement of objections, to an HH SATA Combo auction held on 17 July 2007 and that it was by taking into account Sony Optiarc's reply to that statement of objections that it referred, in the contested decision, to HH SATA BD Combos mentioned in a PLDS email of 25 July 2007.

78 As recalled above, the contested decision cannot be an exact replica of the statement of objections and the Commission may be required to take into account the replies provided by its addressees.

79 Moreover, it should be noted that the applicants had the opportunity to present their arguments as regards the HH SATA BD Combos referred to in the PLDS email of 25 July 2007. In the statement of objections, that email was referred to as 'contact 71'. In their reply to the statement of objections, the applicants stated, in relation to contact 71 concerning the PLDS email, that there was no proof that that contact could have had an anticompetitive effect.

80 The applicants therefore cannot claim that the contested decision undermined their rights of defence in that regard.

81 In addition, it should be noted that the applicants do not deny that the contact referred to in the PLDS email took place, since they explicitly deny, as is apparent from the headings used in their application, information sharing on the part of Sony Optiarc only in relation to contacts 73, 76, 78 and 98, but merely maintain that the information indicating that Sony Optiarc had approached Dell in order to sell HH SATA BD Combos to it for a price of '[around USD] 150/Q1' is information which is incapable of reducing market uncertainty, as it is vague.

82 Thus, secondly, in that regard, it is sufficient to note that the announcement of a price of '[around USD] 150/Q1' is information which is sufficiently precise in order to be useful and, more specifically, to be capable of appreciably reducing uncertainty between the competitors as regards their future intentions in relation to the bid in question.

83 The applicants' argument that Sony Optiarc did not ultimately sell the product in question to Dell is also not relevant. In any event, the HLDS email of 25 July 2007 shows that HLDS considered Sony Optiarc to be a competitor in that bid.

84 It should be noted that this is a case here of an exchange of information concerning a future price. Price-fixing agreements represent particularly serious restrictions of competition (see paragraph 58 above).

85 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).

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

87 Accordingly, the applicants have not been able to put forward any argument capable of calling into question the findings set out in recital 206 of the contested decision.

– *Recital 207 of the contested decision (contact 63)*

88 According to recital 207 of the contested decision, in August 2007 Sony Optiarc had contacts with HLDS and communicated on prices charged in the first quarter of 2008, during which it responded to a request for tenders from Dell. Recital 207 states that, according to the internal PLDS email of 17 August 2007, PLDS ‘managed to [talk] to Sony Optiarc and [Sony Optiarc] stated that their [price offered in the context of the request for tenders] (i.e. Slim 12.7mm SATA Slot DVDRW) is [around USD] 43 for Q1. [Sony Optiarc is] the 2nd source awarded after [Toshiba Samsung Storage Technology Corporation] (i.e. 1st source). Sony [Optiarc] believes that TSST has lower price compare[d] to them. Sony [Optiarc] believes that TSST Q1 pricing is [around USD] 38-39’.

89 According to the applicants, the email makes clear that the content relates to non-specific pricing (‘[around USD] 43’) for an already completed request for tenders (‘the 2nd source awarded’). Any price proposed during a request for tenders would be substantially eroded during the internet negotiation and any information obtained before the internet negotiation would be rapidly superseded by the information made available by Dell. In addition, an email of 15 October 2007 from PLDS indicates that Sony Optiarc reduced its price for the drive in question to bring it within a ‘[USD] 37-38 range’ at Dell’s request. There is thus no basis for the conclusion that the sharing of that generalised information about previously quoted prices in a tendering procedure had an anticompetitive object.

90 The Commission disputes the applicants’ arguments.

91 It should be pointed out that, contrary to what is submitted by the applicants, within the context of internet negotiations organised by Dell, a price relating to a past negotiation could be useful.

92 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.

93 Thus, it is stated in Dell’s procurement rules published in December 2007 that: ‘Starting Bid: to participate in this [internet negotiation], your opening bid for [February] must be equal to or lower than your current [January] price. The opening bid for the [March] event must be equal to or lower than your ending [February] bid’. 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.

94 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.

95 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 [its] price ... [in February 2008 and March 2008]’. 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. 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’. Lastly, recital 208 of the contested decision notes that an internal HLDS email from August 2007 states 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’. 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])’. Also, a PLDS email of 19 June 2008 compares the prices of HLDS, Sony Optiarc and PLDS for August and September 2008.

- 96 It should also be noted that an internal PLDS email of 29 May 2008 classified the auction results, concerning the rankings and pricing of competitors, as ‘Secret — Hot info’.
- 97 The applicants cannot therefore reasonably maintain that information on a price or a ranking from an auction that had already closed is not capable of removing a great deal of uncertainty regarding the course of future auctions.
- 98 In so far as concerns specifically contact 63, although it may be found that the information referring to a price of ‘[around USD] 43’ was, ultimately, of little use, given that the price was brought within a ‘[USD] 37-38 range’ at Dell’s request, the fact remains that, according to what was stated in the PLDS email of 15 October 2007 to which the applicants refer, that circumstance cannot call into question the fact that that contact had an anticompetitive object.
- 99 Moreover, in any event, nothing indicates that Dell often intervened to change the prices so significantly.
- 100 Lastly, in the PLDS email to which the applicants refer, PLDS states (i) that it had discussions with Sony Optiarc and HLDS and (ii) that it was informed that Sony Optiarc had reduced its price. That email therefore appears to be a strong indication that Sony Optiarc shared information on prices with its competitors.
- *Recital 210 of the contested decision (contact 65)*
- 101 According to that recital, HLDS and PLDS ‘discussed bidding strategy with ... Sony Optiarc prior to and after’ the internet negotiations organised by Dell for ‘HH DVDRW, DVD-ROM, Combo and Slim ODDs’ in September 2007. That recital cites several pieces of evidence, among which is an internal PLDS email of 17 September 2007, which states ‘Optiarc: Optiarc is still using NEC design for Slim DVDRW. They will maintain to get [2<sup>nd</sup> place]’, PLDS phone records showing telephone conversations with Sony Optiarc on 17 September 2007, and an internal HLDS email of 18 September stating ‘I did inform PLDS and Optiarc that [HLDS] would suggest an aggressive price’.
- 102 According to the applicants, the information that Sony Optiarc revealed its intention to keep aiming for second rank, or that it received information from HLDS that the latter would ‘suggest an aggressive price’, was rapidly superseded by the information made available by Dell’s auction system during the internet negotiation. In addition, stating its intention to bid aggressively would be likely to encourage more aggressive bidding and therefore lower prices.
- 103 The Commission disputes the applicants’ arguments.
- 104 As regards contact 65, the applicants do not deny that it was Sony Optiarc that provided information in relation to its strategy to PLDS, but merely maintain (i) that that information was rapidly superseded by the information made available by Dell’s auction system and (ii) that that information did in fact enhance competition in that it brought down prices.
- 105 As regards the argument that Dell disclosed information through the auction system that it had established, it must be noted that, although that is a recurring argument in the application, the applicants have not, in any event, adduced any evidence to support it.
- 106 As regards the argument that the information given by Sony Optiarc in fact enhanced competition, 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). In any event, 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).

107 The applicants are therefore also wrong to claim that contact 65 is not indicative of an infringement of the competition rules.

– *Annex I to the contested decision (contacts 66, 67, 70, 73, 76 and 78)*

108 Contacts 66, 67, 70, 73, 76 and 78 only appear in Annex I to the contested decision. Given that those contacts do not appear in the operative part of the decision, they are not items of evidence upon which the Commission based its decision. Accordingly, the applicants' line of argument in relation to those contacts must be rejected as ineffective.

– *Recitals 216 to 219 of the contested decision (contact 88 in Annex I)*

109 According to recitals 216 to 219 of the contested decision, Sony Optiarc engaged in anticompetitive contacts with TSST and PLDS 'in order to discuss their strategy in the upcoming Dell's reverse [internet negotiation]' for slim DVDRW on 18 February 2008. These recitals refer in particular to three emails. An internal Sony Optiarc email of 14 February 2008, also putting Quanta in copy, states that: 'TSST mentioned that they will be price leader but they do not want 60% [total available market] as they have concern on supply. (They might want to target 30% [total available market] — 2nd place) PLDS mentioned that they will not be aggressive on price and maybe only looking at the 10% [total available market] offline negotiation' An internal PLDS email of 14 February 2008 states: '[Please] find the info required for coming Slim DVDRW [reverse internet negotiation] ... Optiarc stated that they need volume to recover investment as their drive was RTS [ready to ship] in Q3 [for the 2007–2008 business year] but was sure not to meet the starting price of [USD] 23.50'. An internal Sony Optiarc email of 19 February 2008, also putting Quanta in copy, communicates the results of an internet negotiation for both TSST and PLDS and states: 'We have inform[ed] ... that it will be very difficult for us to match PLDS price and have proposed the price of [USD] 25.75 as our offer price to request for min. 10% [total available market]'

110 According to the applicants (i) the statements concerning TSST's and PLDS's intentions ('TSST ... will be price leader but do not want 60% [total available market]' and 'PLDS ... will not be aggressive on price') were not sufficiently specific to provide a useful indication of their pricing strategies and (ii) the real-time 'reverse [internet negotiation]' rendered them inconsequential. In any event, the information received by TSST and PLDS was inaccurate, since in spite of their supposed intention not to bid aggressively, they were ranked first and second, respectively. Furthermore, Dell supplied Sony Optiarc with PLDS's price, which appeared at the time of the internet negotiation, and any prior indications concerning PLDS's 'aggressiveness' would have been irrelevant in any discussion between Sony Optiarc and Dell. In that regard, Sony Optiarc's email of 19 February 2008 confirms that Sony Optiarc would not be able to match PLDS's price.

111 The Commission disputes the applicants' arguments.

112 Those contacts concern a reverse internet negotiation scheduled for 18 February 2008. In such a negotiation, according to the explanations given by the applicants, the rules were different from those in normal internet negotiations, in particular because Dell proposed a low price and then increased the price until a supplier accepted that price.

113 Thus, the internal PLDS email of 14 February 2008 shows that Sony Optiarc made it clear that it would not accept the starting price but would still try to secure the market.

114 The internal Sony Optiarc email of 14 February 2008 shows that Sony Optiarc had obtained commercially sensitive information from PLDS and TSST, since the email contains information about market share objectives and ranking. In that regard, the applicants' argument that the information obtained by TSST and PLDS was inaccurate given that, in spite of their supposed intention not to bid aggressively, they were ranked first and second, respectively, must be rejected, since what matters is that the competitors had engaged, even before the bidding, in anticompetitive discussions about their strategies. The fact that the competitors were not committed to what they announced or that Dell ultimately requested Sony Optiarc to

propose another price cannot call into question the fact that the contacts had an anticompetitive object (see paragraph 106 above).

115 As for the internal Sony Optiarc email of 19 February 2008, it should be pointed out, in particular, that Sony Optiarc gives Quanta its price and the market share that it seeks for a future negotiation.

116 It must therefore be held that those three emails had an anticompetitive object.

117 Thus, as has been pointed out in paragraph 55 of the present judgment, 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). In the present case, the Commission therefore did not have to show the actual effect of the contacts on the result of the internet negotiations.

118 Thus, it must be concluded that contact 88 is capable of contributing to a body of evidence.

– *Recital 220 of the contested decision (contact 89 in Annex I)*

119 According to recital 220 of the contested decision, Sony Optiarc shared information with PLDS relating to an internet negotiation for slim SATAs held on 4 March 2008. That recital states that it is evident from the wording of an internal PLDS email of 28 February 2008 that the information obtained from Sony Optiarc ('Optiarc said they are checking with components suppliers to look for cost down') was capable of impacting PLDS's pricing decisions.

120 The applicants maintain that the Commission does not show, in the contested decision, how such information sharing could have given rise to a sufficient degree of harm to competition to be classified as anticompetitive by object simply because PLDS circulated that information internally.

121 The Commission disputes the applicants' arguments.

122 It is first of all necessary to reject the applicants' argument that the Commission found, in the contested decision, that the proof that the information concerning Sony Optiarc was useful was apparent from the fact that PLDS reported it internally.

123 As was stated in paragraph 119 above, it is from the actual 'wording' used in the email that the Commission deduces that the information obtained from Sony Optiarc was capable of impacting PLDS pricing decisions. It must be noted that the wording 'Optiarc said they are checking with components suppliers to look for cost down' is clear information relating to future prices, which is likely to be useful to competitors.

124 Although the Commission stated, in the contested decision, that the internal circulation of that information only reinforced its relevance, in conjunction with the more specific information from TSST and HLDS, the Commission did not, contrary to what the applicants maintain, find that circulation of information to be the most decisive piece of evidence.

125 In that regard, it is appropriate to refer to the entire email:

'[Please] find the necessary info for coming Q2 [of the 2008–2009 business year] PATA SLIM [internet negotiation] on 4/[March] <>. Please kindly note: 1) TSST still want to be number one. Prepared to go below [USD] 25.20 HLDS said that there is no room for price down, but also said that their management always can go down price during actual bidding. As they have only 10% [total available market] for [April 2008], I expect them to bid for #2 position for Q2 [of the 2008–2009 business year]. 3) Optiarc said they are checking with components suppliers to look for cost down. Extra info: Optiarc quoted [USD] 24.80 for Q3 [for the 2008–2009 business year] [for the] SATA SLIM Tray DVDRW [request for quotation]'

126 As the Commission maintains, even if the information that Sony Optiarc sought to lower its prices — after having carried out investigations with component suppliers — was more general than the information provided by TSST and HLDS, it constitutes an anticompetitive contact prior to an auction. Combined with the information relating to other competitors, the information relating to Sony Optiarc reduced uncertainty concerning its future conduct.

127 Moreover, it should be noted that the ‘extra info’ given at the end of the email reveals that Sony Optiarc provided additional information on the future auction by way of information on its past prices.

128 As was stated in paragraph 92 et seq. above, information on a price from an auction that has already closed is very useful for starting a future bid.

129 Therefore, it must be held that the Commission was right to find that the information obtained from Sony Optiarc was capable of impacting PLDS’s pricing decisions.

– *Recital 222 of the contested decision (contact 95 in Annex I)*

130 According to recital 222 of the contested decision, Sony Optiarc, like other competitors, exchanged information for March 2008 about its total market allocation and its ‘pull information’ for [SATA] Slot DVD RWs. The Commission observed that the total market allocation stated what percentage of the volume offered was allocated to each bidder (contested decision, recital 33). The Commission explained that the pulled volumes corresponded to the number of ODDs of the allocated share that were actually sold (contested decision, recital 142). According to recital 222 of the contested decision, an internal PLDS email of 4 April 2008 states: ‘As spoken yesterday, I am sure someone is not telling the truth and most likely it is Optiarc: — Reported by the current 3 suppliers for [March 2008]: [total available market] Pulled Quantity Hit Rate Optiarc 60% 20k 99% Teac 30% 25k 83% Panasonic 10% TBC TBC Very high chance that Optiarc is lying’.

131 The applicants submit that pull data, in the absence of data on suppliers’ total manufacturing capacity, could not constitute useful information, especially when in this case the data were inaccurate.

132 The Commission disputes the applicants’ arguments.

133 The applicants’ argument that the pull data could not be useful in the absence of data on the total manufacturing capacity appears to be called into question by the emails cited by the Commission reflecting the usefulness of information relating to total market share allocations and to pulled volumes.

134 Accordingly, a PLDS email of 30 April 2008 states: ‘Just checked with TSST, they did not inform Dell that they are going to EOL HH DVDCCombo. The message they sent is that they can only accept maximum 45% [total available market]’. A PLDS email of 17 June 2008 states: ‘HLDS just concluded their negotiation with Dell on HH DVD RW & HH DVD ROM [August 2008 and September 2008] [total available market]. Results as follows’, quotes the various prices and the various total available markets and concludes: ‘We need a [miracle] to get more [total available markets] with higher prices!’ Lastly, according to a PLDS email of 14 February 2008 concerning future internet negotiations: ‘TSST mentioned that they will be price leader but they do not want 60% [total available market]’.

135 As regards the allegedly inaccurate information provided by Sony Optiarc, it must be noted that, in any event, it cannot be sufficient to call into question the fact that those contacts had an anticompetitive object (see paragraph 114 above).

136 Therefore, the information provided by Sony Optiarc appears capable of having helped the cartel participants to predict better the future conduct of competitors on the market and to draw conclusions in relation to their own conduct.

– *Recital 229 of the contested decision (contact 98 in Annex I)*

137 According to recital 229 of the contested decision, it follows, in particular, from two internal PLDS emails of 23 and 30 April 2008 that PLDS had engaged in an exchange of sensitive information for a forthcoming internet negotiation with Sony Optiarc. The email of 23 April 2008 contains information relating to several competitors and states in relation to Sony Optiarc ‘[to be confirmed] < [USD] 150. Dell remarked price too high. No chance’. The PLDS email of 30 April 2008 states the following:

‘As promised, here is some info of [Sony] Optiarc: — RTS: [October 2008] — Dell requested them to pull in to [September 2008] — Accordingly, Optiarc has so [many] orders to fulfil on BD ODDs, they are currently having production constraint’.

138 The applicants submit that the wording of the email of 30 April 2008 (‘Dell remarked’) strongly suggests that that information came from Dell and that the Commission admits that the information in the email of 23 April 2008 came from Dell.

139 The Commission disputes the applicants’ arguments.

140 As regards the first email, the contested decision itself states that Dell was the source of information. However, the statement ‘to be confirmed’ may suggest that PLDS intended to be able to confirm this information with Sony Optiarc.

141 There also appears to be proof of contact between PLDS and Sony Optiarc in the second email on account of the expression ‘here is some info of Optiarc’. That expression could nevertheless have a different meaning and simply mean ‘about Optiarc’.

142 Thus, it can only be assumed on the basis of those two emails, in particular when read together, that PLDS and Sony Optiarc exchanged information.

143 As regards the usefulness of that information, if it was provided by Sony Optiarc, as noted by the Commission, it can only be found that the knowledge that Sony Optiarc was experiencing production constraints allowed its competitors to infer that Sony Optiarc would not bid aggressively in upcoming tenders. Such information was thus capable of reducing uncertainty as regards the future conduct of the competitors.

144 Thus, it must be concluded that contact 98 is capable of contributing to a body of evidence.

– *Recitals 233 to 236 of the contested decision (contact 100 in Annex I)*

145 According to recitals 233 to 236 of the contested decision, account managers at HLDS, TSST, PLDS and Sony Optiarc organised telephone contacts at the beginning of June 2008 in relation to Dell’s internet negotiation for the August and September 2008 HH DVDRW and HH DVD-ROM prices. Those recitals refer, in particular, to several internal HLDS and PLDS emails and to oral statements by PLDS.

146 The applicants emphasise that Sony Optiarc was not involved in the HH DVD-ROM internet negotiation and that the Commission acknowledges, in the contested decision, that no agreement was reached between Sony Optiarc and another supplier in relation to the HH DVDRW internet negotiation. As regards the latter product, the Commission’s allegation, in the contested decision, with reference to an internal PLDS email of 2 June 2008, that Sony Optiarc ‘disclosed its intended price of USD 18.88’ is incorrect, as that price had previously been quoted by Sony Optiarc for the whole of the third quarter, covering August, September and October 2008. The information in question is thus old and incorrect. In addition, Sony Optiarc reduced its price to USD 18.78 for September and to USD 18.73 for October 2008.

147 The Commission disputes the applicants’ arguments.

148 The email of 2 June 2008, quoted by the parties, which concerns an auction that took place on 5 June 2008 for HH DVDRW drives for the third quarter of 2008, states (i) that Sony Optiarc proposed a price of

USD 18.88 and (ii) that the latter ‘indicated that they wanted [3<sup>rd</sup>] or even [2<sup>nd</sup> place]’.

149 As regards the price, the applicants maintain that it was both old information, because it in fact related to a price proposed for the previous auction, and incorrect information, because Sony Optiarc ultimately proposed lower prices for September and October 2008.

150 First, it cannot be held that it was old information since, as has already been explained, the final price proposed by a participant during the previous auction generally served as the starting point for its price for the new auction. Accordingly, nor could the price be regarded as inaccurate, in that it was not final.

151 As regards Sony Optiarc’s statement on the rank which it wanted, it follows from paragraph 96 above that the information relating to the ranking in a past auction could be useful. That is the case, a fortiori, for desired ranking for an upcoming auction.

152 Therefore, it must be held that that email was part of an information sharing system relating to sales made by competitors seeking to reduce the degree of uncertainty, within the meaning of the case-law cited in paragraph 59 above.

– *Recitals 237 to 241 of the contested decision (contact 101 in Annex I)*

153 According to recitals 237 to 241 of the contested decision, PLDS, HLDS, TSST and Sony Optiarc exchanged price information during the period from 20 June to 11 July 2008 in relation to bilateral negotiations with Dell for supplies of HH DVDRWs in 2008. Those recitals refer essentially to two PLDS emails. The PLDS email of 20 June 2008 states: ‘Heard Optiarc [got] 35% [total available market] for reducing a price [by] about [USD] 0.10 (i.e. [USD] 18.68)... but how true? ... according to HLDS, he heard ... HLDS is thinking how to reverse the situation’. A second email states: ‘Optiarc said they first quote[d] [USD] 18.70 and was given 35% [total available market]. [Dell] later wanted to cut their [total available market] to 25% but Optiarc refused and increase[d] price to [USD] 18.73 and [got] 30% [total available market]. Optiarc said that [it had been called] regarding our price of [USD] 18.73, that [is] the reason why [it] aligned the price. I am not [buying] Optiarc[’s] story as we quoted a lower price of [USD] 18.70 and was told that we will get a [total available market] of 5%. HLDS quoted a price of [USD] 18.73 and was also told by [R.] that he will get 5% [total available market].... Something fishy is happening here’ Those recitals also refer to the PLDS oral statement that ‘according to [an HLDS employee], he received some of the information about HLDS from Optiarc. He told us that the quote was a guess of Optiarc’s and not information received from HLDS’.

154 The applicants maintain that the PLDS email of 20 June 2008 describes only vague historical information (‘Heard Optiarc [got] 35% [total available market] for reducing a price’) and suggests that the information in question may have been a rumour (‘but how true?’). The applicants add that, although the PLDS leniency statement states that information about HLDS was speculation from Sony Optiarc, the email of 20 June 2008 suggests rather that PLDS contacted HLDS directly (‘According to HLDS, he heard ... HLDS is thinking how to reverse the situation’).

155 The Commission disputes the applicants’ arguments.

156 Contrary to what is submitted by the Commission, the first email does not clearly show that the information that was exchanged came from Sony Optiarc.

157 As for the second email, PLDS states that the information attributed to Sony Optiarc is not reliable and that it is indeed, on the contrary, deceptive (‘I am not [buying] Optiarc[’s] story’) Thus, that information cannot be considered as being capable of constituting evidence of anticompetitive contacts.

158 However, that Sony Optiarc may have attempted, on some occasions, to deceive the other cartel participants cannot cast doubt on the reality and the relevance of its involvement in some other contacts (see paragraph 106 above).

159 In the light of the foregoing, it must be concluded that contact 101 is not capable of contributing to a body of evidence.

– *Annex I to the contested decision (contact 105)*

160 Contact 105 relates to various emails concerning an invitation to tender for the fourth quarter of the business year 2008–2009 for Slim ODDs.

161 According to the applicants, either the information was probably provided by Dell (the PLDS email of 18 June 2008 and the HLDS emails of 19 and 23 June 2008), or it was speculative (the PLDS email of 20 June 2008), or it related to prices that had already been quoted (the PLDS email of 11 July 2008). In addition, Sony Optiarc was not successful in that invitation to tender, as Dell did not select it as a supplier, and the information would therefore have no relevance for any future internet negotiation, which, unlike the invitation to tender, actually set the prices and terms for the product and months concerned.

162 The Commission disputes the applicants' arguments.

163 It should be noted that the date of the allocation of the auction in question is not apparent from the evidence in the case file, although the parties agree on the fact that some information was exchanged before and some after that allocation.

164 As regards the information which was exchanged before that allocation, the PLDS email of 20 June 2008 states the following:

'Two suppliers are invited, namely HLDS and Optiarc. Optiarc mentioned to their management that HLDS "most likely" will quote around [USD] 40. HLDS management is very keen to get this project. So, let me know who you want them to get this project!'

165 It follows from the wording of that email that, even if the information is not absolutely proved, it reveals a high degree of certainty ('most likely'). It therefore constitutes useful information, which is capable of reducing uncertainty in relation to the price which would be offered by Sony Optiarc.

166 As regards the information which was exchanged after that allocation, the Commission refers to the PLDS email of 11 July 2008, which states the following:

'Optiarc ... Optiarc said they quoted [USD] 41 (I believed it is lower than [USD] 41 and above [USD] 40). HLDS. Quoted [USD] 40 ... Very confident to get [the application] slot. ... mentioned to both that their competition quoted [USD] 38.00. IMPACT: PLDS needs to be able to have a sales price of [USD] 40 in Q4 [for the 2008–2009 business year] with profit!'

167 As the Commission argues, that email demonstrates the fact that PLDS adjusted its sales price based on the information provided by Optiarc. Thus, that email illustrates the fact that the information received through the contacts had an effect on the conduct of the competitors.

168 It must therefore be concluded that contact 105 is capable of contributing to a body of evidence.

– *Recitals 257 to 259 of the contested decision (contact 116 in Annex I)*

169 According to recitals 257 to 259 of the contested decision, HLDS, PLDS and Sony Optiarc exchanged information prior to Dell's internet negotiation which took place on 30 October 2008. Those recitals refer, in particular, to an internal Sony Optiarc email, also sent to Quanta, of 28 October 2008, and to an internal HLDS email of 29 October 2008. The Sony Optiarc email states that 'PLDS will launch their refresh model in [January] 2009 @ [USD] 25.00. (They will use this price as start price for [January] 2009)'. As regards the HLDS email of 29 October 2008, it states the following:

‘Slim [internet negotiation] ... — S company trend report — They plan to participate in [a] 12.7mm Tray/Slot DVD-W [negotiation] only but no aggressive price adjustment is expected ... Because [the prices] were mentioned by S company’s personnel, there is [a] possibility that they will change their position in the actual [internet negotiation]. So I will check their movement in [the internet negotiation].’

170 The applicants maintain, with regard to the first Sony Optiarc email, which refers to a PLDS ‘refresh model’ with a ‘start price’ of ‘[USD] 25’, that the information about that price, that is to say, a starting price, was not capable of removing or significantly reducing uncertainty about future pricing behaviour because it was known that the price would drop significantly during the internet negotiations. The applicants emphasise that this price of USD 25 was neither PLDS’s starting price nor its final price, since the price had been reduced from USD 25.20 to USD 24.60. As for the second email, from HLDS, which states that Sony Optiarc planned ‘to participate in [a] 12.7 mm Tray/Slot DVD-W [negotiation]’ but that ‘no aggressive price adjustment’ was to be expected, that information would not have been capable of appreciably reducing or removing uncertainty about Sony Optiarc’s conduct, since HLDS observed in the email that ‘there is [a] possibility that [Sony Optiarc] will change their position in the actual [internet negotiation]’.

171 The Commission disputes the applicants’ arguments.

172 First of all, it should be noted that the Sony Optiarc email of 28 October 2008 constitutes direct information sharing with a competitor, since the email was not only sent internally but also to Quanta.

173 Next, it is necessary to reject the applicants’ argument that the price of USD 25 was not reliable and was not a final price. First, it is logical that, in the context of a bidding event, a price may evolve. Secondly, the fact that the price supplied to a competitor may not be the final price cannot change the anticompetitive nature of that information.

174 The same applies to the HLDS email of 29 November 2008. It is not because Sony Optiarc could have still changed its position in the internet negotiation that providing that position did not distort the negotiation by reducing uncertainty as regards that position.

175 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.

*Second part: lack of evidence of a ‘single and continuous’ infringement*

176 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 Optiarc was aware of the existence of a common objective and intended to contribute to it. Third, there is no evidence that Sony Optiarc 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 Optiarc made no attempt to conceal its conduct, and, on the contrary, sometimes bid aggressively in the auctions. Fifth, the Commission does not take account of the fact that over the same period it alleges only 17 contacts against Sony Optiarc, whereas it alleges 51 contacts against HLDS, 30 against TSST and 58 against PLDS.

177 The Commission disputes the applicants’ arguments.

178 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).

- 179 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 Technologie 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).
- 180 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).
- 181 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 (judgments of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 90, of 14 May 1998, *Buchmann v Commission*, T-295/94, EU:T:1998:88, paragraph 121, and of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 65).
- 182 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).
- 183 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).
- 184 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.

185 It should also be noted that the applicants do not challenge the contested decision in so far as it is found therein that there was a single and continuous infringement, but claim that the Commission has not proved to the requisite legal standard that Sony Optiarc participated in that infringement.

186 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).

187 In the present case, it must be pointed out that it is apparent from the foregoing that the applicants participated in a number of contacts over a period of fifteen months. Most of the contacts were only a month apart and the applicants sometimes participated in several contacts in the same month. The longest established period without a contact taking place is only 3 months (between July and October 2008).

188 Secondly, as regards the applicants’ argument that the Commission has not demonstrated in the contested decision that Sony Optiarc was aware of the existence of a common objective and intended to contribute to it, it is sufficient to refer to recitals 373 and 374 of the contested decision.

189 Accordingly, in recital 373 of that decision, the Commission pointed out that an internal PLDS email of 20 June 2007 demonstrated that Sony Optiarc had disclosed information, which it had received from TSST, to PLDS: ‘According to resources, TSST has still reserved 40% for HH SATA DVD & DVDRW. This has been further confirmed with HLDS & Sony Optiarc Account Managers’. In that regard, it should be recalled that, in cases concerning infringements of the competition rules, the taking into account of circumstances prior to the period of infringement is not precluded, in so far as those circumstances can, inter alia, serve to create an overall picture of the situation and corroborate the interpretation of other evidence (see judgment of 23 January 2014, *Gigaset v Commission*, T-395/09, not published, EU:T:2014:23, paragraph 67 and the case-law cited).

190 Moreover, the Commission pointed out in recital 373 that the fact that Sony Optiarc shared information with its competitors is also apparent from an HLDS email of 23 June 2008, in which it is stated that ‘SNO [Sony Optiarc] is also already checking up on the price levels of T[SST] and P[PLDS] company’.

191 According to recital 374 of the contested decision, an internal Sony Optiarc email of 14 February 2008 shows that it engaged in contacts with TSST and PLDS and that it also disclosed sensitive information to Quanta. Furthermore, according to that recital, internal HLDS and PLDS emails, dated 18 September and 25 July 2007, confirm that Sony Optiarc participated in anticompetitive contacts.

192 Lastly, in its oral statement, PLDS stated that HLDS, TSST and Optiarc: ‘[had], at some point in time, told it that they had spoken to each other’.

193 Moreover, it can 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).

194 Thus, the Commission rightly found in recital 374 of the contested decision that Sony Optiarc, by engaging in those various contacts, knew or could have reasonably foreseen that those contacts were not isolated, but were united by the same objective and constituted a large ODD cartel consisting of a wider network of parallel contacts.

195 Third, as regards the applicants' argument that the Commission produced no evidence that Sony Optiarc 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 Optiarc had participated in all the auctions. In that regard, the fact that Sony Optiarc might not have participated in certain discussions cannot suffice to exonerate it.

196 Fourthly, as regards the applicants' argument that Sony Optiarc made no attempt to conceal its conduct, and, on the contrary, sometimes bid aggressively in the auctions, it should be noted that the fact that Sony Optiarc 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.

197 As regards Sony Optiarc's sometimes aggressive conduct in the context of certain auctions, the fact that it 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 paragraphs 106 and 114 above).

198 Fifth, as regards the applicants' argument that the Commission does not take account, in the contested decision, of the fact that it alleges only seventeen contacts against Sony Optiarc, it must be pointed out that it is apparent from Annex I to the contested decision that the Commission established thirty-one contacts in relation to Dell during the period of Sony Optiarc's participation in the cartel. According to that annex, HLDS was involved in twenty-two contacts, TSST in eighteen contacts and PLDS in all of the contacts. Even if account is taken of the fact that some of the contacts are not absolutely proved (see paragraph 67 et seq. above), the number of Sony Optiarc's contacts, contrary to what the applicants claim, cannot be classified as minor.

199 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.

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

*Third part: failure to take exculpatory evidence into account*

201 The applicants submit that the Commission failed to take account, or to take sufficient account, of the contemporaneous evidence on which Sony Optiarc relied, which shows that it competed aggressively during the procurement events in question (contact 101). Even where the Commission does not ignore the exculpatory evidence, it fails to resolve doubts in favour of Sony Optiarc (contact 98).

202 The Commission disputes the applicants' arguments.

203 The applicants' arguments, which amount in essence to submitting that the Commission did not take account of the fact that Sony Optiarc sometimes sought to act only for its own benefit, must be rejected. As was already 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.

204 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*

205 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*

206 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 Optiarc’s conduct, it ought to have afforded Sony Optiarc an opportunity to exercise its right to be heard by addressing a supplementary statement of objections to Sony Optiarc, 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 Optiarc’s rights of defence.

207 The Commission disputes the applicants’ arguments.

208 It is necessary to examine, in the light of the principles referred to in paragraph 71 et seq. above, whether Sony Optiarc was clearly informed, in the statement of objections, that the Commission considered that the single and continuous infringement consisted of different bilateral agreements.

209 It must first be noted that there were a number of elements, in the statement of objections, indicating to Sony Optiarc that the Commission considered that the cartel consisted of different agreements. Thus, in particular, recital 301 of that statement states 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.

210 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).

211 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).

212 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.

213 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.

214 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.

215 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.

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

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

– *Lack of evidence*

218 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.

219 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 211 above, the Commission was not required to establish that each contact constitutes an infringement 'by object'.

– *Failure to state reasons*

220 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 Optiarc 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.

221 The Commission disputes the applicants' arguments.

222 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).

- 223 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).
- 224 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).
- 225 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.
- 226 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).
- 227 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 213 above).
- 228 Accordingly, nor is there any inconsistency between those recitals and Article 1 of the contested decision, which states that the single and continuous infringement consisted of several separate infringements.
- 229 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.
- 230 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).

231 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.

232 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.

233 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***

234 In the alternative, the applicants maintain, in the first place, that the contested decision, by applying ‘double counting’ to Sony Optiarc’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 Optiarc’s substantially more limited participation by comparison with the other addressees of the decision.

*First part: the application of ‘double counting’ to Sony Optiarc’s detriment*

235 In essence, the applicants submit that the Commission imposed on Sony Optiarc a fine based on revenues obtained from Dell that had been passed on to Quanta under the revenue-sharing arrangements in force between Sony Optiarc and Quanta during the relevant period. Those revenues accounted for at least 36% of the annual value of sales to Dell attributed to Sony Optiarc, namely a minimum of around EUR 9 956 911 out of a total of EUR 28 014 950. The applicants maintain that the amount of the fine imposed on them was set at around EUR 3 480 096 more than it would have been if those revenues had been excluded from the annual value of Sony Optiarc’s sales, as they should have been. 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.

236 The Commission disputes the applicants’ arguments.

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

238 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.

239 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.

- 240 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).
- 241 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).
- 242 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).
- 243 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).
- 244 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.
- 245 In that regard, the method advocated by the applicants, consisting in deducting from the revenues received by Sony Optiarc from Dell the revenues passed on to Quanta under the revenue-sharing arrangements in force between Sony Optiarc and Quanta 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.
- 246 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.
- 247 In that regard, the contested decision did not therefore undermine the principles of equal treatment and of proportionality, or the Guidelines.
- 248 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 amount of the fine imposed on them should be calculated solely by reference to the revenues that they kept, and that the revenues passed on to Quanta should be excluded.

249 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.

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

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

251 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 Optiarc 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 Optiarc'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.

252 The Commission disputes the applicants' arguments.

253 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 Optiarc 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.

254 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 alleged infringement with respect to HP.

255 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.

256 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 in relation to HP.

- 257 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 the final amount of the fine imposed would have been much higher.
- 258 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.
- 259 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.
- 260 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.
- 261 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.
- 262 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 197 above, the fact that Sony Optiarc 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.
- 263 Accordingly, all the applicants' arguments relating to the second part of the second plea must be rejected.
- 264 The second plea in law must therefore be rejected in its entirety.
- 265 In the light of all of the foregoing, all the claims made in the present action must be rejected.

### Costs

- 266 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 Optiarc, Inc. and Sony Optiarc America, 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

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\* [Language of the case: English.](#)