

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

12 July 2019 (*) (1)

(Competition — Agreements, decisions and concerted practices — Market for optical disk drives — Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Collusive agreements relating to procurement events organised by two computer manufacturers — Breach of essential procedural requirements and of the rights of the defence — Jurisdiction of the Commission — Geographic scope of the infringement — Single and continuous infringement — Principle of good administration — 2006 Guidelines on the method of setting fines)

In Case T-8/16,

Toshiba Samsung Storage Technology Corp., established in Tokyo (Japan),

Toshiba Samsung Storage Technology Korea Corp., established in Suwon-si (South Korea),

represented initially by M. Bay, J. Ruiz Calzado, A. Aresu and A. Scordamaglia-Tousis, and subsequently by M. Bay, J. Ruiz Calzado and A. Aresu, lawyers,

applicants,

v

European Commission, represented initially by N. Khan, A. Biolan and M. Farley, and subsequently by A. Biolan, M. Farley and A. Cleenewerck de Crayencour, acting as Agents,

defendant,

ACTION under Article 263 TFEU seeking, principally, annulment in whole or in part of Commission Decision C(2015) 7135 final of 21 October 2015 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 3 May 2018,

gives the following

Judgment

I. Background to the dispute

A. *The applicants and the market concerned*

- 1 The applicants, Toshiba Samsung Storage Technology Corp. ('TSST Japan') and Toshiba Samsung Storage Technology Korea Corp. ('TSST KR'), are manufacturers and suppliers of optical disk drives ('ODDs'). In particular, TSST Japan is a joint venture owned by Toshiba Corporation, established in Japan, and Samsung Electronics Co., Ltd, established in South Korea. During the infringement period, TSST Japan was the parent company of TSST KR.
- 2 TSST Japan and TSST KR (together, 'TSST') began operations on 1 April 2004 as two separate operating units. In December 2005, TSST Japan exited the market, remaining with reduced transitional sales activities until early 2008. TSST KR gradually assumed the sales activities of TSST Japan and was directly engaged in the development, marketing, sales and after-sales services of ODDs (contested decision, recital 14).
- 3 The infringement concerns ODDs used in personal computers (desktops and notebooks) ('PCs') produced by Dell Inc. ('Dell') and Hewlett Packard ('HP'). ODDs are also used in a wide range of other consumer appliances such as compact disc ('CD') or digital versatile disc ('DVD') players, game consoles and other electronic hardware devices (contested decision, recital 28).
- 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 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. Those two companies 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 carried out bidding events mainly 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, recitals 34 and 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).

B. Administrative procedure

- 9 On 14 January 2009, the European 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) from Koninklijke Philips NV ('Philips'). On 29 January and 2 March 2009, that request was supplemented in order to include, alongside Philips, Lite-On IT Corporation ('Lite-On') and their joint venture Philips & Lite-On Digital Solutions Corporation ('PLDS').
- 10 On 29 June 2009, the Commission sent a request for information to undertakings active in the ODD sector.
- 11 On 30 June 2009, the Commission granted conditional immunity to Philips, Lite-On and PLDS.
- 12 On 4 and 6 August 2009, Hitachi-LG Data Storage, Inc. and Hitachi-LG Data Storage Korea, Inc. (together 'HLDS') submitted an application to the Commission for a reduction of the amount of the fine under the Commission Notice on immunity from fines and reduction of fines in cartel cases.
- 13 On 18 July 2012, the Commission initiated a proceeding and adopted a statement of objections against 13 ODD suppliers, including the applicants. In that statement of objections, the Commission stated, in essence, 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 on ODDs from 5 February 2004 until 29 June 2009, consisting in orchestrating their conduct with respect to invitations to tender organised by two computer manufacturers, Dell and HP.
- 14 On 29 October 2012, the applicants sent the Commission their comments on the statement of objections.
- 15 On 29 and 30 November 2012, all the addressees of the statement of objections took part in a hearing before the Commission.
- 16 On 14 December 2012, the Commission requested all the parties to provide the relevant documents received from Dell and HP during the infringement period. All the parties, including the applicants, replied to those requests. In addition, each of the parties was granted access to the non-confidential version of the replies provided by the other ODD suppliers.
- 17 On 27 November 2013, the applicants filed supplementary comments on the other parties' replies.
- 18 On 18 February 2014, the Commission adopted two supplementary statements of objections in order, as it stated, to supplement, amend and clarify the objections addressed to certain addressees of the statement of objections as regards their liability for the alleged infringement.
- 19 On 1 June 2015, the Commission adopted another supplementary statement of objections. The purpose of this new statement of objections was to supplement the earlier statements of objections by addressing the objections set out in those statements to additional legal entities belonging to the groups of undertakings (parent companies or predecessors) which had already been addressees of the first statement of objections.
- 20 The addressees of the statements of objections of 18 February 2014 and 1 June 2015 made known their views to the Commission in writing but did not request an oral hearing.

- 21 On 3 June 2015, the Commission issued a letter of facts to all the parties. The addressees of the letter of facts made known their views to the Commission in writing.
- 22 On 21 October 2015, the Commission adopted Decision C(2015) 7135 final relating to a proceeding pursuant to Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39639 — Optical disk drives) ('the contested decision').

C. Contested decision

1. The infringement at issue

- 23 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).
- 24 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).
- 25 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).
- 26 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 obtained (contested decision, recital 70).
- 27 The Commission further stated that, whilst taking into account that the cartel members 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, via emails, including private (hotmail) addresses and instant messaging services, or meetings, mostly at the level of global account managers (contested decision, recital 71).
- 28 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).

2. The applicants' liability

- 29 The applicants' liability was established owing to (i) the direct participation of TSST KR in the cartel, from 23 June 2004 to 17 November 2008, in particular for coordination with other competitors with regard

to Dell and HP, and (ii) the exercise of decisive influence by TSST Japan over its subsidiary throughout the entire infringement period, as presumed by the Commission (contested decision, recital 498).

3. *The fine imposed on the applicants*

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

31 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).

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

33 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).

34 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).

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

36 Lastly, since the adjusted basic amount of the fine imposed on the applicants reached the cap of 10% of their turnover, the Commission was required to make a fresh adjustment on the basis of Article 23(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) (contested decision, recitals 570 to 572).

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

'Article 1

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

...

(e) [the applicants] from 23 June 2004 to 17 November 2008, for their coordination with regards to Dell and HP.

...

Article 2

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

...

(e) [the applicants], jointly and severally liable: EUR 41 304 000.’

II. Procedure and forms of order sought

38 By application lodged at the Court Registry on 5 January 2016, the applicants brought the present action.

39 The Commission lodged the defence on 21 July 2016.

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

41 By order of 23 April 2018, adopted pursuant (i) to the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and (ii) to Article 91(b) and Article 92(3) of the Rules of Procedure, the Court (Fifth Chamber) ordered the Commission to produce those transcripts.

42 On 24 April 2018 the Commission produced those transcripts, which could be consulted by the applicants’ lawyers at the Court Registry before 30 April 2018 at 17.00.

43 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 May 2018.

44 The applicants claim that the Court should:

- annul the contested decision, in whole or in part;
- in addition, or in the alternative, reduce the amount of the fine imposed on them;
- order the Commission to pay the costs;

45 The Commission contends that the Court should:

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

III. Law

46 In support of the action, the applicants raise nine pleas in law. The first plea alleges breach of essential procedural requirements and of the rights of the defence; the second alleges lack of jurisdiction on the Commission’s part to apply Article 101 TFEU and Article 53 of the EEA Agreement; the third alleges errors of fact and of law in the determination of the geographic scope of the infringement; the fourth alleges errors of fact and of law in the finding of a single and continuous infringement; the fifth alleges errors of fact and of law in respect of the applicants’ alleged awareness of the whole infringement; the sixth alleges errors of fact and of law relating to the starting date of the applicants’ participation in the infringement; the seventh plea alleges failure to prove the applicants’ participation in concerted practices or anticompetitive agreements; the eighth alleges breach of the right to good administration owing to the excessive duration of the investigation; and the ninth plea, put forward in the alternative, alleges errors by the Commission in the calculation of the amount of the fine.

A. First plea: breach of essential procedural requirements and of the rights of the defence

47 The applicants allege, by their first plea, breach of essential procedural requirements and of their rights of defence during the administrative procedure before the Commission. This plea is divided into six parts.

1. First part: inconsistency between the statement of objections and the contested decision as regards the legal characterisation of the alleged conduct

48 The applicants claim that the legal characterisation of the alleged conduct in the statement of objections is inconsistent with that set out in the contested decision. They maintain, in that regard, that while the statement of objections had characterised the alleged anticompetitive arrangements as a ‘single, continuous and complex infringement’, the Commission considered in the contested decision that the infringement was also composed of ‘several separate infringements’. Thus, according to the applicants, the Commission breached their rights of defence, since it relied in the contested decision on an additional legal characterisation or one that was different from that set out in the statement of objections, which did not allow the applicants to submit their observations in that regard.

49 The Commission disputes the applicants’ arguments.

50 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).

51 However, 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).

52 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).

53 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).

54 It is therefore necessary to examine, in the light of those principles, whether the applicants were informed, in the statement of objections, that the Commission considered that the infringement committed was a single and continuous infringement, consisting of separate infringements.

55 In that regard, it should be recalled, first of all, that, according to settled 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 (see judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81 and the case-law cited).

- 56 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 (judgments of 24 October 1991, *Rhône-Poulenc v Commission*, T-1/89, EU:T:1991:56, paragraphs 125 and 126).
- 57 It is therefore apparent from the very concept of a single and continuous infringement that such an infringement presupposes a ‘complex of practices or infringements’. The applicants cannot therefore claim that the Commission included an additional legal characterisation in Article 1 of the contested decision by finding, in addition to a single and continuous infringement, that that infringement was composed of several ‘separate infringements’, given that those various instances of anticompetitive conduct are precisely what constitute that single infringement.
- 58 It must therefore be held that there is no inconsistency between the statement of objections and the contested decision when that decision states that the single and continuous infringement was composed of several ‘separate infringements’.
- 59 In any event, and as is apparent from the case-law set out in paragraph 53 above, the Commission’s decision cannot be annulled on the sole ground that the definitive conclusions drawn from the various instances of conduct alleged against the applicants do not correspond precisely with the legal classification of the facts made in the statement of objections, since that classification is only provisional.
- 60 It must be stated, next, that there were a number of elements in the statement of objections indicating to the applicants that the Commission considered that the parties had participated in several types of anticompetitive conduct. Thus, in particular, recital 308 of the statement of objections mentions the ‘complex of infringements in this case’. Recital 353 of that statement 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 also states that that ‘complex of concerted practices and/or agreements’ had as its object the restriction of competition.
- 61 Lastly, it must be pointed out, as the Commission correctly observes, that the bilateral contacts in which the applicants were found to have engaged, and the legal characterisation given to such conduct, were mentioned in recitals 273 and 274 of the statement of objections and the applicants were able to dispute them.
- 62 The applicants acknowledged, in recitals 245 and 246 of their reply to the statement of objections, that ‘each procurement event reflected a unique competitive dynamic’ and that, accordingly, ‘the [statement of objections] ignores the independent, self-standing nature of the different and separate alleged bilateral contacts’. In contesting the existence of a single and continuous infringement, the applicants claimed in their reply to the statement of objections that, if the practices complained of infringed Article 101 TFEU, they did so separately in relation to different bidding events.
- 63 In addition, the applicants also contested each contact separately and at length in their reply to the statement of objections and were indeed successful in persuading the Commission not to pursue its allegations in relation to certain bilateral contacts, which resulted in a reduction in the duration of the applicants’ participation in the infringement, which was initially established from 1 April 2004 to 29 June 2009.
- 64 Consequently, the applicants cannot claim that the Commission infringed their rights of defence by not allowing them to submit their observations on the legal characterisation of the conduct alleged against them.
- 65 Accordingly, it must be found that (i) the contested decision does not contain a legal characterisation of the infringement at issue which is additional to, or separate from, that set out in the statement of objections and (ii) the applicants’ rights of defence were respected, since they were able to submit their observations in that regard.

66 The applicants' arguments relating to the alleged breach of the rights of the defence in the context of the contested decision as regards the legal characterisation of the alleged conduct must therefore be rejected.

67 The first part of the first plea must be rejected.

2. *Second and third parts: failure to state reasons resulting from the inconsistencies in the contested decision as regards the legal characterisation of the alleged infringement*

68 The applicants claim that the contested decision contains a number of inconsistencies between the statement of reasons and the operative part and in the reasons themselves as regards the legal characterisation of the alleged infringement, thus giving rise to a failure to state reasons. In their submission, that failure to state reasons has resulted in a breach of the principle of legal certainty and of their right to an effective judicial review, as it did not enable them to understand the nature and scope of the infringement in which they were alleged to have participated, thus preventing the Court from exercising its power of review.

69 The Commission disputes the applicants' arguments.

70 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 direct and individual concern 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).

71 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).

72 In addition, the statement of the reasons for a measure 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).

73 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, 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 (see judgment of 16 December 2015, *Martinair Holland v Commission*, T-67/11, EU:T:2015:984, paragraph 31 and the case-law cited).

- 74 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).
- 75 It is in the light of that case-law that it is necessary to analyse whether there are inconsistencies in the contested decision as regards the legal characterisation of the alleged infringement and, if so, whether those inconsistencies gave rise to a failure to state reasons with respect to the applicants.
- 76 In the first place, it must be observed that there is no inconsistency between, on the one hand, recital 352 of the contested decision, relating to the alleged conduct of a single and continuous infringement, and, on the other hand, Article 1 thereof, stating, in essence, that the alleged conduct constitutes individual infringements which, at the same time and as a whole, meet the criteria for a single and continuous infringement. As was noted in paragraphs 56 to 58 above, the very concept of a single and continuous infringement presupposes a ‘complex of practices or infringements’ and is not an additional legal characterisation which was included in Article 1 of the decision.
- 77 For that same reason, and contrary to what the applicants maintain, nor is Article 1 of the contested decision inconsistent with recitals 378 and 379 of that decision.
- 78 Moreover, the fact that the Commission states in recitals 303 and 346 of the contested decision that it would have been artificial to split up the infringement consisting in continuous conduct with a single purpose, even if the various individual contacts within the cartel satisfied in themselves the criteria of Article 101 TFEU, is not inconsistent with the fact that Article 1 of the operative part refers to ‘several separate infringements’. To the extent that the Commission considered that the conduct of those responsible for the cartel had been continuous and pursued a single purpose, it was entitled to classify those separate infringements, consisting of bilateral contacts, as a single and continuous infringement. For the same reasons, recitals 303 and 346 and recital 352 are also consistent.
- 79 It must therefore be held that the statement of reasons and the operative part of the contested decision are consistent as regards the legal characterisation of the alleged infringement.
- 80 In the second place, as regards the applicants’ argument relating to the failure to state reasons with respect to the legal characterisation, duration, scope, evidence and those responsible for the ‘separate infringements’, it must be stated, first of all, that, in sections 4.6, 5.4 and 6.2 of the contested decision, the Commission clearly and unambiguously describes the functioning of the cartel, the application of Article 101(1) TFEU to the alleged conduct, and those responsible for the cartel. Next, Annex I contains the list of the alleged contacts liable to constitute separate infringements. Lastly, Article 1 of the contested decision finds the applicants liable for a single and continuous infringement in the ODD sector covering the whole EEA from 23 June 2004 to 17 November 2008, for the coordination of conduct with regard to Dell and HP. The Commission also stated in recital 517 of the contested decision, in relation to the duration of the applicants’ participation in the cartel, that it covered the period from 23 June 2004 to 17 November 2008.
- 81 The fact that neither the operative part nor recital 352 of the contested decision identifies the ‘separate infringements’ does not constitute a failure to state reasons for that decision, since those infringements do not entail an additional legal characterisation which may be described in more detail. As is apparent from paragraphs 57 and 65 above, the only legal characterisation of the infringement at issue is that of a ‘single

and continuous infringement' which itself presupposes a 'complex of practices or infringements'. Moreover, those alleged practices or infringements, which are composed of various contacts, were set out in detail in the main body of the contested decision itself and listed in Annex I thereto.

82 It must be observed that the statement of reasons for the contested decision sets out the alleged instances of conduct (see contested decision, section 4.6.3), composed of various bilateral contacts between the cartel participants, and the persons who took part in each alleged contact. Those contacts were also listed by date in Annex I to that decision. Consequently, the applicants cannot claim that the contested decision is vitiated by a failure to state reasons because it failed to list those 'separate infringements' in its operative part. Accordingly, nor have the principles of effective judicial protection and of legal certainty been infringed.

83 It is therefore necessary to reject the applicants' argument that the statement of reasons does not identify the conduct and evidence on which it is based nor the persons who participated in each instance of conduct.

84 Accordingly, as is apparent from the foregoing, the Commission explained, to the requisite legal standard, the scope, the nature of the applicants' conduct and the contacts that it considered to constitute an infringement of Article 101 TFEU, as well as the evidence underpinning those conclusions.

85 In the third place, it should be pointed out that the applicants were in a position to understand the reasons underlying the contested decision and, as is apparent from the grounds relied on in the application, also to make detailed submissions to the Court on the scope and nature of their conduct and on the contacts in respect of which the Commission found the applicants to have been involved, and that they were therefore able to exercise their right to effective judicial protection.

86 It is apparent from all the foregoing that the Commission fulfilled its obligations under Article 296 TFEU and that the principles of effective judicial protection and of legal certainty were respected.

87 The second and third parts must therefore be rejected.

3. Fourth part: refusal to give access to exculpatory evidence

88 The applicants claim that the Commission breached their rights of defence by not communicating to them the replies to the statement of objections filed by the other undertakings under investigation or some of the observations lodged by the addressees of the two supplementary statements of objections of 18 February 2014 (see paragraph 18 above). The applicants maintain, on that point, that they would have been able to use that evidence in their defence throughout the administrative procedure. They maintain, moreover, that the Commission is also required to disclose documents subsequent to the notification of the statement of objections where they contain new incriminating or exculpatory evidence. The applicants submit that, among the documents that were not communicated, some concerned crucial matters on which they ought to have been able to express a view, in particular, on the question relating to market transparency, the characteristics of the ODD market and the probative value of the evidence used against them. The applicants conclude that they would thus have been able to influence the Commission's assessment in the contested decision, at least as regards the gravity of the conduct and, accordingly, the level of the amount of the fine.

89 The Commission disputes the applicants' arguments.

90 Respect for the rights of the defence requires that the person concerned must have been afforded the opportunity, during the administrative procedure, to make known his views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (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 66).

- 91 A corollary of the principle of respect for the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents comprise both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (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 68).
- 92 In this respect, it should be recalled that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, the replies to the statement of objections of the other undertakings alleged to have participated in the cartel are not, in principle, included in the documents of the investigation file that the parties may consult (judgment of 30 September 2009, *Hoechst v Commission*, T-161/05, EU:T:2009:366, paragraph 163).
- 93 However, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 101 TFEU, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes incriminating evidence against the various undertakings alleged to have participated in the infringement (see judgment of 30 September 2009, *Hoechst v Commission*, T-161/05, EU:T:2009:366, paragraph 164 and the case-law cited). The abovementioned case-law cited is applicable, by analogy, to Article 53(1) of the EEA Agreement.
- 94 By analogy, if a passage in a reply to a statement of objections or in a document annexed to such a reply may be relevant for the defence of an undertaking in that it enables that company to invoke evidence which is not consistent with the inferences made at that stage by the Commission, it constitutes exculpatory evidence. In that case, the undertaking concerned must be authorised to examine the passage or the document concerned and to give its view thereon (judgment of 12 July 2011, *Hitachi and Others v Commission*, T-112/07, EU:T:2011:342, paragraph 34).
- 95 However, the mere fact that other undertakings put forward the same arguments as the undertaking concerned and that they may have used more resources for their defence is not sufficient for those arguments to be regarded as exculpatory evidence (see, to that effect, judgment of 27 September 2006, *Jungbunzlauer v Commission*, T-43/02, EU:T:2006:270, paragraphs 353 and 355).
- 96 As regards the consequences of granting access to the file contrary to those rules, the failure to communicate a document on which the Commission based its decision to inculcate an undertaking constitutes a breach of the rights of the defence only if the undertaking concerned shows that the result at which the Commission arrived in its decision would have been different if the document which was not communicated had to be disallowed as incriminating evidence (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, paragraphs 71 and 73).
- 97 Where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. It is sufficient for the undertaking to show that it would have been able to use the exculpatory document for its defence, in the sense that, had it been able to rely on it during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in the decision, at least as regards

the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the amount of the fine (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, paragraphs 74 and 75).

- 98 The possibility that a document which was not disclosed might have influenced the course of the procedure and the content of the Commission's decision can be established only if a provisional examination of certain evidence shows that the documents not disclosed might — in the light of that evidence — have had a significance which ought not to have been disregarded (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 76).
- 99 It is nevertheless for the applicant to adduce prima facie evidence that the undisclosed documents would be useful to its defence (judgment of 14 March 2013, *Fresh Del Monte Produce v Commission*, T-587/08, EU:T:2013:129, paragraph 690).
- 100 In the first place, it is necessary to examine, in the light of those principles, whether the Commission granted the applicants proper access to potentially exculpatory evidence, in particular as regards the other parties' replies to the statement of objections.
- 101 In this instance, it is necessary to reject, at the outset, the arguments formulated in a general manner by the applicants that they should have been given access to all the replies to the statement of objections and to the other submissions of the other parties.
- 102 As is apparent from the case-law cited in paragraph 92 above, the replies to the statement of objections of the other undertakings alleged to have participated in the cartel are not, in principle, included in the documents of the investigation file that the parties may consult, unless such a document constitutes exculpatory evidence (see also paragraph 94 above).
- 103 In that regard, first, the applicants assert that several passages of the replies of the other participants to the statement of objections adduced evidence of the existence of market transparency and that the applicants should have had access to them. In order to specify what that information is, the applicants refer to a table annexed to the application containing the references of five documents relating to the other parties' replies to the statement of objections and to the recitals of the contested decision citing those documents. However, it must be observed that (i) neither the application nor that table specifies the items or precise passages which could be regarded as exculpatory evidence and (ii) the applicants have not demonstrated the usefulness that those documents which have not been cited and disclosed might have for their defence.
- 104 In addition, the applicants appear to acknowledge in paragraph 55 of the application that the Commission granted such access to the parties as regards the replies to the requests for information relating to market transparency which had been sent by the Commission in December 2012 and that the question of market transparency was much discussed at the oral hearing. Moreover, recital 62 of the contested decision corroborates that information. Consequently, the applicants cannot claim that they did not have access to the most important information regarding that question.
- 105 The applicants' arguments must therefore be rejected.
- 106 Second, the applicants submit that they should have also had access to the parties' submissions regarding the market characteristics, in particular as to whether there was a significant level of buyer power, given that, in their view, those submissions would have allowed them to complement the arguments submitted in paragraph 525 of their reply to the statement of objections, which urged the Commission to consider the market specificities for the purposes of determining the gravity of the conduct in question. It must be stated that the applicants again refer to a table annexed to the application containing the references of three documents consisting of the other parties' replies to the statement of objections and to the recital in which those documents are cited in the contested decision, without specifying the precise passages containing the

information in question or explaining why and how that information might have supplemented their arguments in defence.

107 The applicants' arguments on the need for them to have access to the submissions of the parties regarding the market characteristics must therefore be rejected.

108 Third, as regards the applicants' arguments that the other parties' replies to the statement of objections contain new arguments and evidence that dispute the probative value of evidence used directly against them, it must be observed that the applicants again refer to the annexes to the application in order to set out the documents containing that evidence but do not make clear what specific arguments and evidence provided by the other parties might call into question the probative value of the evidence used directly against them. Whilst it is true that, in the table annexed to the application, the applicants cite five items of evidence adduced by the other parties in their replies to the statement of objections which, according to the applicants, could call in question the evidence used against them, the fact remains that they have not specified what passages were at issue, what precise evidence against them might be called in question, or how that evidence might be called into question. Moreover, nor have they put forward any concrete evidence on the usefulness that those documents which have been cited but not disclosed might have for their defence. The applicants merely assert in a general manner that access to the other parties' submissions in relation to those parties' emails and internal reports would have helped them to challenge the evidence used against them but do not make clear what precise evidence might be challenged, what specific information may have proved useful for their defence, or how that information may have been able to influence the content of the contested decision if they had been able to have access to the documents that were not disclosed.

109 Those arguments must therefore be rejected.

110 Accordingly, it must be stated that the applicants have not demonstrated that the Commission breached their rights of defence by not communicating to them the parties' replies to the statement of objections.

111 In the second place, the applicants take issue in their reply with the fact that the Commission did not respond to their letter of 4 February 2013 containing their request for access to the parties' replies to the statement of objections.

112 In the present case, it should be pointed out, as the Commission observes, that it is not apparent from the arguments set out in the application that the applicants took issue therein with the fact that the Commission did not respond to their letter of 4 February 2013. The applicants cite that letter in footnote 37 of the application in order to show that market transparency had been much discussed during the administrative procedure, but do not specify that that letter included a request for access to such documents.

113 However, it should be pointed out that the applicants raised the matter of the lack of a response to their letter of 4 February 2013 in their reply following the Commission's assertion, in the defence, that the applicants had not lodged a request for access to the information in question. In that regard, the applicants replied that they had made such a request by the letter of 4 February 2013, and that the Commission had not in fact replied. As is apparent from the case-law, arguments which in substance have a close connection with a plea raised in the application initiating the proceedings cannot be considered new pleas and they may be raised at the stage of the reply or the hearing (see judgment of 22 March 2018, *Stavytskyi v Council*, T-242/16, not published, EU:T:2018:166, paragraph 123 and the case-law cited). Accordingly, contrary to what the Commission contends, the applicants' arguments must be declared admissible.

114 The Commission maintains in that regard that that letter was only addressed to its Directorate-General (DG) 'Competition' and, in copy, to the Hearing Officer, contrary to what is provided for in Article 3(7) of the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings.

115 In that regard, it should be noted that that article provides as follows:

‘Any issue regarding the effective exercise of the procedural rights of the parties concerned, other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 (hereinafter ‘the other involved parties’), complainants within the meaning of Article 7(2) of Regulation (EC) No 1/2003 (hereinafter ‘complainants’) and interested third persons within the meaning of Article 5 of this Decision involved in such proceedings shall first be raised by those persons with the Directorate-General for Competition. If the issue is not resolved, it may be referred to the hearing officer for independent review. Requests related to a measure for which a time limit applies must be made in due time, within the original time limit.’

116 It must be stated that, at the hearing, the applicants acknowledged that they submitted their request for access, that that request had been refused and that, subsequently, they did not request the opinion of the Hearing Officer for independent review pursuant to the decision cited above. Consequently, the applicants cannot allege that the Commission did not respond to their request.

117 It follows from all the foregoing that the fourth part of the first plea must be rejected.

4. Fifth part: breach of the applicants’ rights of defence in that the Commission established the existence of a single infringement in reliance on a new essential criterion which had not been addressed in the statement of objections

118 The applicants claim that the Commission did not sufficiently indicate in the statement of objections all the constituent elements of the alleged single infringement on which it relied in order to find the existence of that infringement in the contested decision. In particular, they maintain that recitals 383 and 389 of the contested decision introduced a new factor referring to the existence of a ‘link of complementarity’ between the various collusive actions outlined in that decision. They submit that they were not given the opportunity to rebut the existence of that ‘link of complementarity’ during the administrative procedure, and that the Commission has thus breached their rights of defence.

119 The Commission disputes the applicants’ arguments.

120 Recital 383 of the contested decision, under the heading ‘Existence of a common, underlying plan’, states as follows:

‘... Furthermore and irrespective of whether the individual collusive contacts related to Dell, HP or otherwise, they concerned the same product, had a 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. Such elements clearly display a link of complementarity between [several] collusive actions outlined in this Decision and represent objective indicia of an overall plan put into effect by a uniform group of undertakings.’

121 Recital 389 of the contested decision, in the same section, provides as follows:

‘The Commission notes that the abovementioned links of complementarity (recital (383)) between the various forms of conduct constitute objective evidence of the existence of a global plan ...’

122 It is apparent from the recitals cited that the reference by the Commission to the ‘link of complementarity’ relates to the various collusive actions set out in the contested decision which amount, according to the Commission, to objective indicia of an overall plan put into effect by a uniform group of undertakings. Such a reference is intended to corroborate that each of the alleged instances of conduct is intended to deal with one or more consequences of the normal pattern of competition and, through interaction, contributes to the attainment of the set of anticompetitive effects desired by those responsible, within the framework of a global plan having a single objective.

123 It is not necessary to establish whether those instances of conduct present a link of complementarity in order to characterise them as a single and continuous infringement. On the other hand, it is necessary to

establish, in order to show that there has been a single and continuous infringement, whether the condition relating to a single objective has been respected, that is to say whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the conduct in fact implemented by other participating undertakings does not have an identical object or identical anticompetitive effect and, consequently, does not form part of an ‘overall plan’ as a result of an identical object distorting the normal pattern of competition within the internal market (see, to that effect, judgment of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 247 and 248).

124 In those circumstances, it should be noted that the Commission was not required to analyse that ‘link of complementarity’ in the statement of objections. The statement of objections sent to the applicants must ensure respect for their rights of the defence and, in order to do so, must contain the essential elements used against them, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that they may submit their arguments effectively in the administrative procedure brought against them (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).

125 Accordingly, the ‘link of complementarity’ referred to by the applicants cannot constitute either an essential element used against them or evidence for the purpose of the case-law cited in paragraph 123 above. It must be stated that the ‘link of complementarity’ referred to in recital 383 of the contested decision appears in section 5.4.3.3, entitled ‘Arguments of the parties and assessment thereof by the Commission’, and was intended to respond to the applicants’ challenge in their reply to the statement of objections to the finding of a single and continuous infringement.

126 The applicants claim that the Commission introduced a new factor in the contested decision for the purposes of the judgment of 19 May 2010, *IMI and Others v Commission* (T-18/05, EU:T:2010:202, paragraph 108). In their submission, the inclusion of that new constituent element of the infringement alleged therein, namely the link of complementarity, breached their rights of defence, as they were not given the opportunity to dispute its existence during the administrative procedure.

127 In that regard, it should be borne in mind that the Commission’s final decision is not necessarily required to be an exact replica of the statement of objections, since the statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (judgment of 7 June 1983, *Musique Diffusion française and Others v Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 14).

128 If the Commission is indeed 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 in order to respect their rights of defence (judgment of 8 July 2004, *Mannesmannröhren-Werke v Commission*, T-44/00, EU:T:2004:218, paragraph 100), it did precisely that in this case.

129 It must be observed that, as is apparent from paragraph 125 above (i) the bilateral contacts (that is to say the essential elements of the infringement) used against the applicants were referred to in the statement of objections and (ii) the applicants were able to challenge those elements, in their reply to the statement of objections, as well as the existence of a single and continuous infringement (that is to say the characterisation of those elements).

130 Consequently, it must be held that the Commission respected the applicants’ rights of defence.

131 The fifth part must therefore be rejected.

5. Sixth part: breach of the rights of the defence as regards the evidence contained in the contested decision

132 The applicants claim that the Commission breached their rights of defence by basing the contested decision on evidence that was either not mentioned in the statement of objections or the annexes thereto, or

mentioned solely in Annex I to the statement of objections and not examined in the statement of objections itself. They also dispute the references which the Commission made, both in the statement of objections and in the contested decision, to the whole of Annex I to those documents. In the context of this part of the plea, the applicants put forward, in particular, three complaints.

(a) First complaint: breach of the rights of the defence resulting from the fact that the decision relied on documents not mentioned in the statement of objections

133 The applicants submit that the Commission has breached their rights of defence by basing the contested decision on evidence not mentioned in the statement of objections or in the annexes thereto. They claim in that regard that only documents that were mentioned in the statement of objections are capable of constituting admissible evidence. Thus, in their submission, they were deprived of the opportunity to comment on the probative value of a considerable number of documents mentioned only in the contested decision.

134 The Commission disputes the applicants' arguments.

135 The applicants submit, in essence, that the contested decision relies, in its grounds and in Annex I thereto, on oral statements and documents that were never mentioned in the statement of objections. However, it should be noted that the applicants did not make clear in the main body of the application what the new documents and specific new information are on which the contested decision might be based.

136 The application merely states that 'the Decision ... relies on a total of 20 pages of oral statements and 37 contemporaneous documents that were never mentioned in the [statement of objections] ..., respectively 14 and 30 of which are used by the Commission to support either general allegations against the participants in the alleged cartel or to implicate the Applicants in specific procurement events (see Annex A.9, Table 1)'.

137 The failure to provide a clear and comprehensible explanation of the information and relevant documents for the purposes of establishing whether their absence from the statement of objections infringed the applicants' rights of defence cannot be cured by a reference to the annexes to the application.

138 In that regard, it should be borne in mind that, according to settled case-law, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function. The annexes cannot therefore serve as a basis for developing a plea set out in summary form in the application by putting forward complaints or arguments which are not contained in that application (judgments of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 167, and of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 94).

139 The applicants' arguments that they were deprived of the opportunity to comment on the probative value of a considerable number of documents mentioned only in the contested decision must therefore be rejected as inadmissible.

140 The first complaint must therefore be rejected.

(b) Second complaint: breach of the rights of the defence resulting from the fact that the decision relied on documents mentioned in Annex I to the statement of objections

141 The applicants claim that the Commission prevented them from properly defending themselves since the allegations in the statement of objections were based on documents mentioned only in Annex I thereto. They submit that the contested decision also relies on evidence mentioned exclusively in Annex I to the statement of objections and not analysed in that statement. They maintain that, furthermore, Annex I to the statement of objections contained no evidence enabling them to understand the usefulness of the alleged contacts or the inferences drawn from those documents with regard to the applicants. They conclude that

the Commission should not have taken into consideration Annex I to the statement of objections in order to adopt the contested decision and in order to provide a basis for all the assertions in the decision that are based on documents mentioned in that annex, and that, accordingly, that evidence must be annulled in that it was not validly proven.

142 The Commission disputes the applicants' arguments.

143 The applicants complain that the Commission referred, in the contested decision, to documents whose precise page number was mentioned only in Annex 1 to the statement of objections.

144 First of all, it should be pointed out, as the Commission observes, that the criticisms made by the applicants in the context of this complaint seem to be unclear. While the applicants submit that 'all allegations in the [contested decision] that are based, explicitly or implicitly, on documents merely referred to in [Annex I to the statement of objections] should be annulled', they do not specify which findings in that decision are allegedly affected. Moreover, they do not specify to what extent those are documents which substantiate the anticompetitive conduct imputed to them and which, therefore, justify their interest in putting forward this complaint.

145 Next, and in any event, it should be observed that, contrary to what the applicants submit, Annex I to the statement of objections provides references drawn up by reference to a series of events and evidence which demonstrate the various stages of infringing conduct of the cartel participants, as is noted, indeed, in recital 283 of the contested decision. The situation cannot therefore be compared with that at issue in the case which gave rise to the judgment of 9 July 2009, *Archer Daniels Midland v Commission* (C-511/06 P, EU:C:2009:433, paragraphs 85 to 87), on which the applicants rely as the basis of their line of argument. In that case, the Commission had omitted to mention in the statement of objections any of the relevant facts on which it subsequently relied to classify the undertaking concerned as the ringleader of the cartel at issue. The documents on which the Commission allegedly relied in that respect were not even mentioned in the statement of objections, which is not the case here.

146 Lastly, while the applicants claim that they could not exercise their rights of defence, it must be stated that they do not explain however how their rights of defence were in fact infringed.

147 It is clear from all the foregoing that the second complaint must be rejected.

(c) Third complaint: breach of the obligation to state reasons on account of the fact that references to Annex I to the contested decision were made in that decision

148 The applicants claim that the European Commission has not fulfilled its obligation to state reasons by referring in a general and abstract manner in the contested decision to the content of Annex I. They assert that the Commission has not explained in a clear and unequivocal manner the reasoning relating to the contacts mentioned in Annex I to the contested decision, on which in their submission it relies in order to substantiate its findings in the contested decision. The applicants maintain that neither Annex I to the contested decision nor the reasons on which it is based contain any evidence from which it might be understood whether those contacts must be considered to be a means of proving the existence of the infringement found by the Commission or whether each different contact must be treated in isolation as a separate infringement.

149 The Commission disputes the applicants' arguments.

150 The applicants claim, in essence, that the Commission failed to fulfil its obligations under Article 296 TFEU by relying extensively on Annex I to the contested decision, without however providing sufficient indication as to the precise probative value of each fact referred to.

151 This complaint must be rejected.

- 152 It is clearly apparent from the contested decision that, contrary to what the applicants claim, the Commission did not rely on Annex I to that decision in order to substantiate specific allegations beyond those set out in its grounds. In that regard, it should be noted that Annex I to the contested decision is a table of cartel contacts which took place, according to the Commission, between the cartel participants. The fact that the Commission did not give a detailed explanation of each of those contacts cannot mean that it failed to fulfil its obligation to state reasons under Article 296 TFEU. As the Commission contends, it stated, in the main body of the contested decision, the essential facts and circumstances supporting the finding of an infringement, which is not inconsistent with the drawing up of an additional list of contacts setting out the instances of collusive conduct by the undertakings involved in the cartel which are described in the contested decision.
- 153 Moreover, it should be observed that the particular entries of Annex 1 to the contested decision and how those entries are linked to the Commission's findings are evident from the structure of that annex. As the Commission states, the table contained in Annex I to the contested decision sets out key information regarding each contact, namely the date on which the contact took place, the parties to the contact, the customer account to which the contact related, the subject matter of the contact and the corresponding references to the evidence in the Commission's file.
- 154 Accordingly, it must be stated that the applicants were aware from the table of the contacts that the Commission considered relevant for the applicants and the evidence supporting the Commission's conclusion that they were involved in those contacts.
- 155 It follows that the applicants cannot claim a breach of the obligation to state reasons because the Commission did not give them further explanations with respect to each item listed in Annex I to the contested decision.
- 156 The third complaint must therefore be rejected.
- 157 Moreover, at the hearing, the applicants claimed that the references or the identification numbers used to list the contacts in the statement of objections did not correspond to the references used in the annex to that document or in the contested decision and in the annex thereto and that, therefore, their rights of defence were infringed.
- 158 It should be observed, as a preliminary point, that the applicants again challenge in a general manner that difference in references without providing any specific evidence whatsoever as regards the allegations made or indicating how their rights of defence may have been infringed.
- 159 Whilst it is true that the list of the documents setting out the contacts differs between the statement of objections and the annex thereto or the contested decision and the annex thereto, the fact remains that the items mentioned in those documents are the same and that, accordingly, those items are still identifiable. Although, for example, in the statement of objections, the document relating to the contact which took place with TSST in June 2004 appears in the statement of objections with the reference 'ID 490 p. 70', that document is cited in Annex I thereto and in the contested decision and the annex thereto with the reference 'ID 490/70'. Moreover, the heading of the table of Annex I to the statement of objections and the heading of the table of the annex to the contested decision explain clearly that the document referenced 'ID 490 p. 70' corresponds to document 490 (ID) and that that contact is mentioned on page 70. Consequently, the applicants cannot claim that there has been a breach of their rights of defence.
- 160 In any event, it must be stated that both the main body of the statement of objections or that of the contested decision and their respective annexes contain sufficient information to enable the alleged contacts to be identified. Each time a contact is mentioned, the conduct alleged, the period of the infringing conduct, the participants, the customers or the procurement events in question are mentioned, thus making it easy to identify the contact in question. Consequently, the applicants cannot claim that there has been a breach of their rights of defence.

161 In the light of the foregoing, the sixth part of this plea must be rejected, as must the first plea in its entirety.

B. Second plea: the Commission lacked jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement

162 The applicants claim, in essence, that the Commission does not prove in the contested decision that trade between Member States was affected by the alleged conduct at issue and that, consequently, the Commission did not have jurisdiction to impose a fine on them under Article 101 TFEU and Article 53 of the EEA Agreement. This plea is divided into two parts.

1. First part: the cartel had no effect on the EEA

163 The applicants maintain, first of all, that the Commission has not proved to the requisite legal standard the cartel's impact on trade within the EEA. In their submission, there is no trade in ODDs within the EEA, since their suppliers are located outside the EEA market. They submit, next, that in the absence of any ODD production site in the EEA, imports originating outside the EEA alone sold to Dell and HP cannot satisfy the 'effect on trade' criterion. They further claim that Dell and HP used the ODDs only in order to assemble downstream consumer products. Lastly, they conclude that the fact that ODDs were sold in two Member States is not sufficient to prove that such conduct was capable of having even potential effects on trade within the EEA.

164 The Commission disputes the applicants' arguments.

165 It should first of all be borne in mind that, according to the case-law, the Commission's jurisdiction under public international law to find and punish conduct adopted outside the European Union may be established on the basis of either the implementation test or the qualified effects test (judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 and 47).

166 Thus, the Court has held that the fact that an undertaking participating in an agreement is situated in a third country does not prevent the application of Article 101 TFEU and of Article 53 of the EEA Agreement if that agreement is operative on the territory of the internal market (judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11).

167 Moreover, in order to justify the application of the implementation test, the Court has emphasised that if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions (judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others v Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 16).

168 In that regard, the Court would point out that demonstrating the implementation of the practices at issue in the EEA or demonstrating qualified effects are alternative and not cumulative approaches for the purposes of establishing that the Commission's jurisdiction is justified under the rules of public international law.

169 In the present case, it was the implementation criterion that the Commission sought to apply in the contested decision.

170 Thus, it must be observed that, in recital 53 of the contested decision, the Commission established that ODDs are supplied globally, including in the EEA, and that the suppliers that are addressees of the contested decision were active in supplying to a number of EEA Member States, inter alia Ireland and Poland. In addition, it is noted in that recital that customers of the ODD suppliers concerned by the contested decision, Dell and HP, were also established in the EEA and that, therefore, during the infringement period set out in the contested decision, there were substantial trade flows of ODDs between the Member States of the EEA. Moreover, in recital 270 of the contested decision, the Commission also stated that the cartel covered global procurements in which ODD suppliers competed for orders from Dell

and HP throughout the world. Similarly, in recitals 464 to 468 of the contested decision, the Commission highlighted once again that the collusive contacts assumed a worldwide dimension and that the scope of the cartel itself covered the entire EEA.

171 With respect to Dell, it should be noted that it is apparent from its reply to the Commission's request for information of 30 September 2009 that it had entities in Poland and in Ireland. The Commission noted, moreover, that Philips had confirmed, in its oral statements, that Dell had one assembly factory in Limerick, in Ireland, and that it had made the decision to shift its European manufacturing operations to Poland.

172 With respect to HP, according to the Commission, Philips had also confirmed that HP had an office in Berkshire, in the United Kingdom, and has various sales offices in that country. Philips also stated that significant volumes of ODDs were shipped to Ireland for Dell and to the United Kingdom, Czech Republic and the Netherlands for original design manufacturers (ODMs) acting for HP. According to Philips, apart from sales to original equipment manufacturers (OEMs), such as HP and Dell, there were also sales of ODDs to large retailers, distributors and wholesalers across the entire EEA.

173 The criterion as to the implementation of an agreement is satisfied by mere sale within the Union, irrespective of the location of the sources of supply and the production plant (judgment of 25 March 1999, *Gencor v Commission*, T-102/96, EU:T:1999:65, paragraph 87). It must therefore be concluded, as the Commission states, that the Commission had jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement in the present case.

174 As is apparent from the foregoing, the Commission correctly showed that ODDs were sold to Dell and HP, which are established in the EEA, inter alia in Ireland and Poland, and that, therefore, during the infringement period set out in the contested decision, there were substantial trade flows of ODDs between the Member States of the EEA.

175 The applicants submit in that regard that the evidence adduced in paragraph 76 of the defence by the Commission is inadmissible since it was not adduced in the contested decision.

176 However, it must be stated, as the Commission observes, that the applicants were given access to the evidence the Commission relied on in the defence since that evidence was mentioned in the statement of objections and that, moreover, that statement set out the reasons for finding that there was intra-EEA trade of ODDs.

177 It is apparent from the foregoing that, contrary to what the applicants submit, the Commission has proved that the cartel was implemented on the EEA market.

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

2. Second part: failure to assess the appreciable nature of the effect on trade

179 The applicants maintain, in the alternative, that the Commission did not carry out in the contested decision a significant examination of the conduct at issue in such a way as to establish that it was capable of having an appreciable effect on trade between Member States. They assert, moreover, that the contested decision contains no examination of the relevant market and that the appreciability of the alleged effect on trade is rejected in the contested decision itself, in recital 465. In that regard, they claim that, even though the Commission established a threshold of 5% of market share that would be affected by the conduct in question, in the absence of any definition of that market, the contested decision should be annulled.

180 The Commission disputes the applicants' arguments.

181 First, it must be observed that Article 101(1) TFEU and Article 53 of the EEA Agreement concern only agreements which are capable of affecting trade between Member States. As is stated in the case-law, if an

agreement is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (judgment of 29 February 2016, *UTi Worldwide and Others v Commission*, T-264/12, not published, EU:T:2016:112, paragraph 196).

182 It must also be recalled that an agreement will fall outside the prohibition in Article 101 TFEU if it has only an insignificant effect on the market (judgment of 29 February 2016, *UTi Worldwide and Others v Commission*, T-264/12, not published, EU:T:2016:112, paragraph 197)

183 As regards the appreciability of the effect on trade, paragraph 53 of the Guidelines on the effect on trade concept contained in Articles [101 TFEU] and [102 TFEU] (OJ 2004 C 101, p. 81 ‘the 2004 Guidelines’), is worded as follows:

‘The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement ... exceeds [EUR] 40 million ... In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5% threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State.’

184 This provision therefore establishes a rebuttable presumption that an agreement or practice affects trade appreciably, first, when the agreement or practice is, by its very nature capable of affecting trade between Member States, such being the case, for example, when it concerns imports and exports or several Member States and, second, when the turnover of the parties in the products covered by the agreement or that practice exceeds EUR 40 million or where the market share of the parties concerned is at least 5% (judgment of 29 February 2016, *UTi Worldwide and Others v Commission*, T-264/12, not published, EU:T:2016:112, paragraph 200).

185 However, where the Commission establishes to the requisite legal standard that the second alternative condition provided for in the presumption laid down in paragraph 53 of the 2004 Guidelines has been met, by providing in particular a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope, it identifies the relevant goods and market precisely. Such a description of the sector can be sufficient in so far as it is sufficiently detailed to enable the Court to verify the Commission’s basic assertions and in so far as, on that basis, it is clear that the combined market share far exceeds the 5% threshold. Thus, exceptionally, the Commission is entitled to base its decision on the second alternative condition of paragraph 53 of the 2004 Guidelines without expressly determining the market within the meaning of paragraph 55 of those Guidelines (see, to that effect, judgment of 16 June 2011, *Ziegler v Commission*, T-199/08, EU:T:2011:285, paragraphs 69 to 72).

186 In the context of the positive presumption laid down in paragraph 53 of the 2004 Guidelines, it is sufficient if only one of the two alternative conditions is met in order to prove that the effect on trade between Member States is appreciable (judgment of 16 June 2011, *Ziegler v Commission*, T-199/08, EU:T:2011:285, paragraph 73).

187 In that regard, first of all, it must be observed that the Commission satisfied the criterion relating to the effect on trade laid down in paragraph 53 of the 2004 Guidelines. As is apparent from paragraphs 170 to 172 above, the Commission demonstrated to the requisite legal standard the existence of imports of ODDs from the cartel participants by Dell and HP (contested decision, recital 464) in several Member States and which were capable of affecting trade between those States. Consequently, since one of the conditions laid down in paragraph 53 of the 2004 Guidelines is met, it must be held that the appreciable nature of the effect on trade was sufficiently proved by the Commission.

188 As regards, next, the applicants' argument that the decision does not contain a definition of the relevant market and does not therefore enable the Commission to determine — as recital 465 of the contested decision indicates — that the 5% threshold of market share was exceeded, it must be stated that one of the two conditions laid down in paragraph 53 of the 2004 Guidelines has been met, as is clear from the previous paragraph.

189 Moreover, it should be noted that (i) the contested decision defines clearly and precisely the relevant market, in sections 2.3 and 2.4, which provide a sufficiently detailed description of the relevant sector, including in terms of supply, demand and geographic scope. It must also be stated (ii) that the turnover of the parties to the cartel exceeded EUR 40 million, as the basic amount of the fine shows — more specifically, the actual value of sales made by the undertakings during the full calendar months of their respective participation in the infringement — taken into account for the calculation of the fines imposed, and that, consequently, the Commission was entitled to find, in recital 465 of the contested decision, that the 5% threshold laid down in paragraph 53 of the 2004 Guidelines was exceeded.

190 In the light of the foregoing, it is necessary to uphold the Commission's finding in recital 466 of the contested decision that the ODD cartel, consisting of bilateral negotiations between the cartel participants and the ODD customers, Dell and HP, by means of procurement events, had as its object or effect the prevention, restriction or distortion of competition within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement and that it was capable of having an appreciable effect on trade between Member States.

191 The second part of the second plea must therefore be rejected, as must this plea in its entirety.

C. Third plea: errors of fact and of law in the determination of the geographic scope of the infringement

192 The applicants dispute that the infringement covered the whole of the EEA, contrary to what was stated in Article 1 of the contested decision. They claim that sales of ODDs by the cartel participants were limited to Dell and HP, which are established in the Netherlands and Germany respectively. They maintain that the place where customers buy the products concerned is the decisive criterion for the purpose of determining whether an infringement has been implemented.

193 The Commission disputes the applicants' arguments.

194 The applicants dispute, in essence, that the infringement covered the whole of the EEA, since the infringement concerned only Dell and HP as customers and, in particular, they claim that the subsidiaries of those two undertakings were incorporated only in the Netherlands and Germany.

195 At the outset, it should be pointed out that, according to the case-law and as the Commission recalls, it is the cartel participants that delineate the scope and key parameters of an infringement and not the location of the customers (see, to that effect, judgment of 15 June 2005, *Tokai Carbon and Others v Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, not published, EU:T:2005:220, paragraph 90). Accordingly, the argument based on the location of incorporation of the subsidiaries of Dell and HP within the EEA must be rejected.

196 Moreover, contrary to what the applicants submit, it must be held that the Commission demonstrated to the requisite legal standard, in recitals 53, 270 and 464 to 466 of the contested decision, that the collusive contacts assumed a worldwide dimension and the scope of the cartel also covered the entire EEA. As the Commission states, replies to requests for information and statements provided by HLDS and PLDS confirm the global nature of the contracts between Dell and HP, on the one hand, and their ODD suppliers, on the other. Moreover, it is also apparent from the documents before the Court that the cartel members discussed sales to Dell and HP generally and not only to their subsidiaries in the Netherlands and Germany. In any event, the mere fact that the subsidiaries in question were incorporated only in Germany and the Netherlands does not change the scope of the cartel.

197 The applicants claim in counter to the foregoing that the location of the customers purchasing the products concerned is decisive for determining whether an infringement has been implemented and also constitutes a decisive criterion for determining the geographic scope of the cartel. They submit that the sales of ODDs to the Dell and HP subsidiaries established in two Member States demonstrate that the scope of the cartel was not EEA-wide.

198 However, it should be noted that the applicants confuse, on the one hand, the Commission's jurisdiction under Article 101 TFEU and Article 53 of the EEA Agreement in the light of public international law over an agreement, decision or concerted practice which was challenged under the second plea and, on the other, the geographic scope of the agreement, decision or concerted practice in question. It should be pointed out, as the Commission observes, that, while the implementation of the conduct in the EEA is relevant for the purposes of establishing the Commission's jurisdiction, the geographic area covered by that conduct is determined by the conduct covered by the cartel and by the functioning of the cartel. Consequently, as is apparent from the documents before the Court, the Commission was correct to find that the scope of the cartel was EEA-wide.

199 Accordingly, it must be held that the Commission did not commit errors of fact or of law, in the manner claimed by the applicants, when determining the geographic scope of the infringement.

200 The third plea must therefore be rejected.

D. Fourth plea: errors of fact and of law in the finding of a single and continuous infringement

201 By this plea, the applicants dispute the Commission's findings as regards the existence of a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement. This plea consists essentially of two parts.

1. First part: the need to establish a link of complementarity in order to establish the existence of a single and continuous infringement

202 The applicants claim that proof of a link of complementarity between the various instances of individual anticompetitive conduct is essential for the purpose of establishing the existence of a single and continuous infringement, and the Commission did not succeed in proving it to the requisite legal standard in the contested decision. According to the applicants, the Commission relied, on the contrary, on three different categories of criteria which are insufficient for the purpose of establishing that link of complementarity. In addition, they maintain that an accumulation of similarities between the alleged actions does not suffice to establish the existence of a single and continuous infringement, which requires proof of a 'plus factor', namely the existence of a synergetic link between the impugned actions pursuing a single economic aim. Furthermore, they claim that proof that the cartel participants were aware of the general scope of the contacts as a whole and of their anticompetitive nature does not serve to establish the existence of a single and continuous infringement.

203 The Commission contends that the applicants rely on a misunderstanding of the applicable case-law.

204 In the first place, the applicants dispute the Commission's findings as regards the existence of a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement. They claim, in that regard, that the essential criterion for the purpose of establishing that existence is proof of a link of complementarity between the various instances of anticompetitive conduct.

205 It is sufficient to observe that, as was already pointed out in paragraph 123 above, the decisive criterion for the existence of a single and continuous infringement is that the various instances of conduct forming part of the infringement are part of an 'overall plan' having a single objective. In addition, it is not necessary to establish whether those instances of conduct present a link of complementarity in order to characterise them as a single and continuous infringement, in the sense that each of the alleged instances of conduct is intended to deal with one or more consequences of the normal pattern of competition and, through

interaction, contributes to the attainment of the set of anticompetitive effects desired by those responsible (see, to that effect, judgment of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 247 and 248).

- 206 Consequently, the applicants' arguments that the link of complementarity is the decisive criterion for the purpose of establishing the existence of a single infringement must be rejected.
- 207 In addition, it should be noted that, in recitals 354 to 356, 378 and 383 of the contested decision, the Commission explained that the cartel at issue consisted of a regular and clearly distinguishable network of collusive, largely bilateral contacts forming an overall plan whose object distorted competition in the ODD sector.
- 208 According to the Commission, all addressees shared their 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 desired position. Accordingly, in the contested decision, the Commission found that the applicants and the other 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.
- 209 Moreover, in recitals 354, 383, 389 and 410 of the contested decision, the Commission observed 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. In the contested decision, the Commission concluded 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.
- 210 It follows that, contrary to what the applicants claim, the Commission demonstrated that the various instances of conduct forming part of the infringement were part of an 'overall plan' having a single objective, thus constituting a single and continuous infringement.
- 211 In the second place, the applicants dispute the accumulation of similarities between the various instances of conduct alleged found by the Commission in the contested decision in order to prove the existence of a single and continuous infringement. They submit in that regard that it is necessary to demonstrate a 'plus factor', namely the existence of a synergetic link between the impugned actions pursuing a single economic aim.
- 212 It must be stated that the similarities between the instances of conduct that the applicants call into question are relevant criteria for the purpose of proving the existence of the single and continuous infringement, irrespective of the existence of a common plan drawn up in advance, contrary to what the applicants submit (see, to that effect, judgment of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraph 128). Several criteria are relevant for assessing the single and continuous nature of the infringement. Apart from the identical nature or the substitutability of the products concerned, those criteria include the identical nature or diversity of the objectives of the practices at issue, the identity of the undertakings which participated in those practices and the identical nature of the detailed rules for the implementation of those practices. Other criteria which are also relevant are whether the natural persons involved on behalf of the undertakings are identical and whether the geographical scope of the practices at issue is the same (see, to that effect, judgment of 12 December 2012, *Almamet v Commission*, T-410/09, not published, EU:T:2012:676, paragraphs 172 and 174).
- 213 It must therefore be held that the similarities relied upon by the applicants and set out in paragraph 208 above are relevant criteria for determining whether the various instances of conduct forming part of the

infringement are part of an 'overall plan' having a single objective, without it being necessary to establish any type of a synergy between the impugned action, as the applicants claim.

214 In the third place, the applicants claim that proof that the cartel participants were aware of the general scope of the contacts as a whole and of their anticompetitive nature does not serve to establish the existence of a single and continuous infringement, contrary to what is stated in recital 352 of the contested decision.

215 In that regard, it should be borne in mind that recital 352 of the contested decision states as follows:

'On the basis of the facts described in Section 4 and Annex I hereof, any one of the aspects of conduct in respect of any customer concerned (Dell or HP) or any set (or several sets) of bilateral contacts has as its object the restriction of competition and therefore constitutes an infringement of Article 101(1) of the FEU Treaty (see also Section 5.3.4). However, the facts described in Section 4 and Annex I at the same time together meet the criteria for a single and continuous infringement of Article 101(1) of the FEU Treaty and Article 53(1) of the EEA Agreement given (a) the single anticompetitive aim of the participants, (b) the fact that the parties intentionally contributed in their own way to the single aim and (c) the parties were aware or should have been aware of the general scope of the contacts as a whole and of their anticompetitive nature'.

216 In the present case, it must be observed that that recital is not intended to establish that awareness by the cartel participants of the general scope of the contacts as a whole and of their anticompetitive nature is one of the decisive criteria for the purposes of establishing the existence of a single and continuous infringement, but to establish an individual undertaking's liability in the context of such an infringement, after it has been demonstrated that it was an infringement of this type. Consequently, the applicants' arguments cannot succeed.

217 The first part of this plea must therefore be rejected.

2. Second part: errors of fact and of law as regards the contacts alleged by the Commission to substantiate the existence of a single and continuous infringement

218 The applicants dispute the Commission's finding that the conduct linked with Dell and HP gave rise to a single infringement. First, they maintain that the conduct relating to Dell and HP did not pursue a single anticompetitive aim, as those undertakings were two separate customers. Second, they observe that the conduct linked to Dell was not complementary to that relating to HP, since there was no interaction between the two undertakings. Third, they maintain that the similarities listed in the contested decision relating to the products, the 'modus operandi', the content and the geographic scope do not suffice to prove the existence of a link of complementarity. Fourth, they claim that the conduct relating to Dell and that relating to HP were substantially different as regards duration, participants, customers, the natural persons involved and geographic areas, contrary to what was stated in the contested decision. Fifth, the applicants claim that the evidence relied on in the contested decision is insufficient and irrelevant for the purpose of proving complementarity.

219 The Commission disputes the applicants' arguments.

220 In the first place, the applicants claim that the conduct regarding Dell and HP did not pursue a single aim given that it related to two different customers and that, consequently, their conduct was not complementary as they did not interact with each other.

221 In that regard, it should be recalled that the Commission correctly relied on a series of factors linking the various forms of conduct related to Dell and HP in order to prove the existence of a single and continuous infringement: the single aim of the Dell- and the HP-related conduct to distort the normal operation of competition for ODD procurement events (contested decision, recitals 354 to 360); the Dell- and the HP-related conduct concerned the same category of products, namely ODDs used in PCs manufactured by Dell

and HP (contested decision, recitals 383 and 409); the involvement of the same parties (contested decision, recitals 354 to 360); the same 'modus operandi' and content of the various contacts (contested decision, recitals 381 to 383); the fact that the periods of the Dell- and the HP-related conduct overlapped for a significant part of the infringement period (contested decision, recitals 257 to 264); the fact that the geographic scope of the Dell- and the HP-related conduct was the entire EEA (contested decision, recital 409); the fact that some of the individuals involved in the cartel supervised the separate teams dealing with Dell and HP or were otherwise engaged in a business relationship with both Dell and HP (contested decision, recital 412) and the fact that the parties discussed general issues unrelated to Dell or HP (contested decision, recitals 154 to 157).

- 222 Moreover, it is also apparent from the case file (i) that PLDS explained how the common objective of the cartel was to restrict competition and (ii) that HLDS stated that the Dell- and the HP-related contacts were interdependent in that the outcome of a bidding event organised by either Dell or HP affected the behaviour of the cartel participants at bidding events organised by the other customer. Moreover, the fact that the discussions did not relate only to specific bidding events shows, in the context of the whole body of evidence, that the Dell- and the HP-related conduct was interconnected.
- 223 Consequently, it must be held that the applicants' arguments that the Dell- and the HP-related conduct was not complementary and did not interact with each other are unfounded.
- 224 The applicants moreover claim that the existence of an overall aim is not substantiated, as PLDS's oral statement does not establish the existence of sufficient links between the Dell- and the HP-related conduct. However, it should be borne in mind, in that regard, that PLDS's statements are corroborated by those of HLDS, which explained that the Dell- and the HP-related contacts were interdependent and that the outcome of a bidding event organised by either Dell or HP affected the behaviour of the cartel participants at bidding events organised by the other customer. Moreover, as was observed by the Commission, the fact that the cartel participants do not refer to Dell and HP at the same time in their correspondence cannot prove that the conduct complained of had no effect, since those exchanges generally related to specific tender events, so that it was neither necessary nor appropriate to refer to both customers in a single exchange.
- 225 The applicants' arguments must therefore be rejected.
- 226 In the second place, the applicants claim that the similarities listed in the contested decision relating to the products, the 'modus operandi', the content and the geographic scope do not suffice to prove the existence of a single and continuous infringement. Moreover, they submit that the conduct relating to Dell and that relating to HP were substantially different as regards duration, participants, customers, the natural persons involved and geographic areas, contrary to what was stated in the contested decision.
- 227 In that regard, first, it should be observed that, as is apparent from paragraphs 173 to 175 and 178 above, the similarities between the conduct that the applicants call into question are relevant criteria for the purpose of proving the existence of the single and continuous infringement.
- 228 Second, in challenging the similarity of the 'modus operandi', the applicants submit that that similarity is not relevant and that it does not prove any complementarity between the Dell- and the HP-related sets of conduct, since the contacts took place separately. Those arguments cannot succeed. It must be stated that the similarity of the content or mechanism of the contacts constitutes indicia for finding a single and continuous infringement (judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 196). Moreover, the fact that Dell and HP were never discussed within the same contact cannot be an indication of the lack of an overall plan pursuing a common objective (see, to that effect, judgment of 12 December 2012, *Almamet v Commission*, T-410/09, not published, EU:T:2012:676, paragraph 169), but is rather a consequence of the fact that their procurement events were organised separately.

- 229 As regards, third, the cartel participants, the applicants submit that the participants in each of the two alleged sets of bilateral contacts were mostly different throughout the relevant period and dispute the unity of their conduct referred to in recital 387 of the contested decision. They submit that the fact that five out of eight participants were involved with respect to both Dell and HP is not significant because only three of them participated at the same time during most of the cartel period.
- 230 It should be noted that the fact that certain characteristics of the cartel evolved over time, such as the inclusion of new participants, a reduction in their number or the expansion of the cartel to also cover HP, cannot preclude the Commission from classifying that cartel as a single and continuous infringement, given that the objective of the cartel remained the same (see, to that effect, judgment of 24 March 2011, *Aalberts Industries and Others v Commission*, T-385/06, EU:T:2011:114, paragraph 10). Moreover, the Court concurs with the Commission's observation that the fact that Quanta Storage, Inc. ('Quanta') participated in collusive contacts with respect to both Dell and HP very soon after it acceded to the cartel highlights the existence of an overall plan to distort competition which continued even though certain undertakings ceased to be involved in the single infringement (see, to that effect, judgment of 16 September 2013, *Masco and Others v Commission*, T-378/10, EU:T:2013:469, paragraphs 119 and 120).
- 231 As regards, fourth, the applicants' argument that the conduct of the participants relating to Dell and to HP occurred over separate periods, it must be stated that the case-law does not indicate as a criterion for establishing a single and continuous infringement that the duration of the practices relating to the same products must be identical (see, to that effect, judgments of 13 September 2013, *Total Raffinage Marketing v Commission*, T-566/08, EU:T:2013:423, paragraphs 307 and 308, and of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraph 125). In the present case, it should be pointed out that, contrary to what the applicants claim, the periods during which the contacts relating to Dell and to HP lasted overlapped significantly, namely for the period between 30 November 2005 and the end of November 2008, the cartel in relation to Dell having started on 23 June 2004. Despite the fact that those contacts occurred separately in relation to Dell and HP, it is apparent from the documents before the Court that those anticompetitive practices are highly similar, which is why the Commission was fully entitled to conclude that the relevant conduct formed part of a single and continuous infringement (see, to that effect, judgment of 16 September 2013, *Masco and Others v Commission*, T-378/10, EU:T:2013:469, paragraph 100).
- 232 As regards, fifth, the applicants' argument that the cartel relates to two separate customers, Dell and HP, it must be rejected, as is apparent from paragraphs 221 to 223 above. The fact that the cartel relates to two separate customers cannot lead to a finding that there has been no single infringement, since the alleged conduct constitutes an overall plan with the single objective of distorting competition in the ODD market (see, to that effect, judgment of 12 December 2012, *Almamet v Commission*, T-410/09, not published, EU:T:2012:676, paragraph 173).
- 233 As regards, sixth, the applicants' argument that the individuals supervising the teams dealing with Dell and HP or engaged in a business relationship with those two customers is not relevant and insufficient for the purposes of establishing a single and continuous infringement, the Court concurs with the Commission's observation that that evidence, far from constituting on its own proof of the existence of a single and continuous infringement, corroborates other evidence which emerges from the case file on the conditions for implementing an overall plan to distort competition in the ODD sector. The evidence in the case file shows that (i) some individuals were involved in cartel discussions with respect to both Dell and HP, inter alia Mr F. H. and Mr J.-C. L. of Lite-On, who were involved in cartel contacts relating to both Dell and HP, and (ii) senior managers had oversight over both Dell and HP, thus facilitating the conditions for implementing an overall plan to distort competition in the ODD sector (contested decision, recitals 186, 187 and 194) (see, to that effect, judgment of 16 September 2013, *Masco and Others v Commission*, T-378/10, EU:T:2013:469, paragraph 122).

- 234 As regards, seventh, the geographic scope, the applicants claim that the conduct relating to Dell and that relating to HP do not overlap geographically because the subsidiaries of Dell and HP were located in two different Member States. That argument cannot succeed. As is apparent from the examination of the third plea, the Commission demonstrated to the requisite legal standard that the cartel, including the Dell- and the HP-related conduct, covered the entire EEA.
- 235 In the light of the foregoing, it must be held that the Commission was right to find that the conduct relating to Dell and that relating to HP were substantially similar as regards duration, participants, customers, the natural persons involved and geographic areas. The applicants' arguments must therefore be rejected.
- 236 In the third place, the applicants claim that the evidence relied upon by the Commission to claim that the cartel went beyond specific tenders is irrelevant for the purpose of proving the single and continuous infringement. In the applicants' submission, there are very few such documents and they are customer-specific. Those arguments cannot succeed.
- 237 It is apparent from the contested decision (recitals 142 to 157) that a number of discussions related to general issues such as qualification status, line-up status, inventory status, the launch of new products, quality issues and supply constraints. While it is true that that information on its own does not prove the existence of a single and continuous infringement, the fact remains that it serves to show, inter alia, that the overall plan was not limited to a single customer and is therefore relevant in order to prove, together with other evidence, the existence of a single and continuous infringement. The applicants' arguments must therefore be rejected.
- 238 In the fourth place, the applicants dispute that the evidence relied on by the Commission regarding the internal benchmarking is an element indicating a common plan.
- 239 It should be pointed out, as the Commission observes, that the internal benchmarking highlights the link between the sales to Dell and those to HP and the need for collusive arrangements with respect to both customers at the same time falling within the existence of a common plan (see, to that effect, judgment of 16 September 2013, *Masco and Others v Commission*, T-378/10, EU:T:2013:469, paragraphs 112 and 113). Whilst it is true that those elements are not sufficient to show, in themselves, the existence of a common plan, the fact remains that they provide indicia of the existence of such a plan and are therefore relevant. Consequently, the applicant's arguments must be rejected.
- 240 In the light of all the foregoing considerations, it must be held that the Commission has demonstrated sufficiently that the alleged conduct constituted a single and continuous infringement.
- 241 The fourth plea must therefore be rejected.

E. Fifth plea: errors of fact and of law as regards the applicants' alleged awareness of the whole infringement

- 242 The applicants claim that the Commission has not shown to the requisite legal standard that they were aware or ought to have been aware of the whole single and continuous infringement found in the contested decision and of the involvement of all the other participants. Consequently, in the applicants' submission, the Commission cannot impute participation in such an infringement to them and the contested decision should be annulled in its entirety so far as it concerns them. This plea is divided into four parts, the first and second of which it is appropriate to examine together.

1. First and second parts: errors of fact and of law as regards the applicants' overall awareness of the cartel

- 243 The applicants maintain, first of all, that establishing that an undertaking has had bilateral contacts with some other cartel participants is not sufficient to prove that it was aware of the whole infringement. Next, they claim that bilateral contacts with a common 'subject matter' are not sufficient to establish awareness

of the infringement, which must be based on sufficiently precise and consistent evidence. Furthermore, in their submission, the Commission cannot rely on general statements asserting that the parties are alleged to have talked to each other in order to prove to the requisite legal standard that they were aware of the whole single infringement. Those statements must be corroborated by additional independent evidence. Lastly, the applicants dispute the Commission's assertion that the passing on of information about competitors shows that they were aware of the cartel. They assert, in that regard, that they were never involved in the cooperation agreements or in partnerships with other competitors that could have given them a broader perspective of the existence of a broader network of contacts.

244 Moreover, the applicants claim that even if the evidence of collusive conduct predating the infringement period may form part of the file as evidence, awareness of the attempt to organise a meeting in 2003 between the cartel participants cannot form the basis for establishing their awareness of the anticompetitive aspects of the single and continuous infringement alleged. They note that that attempt also included ODD suppliers which had never participated in the alleged single infringement.

245 The Commission disputes the applicants' arguments.

246 As regards the attempt to organise the 2003 meeting, the Commission claims that it shows that the cartel participants could reasonably foresee the existence of wider collusion with respect to the ODD procurement events organised by Dell. It maintains that in spite of the fact that the proposed meeting involved parties which were not addressees of the contested decision, that Sony Optiarc or Quanta were not invited to that meeting and that it related only to Dell, that information forms part of a body of evidence which shows that the applicants were or ought to have been aware of the overall ODD cartel.

247 The applicants essentially claim that the Commission wrongly imputed to them awareness of the behaviour of all other addressees of the contested decision only on the basis of bilateral contacts with Philips, Lite-On, PLDS and HLDS, which, in the applicants' view, do not contain information concerning other addressees. According to the applicants, the mere identity of object between TSST's contacts and the contacts between other addresses is insufficient to establish TSST's awareness of the cartel as a whole.

248 According to settled case-law, 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. It should be recalled that Article 101(1) TFEU does not apply unless there exists a concurrence of wills between the parties concerned (judgment of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 62 and the case-law cited).

249 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. 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 (judgment of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 63 and the case-law cited).

250 The undertaking concerned must therefore be aware of the general scope and the essential characteristics of the cartel as a whole (judgment of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 64 and the case-law cited).

251 Where that is the case, the fact that an undertaking did not take part in all the constituent elements of a cartel or that it played only a minor role in the elements in which it did participate must be taken into

consideration only when the gravity of the infringement is assessed and, as the case may be, in determining the amount of the fine (judgment of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 65 and the case-law cited).

- 252 In the present case, it should be pointed out that, in recitals 386 and 387 of the contested decision, the Commission found that the applicants intended to contribute to the common plan of the single and continuous infringement alleged, that they were aware of the involvement of the other parties and were aware or could reasonably have foreseen that those contacts were not isolated but had the same objective and were part of a larger cartel in the ODD sector, in the form of a wider network of parallel contacts.
- 253 In particular, it is apparent from recital 376 of the contested decision that the Commission mainly relied on five elements in order to prove that the applicants were aware of the scope and the essential characteristics of the cartel, in accordance with the case-law cited in paragraph 249 above.
- 254 Thus, first, the Commission found that it was apparent from an internal HLDS email, dated 16 February 2007, discussing ranking of ODD suppliers, that, ‘although [the applicants are] our competitor[s], they would know that I can contact others so I do not think that [the applicants] lied’.
- 255 Second, according to a PLDS oral statement, a direct cartel participant representing PLDS indicated that HLDS, PLDS, and Sony Optiarc and the applicants were all talking to each other.
- 256 Third, according to a PLDS oral statement, Mr B. R., a Philips representative directly involved in cartel contacts, explained that Mr R. B., a commercial representative acting on behalf of the applicants, had a lot of information about other competitors on current pricing, intentions on the aggressiveness of bids, results of bid events, quality and production issues, in particular in relation to Sony and HLDS, which Mr R. B. subsequently shared with Mr B. R.
- 257 Fourth, according to the Commission, an attempt to organise a kick-off meeting was made in 2003, before the starting date of the cartel, to hold regular multilateral meetings between ODD suppliers, including one of the applicants’ parent companies, Samsung.
- 258 Fifth, the Commission explained, in recital 377 of the contested decision, that the cartel participants, including the applicants, must have at least foreseen the offending conduct of the other participants, given the unity of the cartel objective, the similarity of the cartel manifestations and the fact that the counterparts involved in the mostly bilateral collusive contacts were alternating. By way of example, the Commission observes that, as regards the applicants, evidence shows that they were in contact with HLDS and, in another instance, with PLDS. Moreover, the fact that each party was involved in multiple competitor contacts comprising various pairs or groups of ODD suppliers regarding various procurement events also supports the conclusion that the parties were or at the very least ought to have been aware of a wider, overarching cartel involving all of the addressees of the Decision.
- 259 The applicants dispute the Commission’s findings, claiming, in the first place, that the contacts between the undertakings were essentially bilateral and that, during those contacts, the conduct of the other alleged cartel participants was not addressed. However, it must be stated that the fact that the contacts were of a bilateral nature is not in itself capable of precluding the existence of an overall plan of a more general scope. It should be observed that, as is apparent in particular from recital 177 of the contested decision, the parties did not need to contact all the participants in a procurement event in order to know competitors’ strategies. In that regard, it was sufficient to contact one or two participants, in general, for the particular auction, based also on the information gathered prior to the procurement event. In addition, the cartel participants also regularly passed on information relating to the strategy of the other participants, including the applicants, as is shown in recital 188 of the contested decision, and, as the Commission observes, in recitals 165 and 172 of that decision. Lastly, the applicants established contacts with all the other participants, as is clear from the analysis carried out in the context of the third part of the present plea, which shows that they were aware of the involvement of all participants.

- 260 In the second place, the applicants dispute the finding made by the Commission in recital 416 of the contested decision that, by taking part in multiple collusive events of the same nature, objective, territorial and product scope and with different parties, the parties undeniably knew or could not have been unaware that they were acceding to a wider network of collusion. In that regard, the applicants submit that the geographic scope of the ODD cartel changed during the cartel period and that the collusive practices did not remain the same as they encompassed HP only as of November 2005. Those claims must also be rejected.
- 261 It must be stated, as the Commission observes, that the Commission did not rely on the fact that the applicants were aware of the cartel because the territorial scope, the nature and the objective remained the same throughout the cartel. As is apparent from recital 416 of the contested decision, the Commission found, by contrast, that the cartel participants were aware of the scope and essential characteristics of the cartel and that, in light of ‘multiple collusive events (as opposed to participation in an isolated cartel incident) of the same nature, objective, territorial and product scope and with different parties, the parties undeniably knew or must have known that they were acceding a wider scheme and effectively joining the global ODD cartel’.
- 262 In addition, the changes that, in the applicants’ submission, the overall plan of the cartel underwent are not capable of showing that the object of that plan was substantially redefined by being transformed into a new plan or divided into forms of conduct of a limited and non-global scope. In that regard, it should be pointed out that, as in the case of most cartels, the ODD cartel was able to evolve over time, some participants joining or leaving at later stages and the scope of the cartel having broadened to other customers, such as HP.
- 263 In the third place, the applicants dispute the probative value of PLDS’s oral statement as regards the awareness of the infringement.
- 264 In that regard, it should be noted that, in that oral statement, it is stated as follows:
- ‘Finally, F. W. explained that his contacts with competitors were always one to one. He stated that he would never meet with more than one competitor at a time, and no one ever proposed such a meeting. [F. W.] believes that HLDS, TSST, PLDS, and Optiarc were all talking to each other. He stated that he recalls that the three of them [M. L.], [J. K.] and [V. C.] at some point in time, all told him that they talked to each other. [F. W.] strongly believes his competitors were having conversations before every auction, but does not believe it was ever more than one on one.’
- 265 Consequently, the abovementioned statement shows that it was obvious for the undertakings involved in bilateral contacts in the present case that all the other competitors were engaging in bilateral contacts as well. Contrary to the applicants’ claims, this oral statement, which corroborates the other items of evidence previously examined, demonstrates that the applicants were aware of or could have reasonably foreseen the whole cartel.
- 266 The applicants’ arguments must therefore be rejected.
- 267 In the fourth place, the applicants call into question the credibility of HLDS’s email of 16 February 2007 for the purpose of proving their awareness of the essential elements of the cartel.
- 268 However, it must be observed, at the outset, that that email meets the criteria set out in the case-law for the purpose of finding that an item of evidence is valid. In particular, it is a contemporaneous written piece of evidence prepared by a direct participant in the collusive contacts.
- 269 Moreover, its content is corroborated by the whole body of evidence mentioned in paragraphs 253 to 258 above. In particular, it should be observed that the email states that:

‘[K. W.] at Sony/NEC checked with Teac/Pioneer and they confirmed that these two vendors were almost ranked last. Through [S. J.] at Sony, I asked the rank of Panasonic and they confirmed that they failed to rank 1st too. In conclusion, one of the companies among TSST, Philips/LT, Sony/NEC must have ranked 1st, but lied about it. Although TSST is our competitor, they would know that I can contact others so I do not think that TSST lied. [K.] and [S.] at Sony/NEC will not lie, considering the relationship we have had so far. ... [I] have asked [J.-C. L.] at Lite-On (a Taiwan friend that received a green card in US) about pricing and rank ... Finally, it was confirmed that Philips/LT has ranked 1st for Q3, Q4, Q1 ‘08.’

270 In the fifth place, the applicants dispute the relevance of the attempt to organise a kick-off meeting in 2003, mentioned in recitals 75, 363 and 424 to 428 of the contested decision. In that regard, they claim that it was a mere attempt that did not amount to collusion and its intended content was not established, that it was attended by a Samsung employee whereas the applicants started their cartel participation only 1 year later; and that, in any event, it involved parties that were not subsequently part of the cartel, that Sony and Quanta were not invited to participate in it and that it related only to Dell.

271 According to settled case-law, the Commission may rely on contacts prior to or subsequent to the infringement period in order to show the overall context and the preparatory steps of the cartel and corroborate the interpretation of certain items of evidence (see, to that effect, judgments of 8 July 2008, *Lafarge v Commission*, T-54/03, not published, EU:T:2008:255, paragraph 428; of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 188; and of 27 June 2012, *Coats Holdings v Commission*, T-439/07, EU:T:2012:320, paragraph 60).

272 In this instance, it should be observed, first of all, that, although the attempt to organise a multilateral kick-off meeting in 2003 did not lead to a concrete result, it is capable of showing, as the Commission correctly contended, that the cartel participants could at the very least reasonably foresee the existence of a wider collusion with respect to the ODD procurement events organised by Dell.

273 In particular, it should be borne in mind that, according to the PLDS oral statement, the purpose of the proposed meeting was conceived as follows:

‘Sharing information between them regarding Dell would “make their jobs easier” or a turn of phrase similar to that ... [L. C.] at the time understood that what [V. W.] wanted, was to find a way for the PMs to share amongst them competition-sensitive information regarding Dell. [L. C.] did not think the proposal was for a one-off sharing of some specific information, but thought [V. W.] wanted to discuss sharing of information on an ongoing basis and that the meeting was to discuss “how they would work this out”, i.e., what sort of information would be shared, how it would be shared and how frequently.’

274 Consequently, as is established in recital 377 of the contested decision, such an attempt, assessed as a whole with the other evidence, shows that the applicants were aware of the other parties’ involvement, and knew or could have reasonably foreseen that their cartel contacts were not isolated, but were united by the same objective and constituted part of a larger ODD cartel consisting of a wider network of parallel contacts.

275 Next, even if, as the applicants claimed, they did not receive the invitation to the multilateral meeting, Samsung’s representative, who later, as is apparent from recital 498 of the contested decision, became an employee of the applicants involved in cartel contacts, must have been aware of the collusion attempt with respect to Dell which, as the Commission contends, reinforces the body of evidence showing that the applicants were aware of or could have reasonably foreseen the whole cartel.

276 Moreover, the fact that this proposed meeting involved other parties which were not addressees of the contested decision, that Sony Optiarc or Quanta did not attend it and that it only concerned Dell cannot call into question the value that it represents in the context of all the evidence assessed by the Commission. It must be held that the attempt is connected to the ODD cartel because it relates to a proposed sharing of commercially sensitive information relating to Dell between a number of participants in the ODD cartel,

namely Lite-On, Philips, HLDS, Sony and Samsung, that it to say one of the applicants' parent companies. As the Commission contends, although this proposed meeting, taken in isolation, does not prove the applicant's awareness of Sony Optiarc's or Quanta's conduct, or of practices relating to HP, it does form part of a body of evidence showing that the applicants knew or should have known about the overall ODD cartel.

277 In the light of all the foregoing, the Commission correctly established that the applicants were aware of or could have reasonably foreseen the existence of the overall cartel as it evolved over time.

278 The first and second parts of the fifth plea must therefore be rejected.

2. Third part: errors of fact and of law concerning the applicants' awareness of Sony's and Quanta's participation in the infringement

279 The applicants maintain that the evidence adduced by the Commission does not substantiate the assertion that they were aware of Sony's and Quanta's participation in the overall single infringement. This part is divided, in essence, into two complaints, concerning the alleged contact (i) between Sony and the applicants and (ii) between Quanta and the applicants.

280 As a preliminary point, it should be pointed out, first of all that, in the context of this part of the plea, it is necessary to ascertain only whether the applicants were aware — or, at least, could reasonably have been aware — of the involvement of Sony and Quanta in the cartel at issue. Accordingly, even if the applicants were to be successful in showing that they had no anticompetitive contacts with those undertakings, it is sufficient to establish, for the purposes of imputing to them liability for the cartel as a whole, that they were aware of Sony's and Quanta's involvement in their infringing conduct.

281 Next, in that context, even though the applicants dispute a total of nine contacts alleged by the Commission to show their awareness of Sony's and Quanta's involvement in the overall plan, it must be stated that imputing the infringement as a whole to the applicants would be appropriate provided that the Commission succeeds in showing that it did not err in relation to one of those contacts of the applicants in respect of each of Sony and Quanta (see, to that effect, 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 193).

(a) The complaint alleging errors of fact and of law concerning the alleged contacts between Sony and the applicants

282 The applicants dispute the truth and the probative value of the seven documents used by the Commission in order to show that the applicants had contacts with Sony and Sony Optiarc.

283 The Commission contends that all the contacts reported in the contested decision in relation to the applicants and Sony are substantiated to the requisite legal standard.

(1) Contact concerning the negotiations organised by Dell on 3 and 4 November 2004 (ID 1479/1143)

284 In recitals 171 to 174 of the contested decision, and in Annex I thereto (contact 7), the Commission states that, in advance of the internet negotiations held by Dell on 3 and 4 November 2004, Mr S. J., of Sony, discussed with Mr C., of HLDS, strategy in those negotiations relating to HH DVD-ROMs. In addition, according to the Commission, an internal email from Mr L., of Lite-On, of 2 November 2004, explained as follows:

'As for TSST, they will keep the ranking in [number] 1 and [number] 2. Note: based on the information on hand that means TSST & HLDS [will compete with] each other again on pricing if Lite-On does not go [aggressively] on the DVD [internet negotiation] on 11/3. In addition, TSST combo pricing will ... drop from USD 34 (Oct'04) [to] USD 28 (Jan'05) [because] [J.] has promise[d] to give them higher [total

available market] if TSST drop their pricing to what [J.] wanted (i.e. USD 28). If this is the case, I believe [J.] will use the same trick for DVD on this DVD [internet negotiation].’

285 The applicants claim, first, that, by relying on this contact in the contested decision whereas it had not done so in the statement of objections, in order to prove their awareness of the whole cartel, the Commission infringed their rights of defence. Next, they submit that this contact fails to prove that the applicants were in contact with Sony.

286 As regards the first argument, it must be pointed out, as the Commission observes, that the statement of objections listed this contact in Annex I thereto as contact 11. Annex I to the statement of objections also provided information enabling the applicants to exercise their rights of defence, such as the date of each contact, the parties involved, the customer concerned, the underlying evidence and the subject matter which was dealt with. The applicants cannot therefore claim that the Commission did not indicate to them that it intended to rely on that contact for the purposes of showing their awareness of the whole cartel. In any event, it should be added, as the Commission also states in its pleadings, that that contact was relied on only with a view to refuting the arguments with respect to the contacts between Sony and the applicants made by the latter in their reply to the statement of objections.

287 As regards the second argument, it should be noted that the wording of the email of 2 November 2004 shows a contact between Sony and the applicants, since it is written therein: ‘... [J.] has promise[d] to give them higher [total available market] if TSST drop their pricing to what [J.] wanted (i.e. USD 28).’

288 Consequently, the email of 2 November 2004 was capable of showing that the applicants were aware of Sony’s involvement in the overall plan of the cartel.

(2) Contact of 20 April 2006 (contact ID 1488/138-141)

289 In recital 184 of the contested decision, and in Annex I thereto (contact 22), the Commission found that, around 20 April 2006, Sony had an anticompetitive contact with the applicants in relation to the June and July Slim Combo internet negotiation.

290 The applicants dispute this finding, stating (i) that the information could have come from Dell since the relevant email chain shows frequent exchanges of detailed information with Dell and (ii) that this email chain is not corroborated by an oral statement.

291 However, the evidence adduced by the Commission in the contested decision demonstrates both the existence of the information exchange between Sony and the applicants and the anticompetitive nature of the contact.

292 Thus, first, it should be observed that it is apparent from the internal report of 20 April 2006, circulated at 20.34 by Mr J. within Sony and Lite-On, namely just after the internet negotiation for Slim DVD-RWs held at 18.00 on that day, that, first of all, in his view, Sony was lucky in its last bid for July because it barely won against the applicants. Next, reference is made to the applicants’ pricing information for June and July. According to Mr J.’s report, the applicants were disappointed about having lost the July auction:

‘They were very upset they lost July ... They wanted [to be number] 1 in both months. They were [number] 1 in June.’

293 Second, it must be stated, as the Commission points out, that a PLDS oral statement refers to the anticompetitive contact in relation to the June and July Slim Combo internet negotiation, adding a clarification by Mr F. H., from Lite-On, that it was typical for Mr J. to pass on pricing information. Another PLDS oral statement explains, in relation to the same anticompetitive contact, that Mr J. obtained pricing information from competitors and that, according to Mr F. H. (Lite-On), Mr J. regularly passed on such information to Lite-On.

294 As the Commission observes, the applicants' argument that the information exchange between Sony and the applicants has not been proved must be rejected for the following reasons.

295 In the first place, the applicants argue that the information concerning Sony could potentially have been obtained from another undertaking, including Dell. However, it is apparent from recital 184 of the contested decision that the report refers to reflections inherently internal to the applicants, for example that they were 'upset they lost July', which, as the Commission observes, most plausibly came from the applicants themselves. This is also consistent with Philips' oral statement, which refers to this document as an example for the purposes of demonstrating that, when Mr J. obtained pricing information from competitors, it was typical for him to pass on the pricing information to Lite-On, and that he did so regularly.

296 In the second place, the interpretation of the context made by the Commission must be endorsed, in that, even if Dell was privy to information about the applicants' mood after the internet negotiation, there is no plausible explanation as to why Dell would have shared this information, as well as TSST's pricing information, with Sony.

297 In the light of the foregoing, the Commission has proved to the requisite legal standard the existence of a contact between Sony and the applicants on 20 April 2006.

(3) Contact of 23 May 2006 (ID 1479/823)

298 According to recital 187 of the contested decision, and to Annex I thereto (contact 23), in May and in June 2006, Mr J., of Sony, engaged in several anticompetitive contacts with competitors. One of these contacts is shown by an internal Lite-On report of 23 May 2006.

299 The applicants argue that this internal report does not prove a contact between Sony and themselves.

300 However, as the Commission states, it must be pointed out that, in the contested decision, it did not find that that email showed a contact between Sony and the applicants, but only between the applicants and Lite-On.

301 Accordingly, and as the Commission itself accepts, such a contact cannot be used for the purposes of showing that the applicants were aware of Sony's involvement.

(4) Contact of 1 June 2006 (ID 1479/817)

302 In recital 187 of the contested decision, and in Annex I thereto (contact 25), the Commission explains that, on 1 June 2006, Mr L., of Lite-On, reported internally on a cost reduction request from Dell in the ongoing negotiations with Dell's ODD suppliers and on the related contacts between Sony and the applicants, on the one hand, and between Sony and HLDS, on the other.

303 The applicants contest this contact because the email of Mr L. (Lite-On) of 1 June 2006 does not show a direct contact between Sony and the applicants, as the author was not a Sony employee. They also question the anticompetitive nature of the contact because the parties did not disclose prices.

304 However, the applicants' arguments must be rejected.

305 First, the email of 1 June 2006 refers expressly to a contact between Sony, represented by Mr S. J., and the applicants. That reference is worded as follows:

'[I t]alked to [S. (Sony)] and he informed that we are [number] 3 in the pricing proposal. There are ... 3 suppliers [in total] (i.e. HLDS, TSST & Sony/LiteOn requested to submit the proposal ... [S. (Sony)] also mentioned that TSST stated that they also receive[d] the message from both [K.] & [B.] stating that they are also disappointed with the cost proposal they submitted but TSST did not [state] the ranking they are

position[ed in] now. ... Conclusion 1. Dell is disappointed with the current proposal which Sony/Lite-On submitted.'

306 It should be observed that, as the Commission states, that email must enjoy high probative value, as it was prepared by a direct participant in the cartel contacts *in tempore non suspecto*.

307 Second, it must be stated that, contrary to what the applicants submit, the contact described by the email of 1 June 2006 is anticompetitive because the applicants disclosed commercially sensitive information about Dell's reaction to its cost proposal in an ongoing negotiation involving only three suppliers.

308 Accordingly, the contact of 1 June 2006 was proved by the Commission.

(5) *Contact of 15 September 2006 (ID 1480/222)*

309 In recital 194 of the contested decision, and in Annex I thereto (contact 39), the Commission states that, in Dell's offline negotiations in September 2006, the report of 15 September 2006 of Mr S. J., of Sony, mentioned that their '2 key competitors' for HH Combo had indicated that they 'will be aggressive to keep [total available market] they have in Q3'.

310 The applicants claim, first, that the use of this document for the purposes of imputing to them liability for the infringement as a whole infringes their rights of defence because it was not relied on in the statement of objections to show that awareness of the whole cartel. Second, the applicants submit that the report of 15 September 2006 fails to prove a contact between the applicants and Sony because it does not name them and the reference to the '2 key competitors' indicates that Sony believed that there were other competitors apart from HLDS and the applicants.

311 Those arguments are unfounded for the reasons set out below.

312 As regards the alleged breach of the rights of the defence, it should be pointed out, as the Commission observes, that the statement of objections mentioned this contact in paragraph 98 thereof and the underlying evidence.

313 Although it is true that document 'ID 1480/222' was not cited exactly in the same manner, the fact remains that that document was referenced in footnote 169 under recital 98 of the statement of objections as document 'ID 1480, p. 222', that is to say with the same numerical reference. In addition, to the extent that the Commission cited, in that recital 98, the content of the report, the applicants could not have been unaware that the Commission intended to rely on this contact in order to show their anticompetitive contacts with Sony.

314 As regards whether the wording '2 key competitors' includes the applicants as a source of information, it must be observed that previous emails of 1 June 2006 and of 7 July 2006 identify Sony/Lite-On, HLDS and the applicants as the only competitors for HH ODDs. In addition, another internal HLDS email of 17 June 2006 confirms this as follows:

'Since it doesn't have any alternative for HH CD, DVD, and CD-RW other than HLDS, TSST, Sony/LT, it will allocate major [total available market] to us.'

315 It is apparent from the foregoing that the only plausible interpretation of the wording '2 key competitors' in the context of the contested email of 15 September 2006 is that the applicants were in fact one of those key competitors.

316 The Commission was therefore entitled to conclude that Sony and the applicants had a contact in relation to Dell's offline negotiations in September 2006.

(6) *Contact of 20 June 2007*

317 In its pleadings, the Commission refers to a contact that was not expressly contested by the applicants which took place between Sony Optiarc and the applicants.

318 In particular, the Commission observes that, in a PLDS email of 17 August 2007, reported in recital 207 of the contested decision, it is stated as follows:

‘I managed to [talk] to Sony Optiarc and [they] stated that their [request for quotation] is [USD] 43 for Q1[.] They are the 2nd source awarded after TSST (i.e. 1st source). Sony believes that TSST has [a] lower price compare[d] to them. Sony believes that TSST Q1 pricing is [USD] 38 — [USD] 39 compare[d] to them. No confirmation on TSST pricing at this time period.’

319 In that regard, it should be noted that this email, read in the context of the whole body of evidence, reinforces the finding that the applicants and Sony Optiarc engaged in anticompetitive contacts.

320 In addition, in accordance with the observation made in paragraph 280 above, since it was not challenged by the applicants, this contact could be sufficient for the purposes of showing that the applicants were aware of Sony’s involvement in the cartel.

(7) Contact of 14 February 2008 (ID 1653/8-9)

321 According to recitals 216 and 217 of the contested decision, Sony Optiarc had anticompetitive contacts with PLDS and the applicants and inter alia reported internally on two contacts in relation to one procurement event. In particular, an internal email of 14 February 2008 states as follows:

‘... TSST mentioned that they will be price leader but they do not want 60% [total available market] as they have concern on supply ... [PLDS] mentioned that they will not be aggressive on price and maybe only looking at the 10% [total available market] offline negotiation.’

322 The applicants claim that the email reproduced above fails to show a contact between Sony and themselves, since it refers explicitly to Mr A. W., a Dell employee, as the source of the information concerning them and not to the applicants themselves. In addition, the applicants note that the email stated as follows: ‘[A.’s] Price Target for Slim DVDRW is [USD] 24.50 — [USD] 25.00, [and] for Slim Combo is [USD] 20.50 — [USD] 21.00’.

323 However, the words ‘TSST mentioned’ and ‘[PLDS] mentioned’ are capable of showing in themselves that the information in question could not have originated from Dell, contrary to what the applicants claim.

324 Moreover, it should be pointed out that, although the contact between Sony Optiarc and PLDS existed, as corroborated by a PLDS internal email of 14 February 2008, the mere fact that Sony also had contacts with Dell is not inconsistent with the existence of contacts with the applicants.

325 Accordingly, the Commission again demonstrates a contact between Sony and the applicants, which also serves to show that the applicants were aware of Sony’s involvement in the overall plan.

(8) Contact of 23 June 2008 (ID 401/177)

326 In recitals 237 and 376 of the contested decision, the Commission states that PLDS, HLDS, Sony Optiarc and the applicants exchanged price information at least from 20 June to 11 July 2008 in relation to bilateral negotiations organised by Dell for the supply of HH DVD-RWs in October 2008. Moreover, an internal HLDS email, of 23 June 2008, reads as follows:

‘The main competitor for this 9.5 mm Tray DVD-W [request for quotation] is SNO company, and currently it is not possible to confirm SNO’s offer. However, SNO is also already checking up on the price levels of T and P company.’

327 The applicants again claim that the use of this email infringes their rights of defence because it was not relied on in the statement of objections to show their awareness of the whole cartel. For the sake of completeness, they submit that this email fails to prove a contact between Sony Optiarc and themselves because it does not constitute direct proof of such contact and is not mentioned in the HLDS oral statement.

328 As regards the first complaint, it is sufficient to note, as the Commission does, that the statement of objections cited this contact in detail in Annex I (contact 125). The applicants could therefore foresee that the Commission intended to rely on this contact.

329 As regards the second complaint, it is sufficient to note that it is apparent from a mere reading of the email of 23 June 2008 that Sony Optiarc (SNO) was in contact with the applicants (T). Moreover, contrary to what the applicants claim, this email constitutes contemporaneous evidence drafted by a direct participant in the anticompetitive contacts and which, therefore, does not require corroboration by an oral statement.

330 The Commission was therefore entitled to rely on this contact in order to show that the applicants were aware of Sony's participation in the cartel.

(b) The complaint alleging errors of law and of fact concerning the alleged contacts between Quanta and TSST KR

331 The applicants dispute the truth and the probative value of two documents produced by the Commission in order to show that they had contacts with Quanta, namely documents ID 1643/64 and ID 1479/706.

332 The Commission disputes those arguments.

333 As a preliminary point, it should be borne in mind that, even if the Court finds that the applicants were not aware of Quanta's involvement in the cartel at issue, they would still be liable for the entire single infringement given that the participation of that company does not constitute a circumstance which can invalidate the Commission's finding that the applicants were aware of the scope and essential characteristics of the cartel from the very beginning. Quanta's involvement was only in the last year of the cartel period and, accordingly, it cannot be defined as being capable of changing the scope and the essential characteristics of the cartel. Consequently, this complaint must be rejected as ineffective.

334 In any event and purely for the sake of completeness, in the first place, it must be stated that, in recital 250 of the contested decision, the Commission refers to discussions between PLDS, HLDS, Quanta and the applicants by referring to a Quanta internal email of 24 October 2008. In that email, it is stated as follows:

‘4 key competitors: PLDS, TSST, HLDS and us [Quanta]... In order to protect the price [at a] certain level, suppliers have the consensus to keep the price no lower than USD 24.25.’

335 Moreover, in recital 253 of the Decision, the Commission finds that an internal HLDS email of 28 October 2008 mentions that, according to HP:

‘1st ranking company's price is under [USD] 24.00. There is no way how to confirm this price, it seems that all the other competitors are hearing the same thing.’

336 In the applicants' submission, this email is insufficient to support a finding of contact between Quanta and themselves, since the applicants were not named in this email. Moreover, the applicants state that the information originates from HP itself and that the email includes information about PLDS and HLDS but not about the applicants. Furthermore, it is contradicted by an HLDS internal email of the same day stating that the applicants wished to compete freely in the auction.

337 As the Commission asserts, Quanta's interpretation that the market competitors had a 'consensus' discussion with HLDS may derive from its discussions with HLDS, which was in contact with PLDS and

the applicants. In HLDS's internal email, it is stated as follows:

'After a thorough confirmation, the current status of our competitors is as below ... 3) TSST is saying that even if the price goes down to the [USD] 24.3–24.2 level it will still proceed, but this cannot be trusted. We tried to cooperate with TSST, but they said that they wanted to do a free competition. They are currently expressing that they will try to secure as much of the product volume as they can.'

338 The abovementioned email shows that, even if the applicants wished to compete freely in the auction, as they maintain, they nevertheless revealed commercially sensitive information to other participants, as is also apparent from recitals 251 and 252 of the contested decision.

339 Accordingly, the abovementioned evidence is capable of showing that the finding that all the parties, including the applicants and Quanta, participated in anticompetitive meetings is substantiated.

340 In the second place, the applicants claim that an internal PLDS email of 4 July 2008 relating to an HP request for quotation is not direct proof of a contact between Quanta and themselves, and that the related PLDS oral statement proves that HP itself is likely to have provided that information.

341 It should be noted, first of all, that the email cited by the applicants is worded as follows:

'Heard from QSI that TSST provided [USD] 24.50 for both OPP and mainstream. But it seems that [A.] will award OPP to Optiarc instead of TSST because [of] the leverage of slim BD COMBO.'

342 Next, the related oral statement states as follows:

'On 1 July 2008,, [J.–C. L.] stated that HLDS had confirmed that they would only focus on Mainstream Products and by email, dated 4 July 2008, he provided the pricing quoted by TSST for Mainstream Products. Subsequently, [L. L.] replied to [J.–C. L.] that she heard from QSI that HP would award OPP to Optiarc instead of TSST. ...'

343 Lastly, previous emails from 2 July 2008 show that PLDS had contacts with both Quanta and the applicants:

'Hi [L.], I am trying to contact TSST but he is on [a] business trip and will only be back by tomorrow. I will double check with TSST tomorrow. In addition, I also manage[d] to [talk] to QSI and they did not make any price movement. Their price is still the same.'

344 The abovementioned evidence shows the existence of a network of contacts between PLDS, on the one hand, and Quanta, HLDS and the applicants, on the other hand. While the PLDS oral statement cited above implies that Quanta was in contact with HP about the outcome of the 'OPP' procurement event, the internal PLDS email of 4 July 2008 relates to a different matter, namely the applicants' bidding price and not to the outcome of the 'OPP' procurement event. Since HP did not have an interest in disclosing the applicants' price, the most plausible explanation of the internal PLDS email of 4 July 2008 is that Quanta and TSST were in contact with each other and thereby exchanged commercially sensitive information.

345 It is apparent from the foregoing that the Commission demonstrated, to the requisite legal standard, that there were contacts between Quanta and the applicants, so that, without prejudice to what was established in paragraph 333 above, the applicants cannot claim that they were not aware of that company's involvement in the cartel.

346 The third part of this plea must therefore be rejected.

3. *Fourth part: errors of fact and of law in connection with the imputability to TSST KR of the conduct of an employee of a third party*

- 347 The applicants dispute the Commission's assertion that they had a broader awareness of the cartel participants through Mr R. B., employed by Intellimark and, according to the applicants, a third party independent sales representative who provided services to the applicants. They claim that the Commission has not adduced specific and consistent evidence capable of showing that Intellimark's conduct was imputable to them. In addition, they take issue with the Commission for not having asked them, at the time of the statement of objections, for information about their contractual relationship with Intellimark.
- 348 The Commission disputes the applicants' arguments.
- 349 It is apparent from recital 503 of the contested decision that the Commission held the applicants liable for the conduct of Intellimark, which, according to the Commission, acted as the applicants' agent. In reaching that conclusion, first, the Commission relied on the applicants' confirmation that Intellimark was acting as a sales representative for them that was required to introduce, promote and solicit orders for the applicants' ODD products. Second, the contested decision finds that PLDS stated that Intellimark was a sales company that worked on behalf of the applicants with respect to the Dell account for several products. Third, according to the Commission, contemporaneous evidence, including a Philips internal email of 13 September 2004, reported in recital 167 of the contested decision, shows that Mr R. B., Intellimark's employee, was perceived as a representative of the applicants. Fourth, the Commission considered, in accordance with the case-law of the General Court, that the evidence does not indicate that Intellimark worked for another ODD supplier or that it bore the economic risk of selling ODDs.
- 350 The applicants submit that the Commission was not entitled to impute to them Intellimark's conduct, *inter alia* by relying, in the contested decision, on negative evidence. In their opinion, the Commission infringed the principles of the presumption of innocence and good administration as well as their rights of defence.
- 351 However, it is necessary to reject the applicants' argument that the Commission infringed the principle of good administration and their rights of defence and, in any event, the presumption of innocence. It should be pointed out that the Commission informed the applicants, through the statement of objections, that, in accordance with its preliminary opinion, they were liable for Intellimark's conduct, which the applicants challenged in their reply to the statement of objections. Moreover, the Commission issued the request for information of 10 November 2009 in order to examine the relationship between Intellimark and the applicants. In that context, it must be observed that the applicants were able to understand the case made against them in the statement of objections. Lastly, as the Commission states, the contested decision provided detailed explanations as to the relationships between Intellimark and the applicants with a view to refuting the arguments made by the applicants in their reply to the statement of objections.
- 352 Next, it should be noted that the applicants do not dispute in the application that Intellimark was an exclusive agent of the applicants. Nor do the applicants dispute that Intellimark assumed any economic risk in the relevant transactions. On the other hand, they claim that the Commission failed to adduce positive evidence to support the finding of an undertaking comprising Intellimark and the applicants. Similarly, during the administrative procedure, TSST merely claimed that Intellimark was its third party independent sales representative between April 2004 and June 2007, and that their relationship did not amount to an agency without providing any evidence in support.
- 353 The applicants also submit that there is insufficient evidence to show that Mr R. B. was aware of the involvement of Sony, Sony Optiarc and Quanta in the cartel. In particular, the applicants observe that Mr R. B. left Intellimark before the start of the cartel arrangements with respect to HP and before the starting date of the infringement with respect to Quanta and Sony Optiarc. Moreover, the applicants claim that the PLDS oral statement indicating that Mr R. B. had disclosed information about other competitors is generic, uncorroborated by other evidence and made several years after the events at issue.
- 354 First of all, it should be pointed out that, as regards the contact of 19 April 2006, in which, as is explained in recital 365 of the contested decision, Mr R. B participated, even if that contact is subsequent to the date on which the latter ceased to be employed by Intellimark, it confirms his involvement in the cartel contacts.

- 355 Moreover, the applicants stated in a reply to a request for information that Mr R. B. was ‘to the best of TSST-Korea[’s] knowledge’ employed by Intellimark ‘until approximately 2005’.
- 356 The Commission correctly observes that the applicants fall into the error of engaging in a fragmentary assessment of the evidence instead of questioning the validity of the whole body of evidence. While the awareness of the infringement derived from Mr R. B.’s involvement in itself may not show that the applicants were aware of the HP-related conduct or of Quanta’s and Sony Optiarc’s conduct, Mr R. B.’s involvement, assessed together with other items of evidence such as the proposed multilateral meeting of 2003, the network of contacts between the participants, including the applicants, or the email of 16 February 2007, sufficiently demonstrates that the applicants were aware of or could have reasonably foreseen the existence of the whole cartel, including the HP-related conduct or of Sony Optiarc’s and Quanta’s conduct.
- 357 The claim that the credibility of the abovementioned PLDS oral statement is undermined by the time lag between the actual events and the statement must be rejected. The statements of a leniency applicant in a cartel investigation are inevitably made a considerable time after the events giving rise to the infringement. According to the PLDS oral statement, Dell confirmed that the applicants had information about other competitors, in particular HLDS and Sony, and this item of evidence is consistent with the other items of evidence gathered by the Commission.
- 358 In the light of the foregoing, the Commission was entitled to rely on the conduct of Mr R. B., an Intellimark employee, in order to show that the applicants were aware of the other cartel participants.
- 359 The fourth part of this plea must therefore be rejected, as must the fifth plea in its entirety.

F. Sixth plea: errors of fact and of law concerning the starting date of the applicants’ participation in the cartel

- 360 The applicants claim that the Commission has not shown to the requisite legal standard that they were aware of all the components of the alleged cartel or that they were aware of the conduct of the other cartel participants from 23 June 2004. They observe in that regard that they could be aware of the single aim of the cartel only from 20 June 2006, the date from which liability for the contacts relating to HP was imputed to them, and that, consequently, the contested decision must be annulled in its entirety.
- 361 The Commission disputes the applicants’ arguments.
- 362 The applicants claim, in essence, that they were not aware of all the components of the cartel from the starting date of the cartel, as set by the Commission, namely 23 June 2004.
- 363 This plea must be rejected, in the light of the evidence adduced by the Commission in the contested decision and of the context of the case, which was examined in part in the fifth plea.
- 364 In the first place, it should be pointed out that the attempted multilateral kick-off meeting in 2003 which the applicants were invited to attend provides an indication that they were aware of the potential for wider collusion in the ODD sector. The Court again notes, as it did in paragraph 271 above, that the Commission may rely on contacts prior to or subsequent to the infringement period in order to show the overall context and the preparatory steps of the cartel and corroborate the interpretation of certain items of evidence.
- 365 In the second place, it is apparent from recitals 165, 167 and 168 of the contested decision that, as regards the Dell internet negotiation relating to August and September 2004, HLDS and the applicants discussed the participation of the other cartel participants, such as Sony, Lite-On and Philips. In particular, HLDS’s internal report of 25 August 2004 states as follows:

‘Today, Samsung called to negotiate with us because it wants to be 1st rank in the whole CD-RW but also [because of] concerns about our price. In other words, Sony/Lite-On won’t decrease price, which enable[s]

Samsung and HLDS to split 1st rank. I told them to discuss this issue in depth after [the] main office negotiation.’

366 Similarly, in HLDS’s internal report of 16 September 2004 concerning the Dell internet negotiation of 15 September 2004, that undertaking states as follows:

‘... after thirty minutes from the beginning, QSI [together with Philips] did not bid any more, and it was confirmed that the remaining bidders are only our company and TSST. Then, TSST called us. It was that since QSI is not bidding any more and since it will compromise for November, our company should compromise the December to TSST. [From] our company’s perspective, so long as we can maintain the price of November to December and [take] the second place, there will be no loss, and thus, we agreed.’

367 In the third place, as is indicated in recital 163 of the contested decision, HLDS and the applicants were involved in a Dell internet negotiation in June 2004. The Commission was therefore right to regard the contact of 23 June 2004 between those two companies as constituting the starting date of the infringement. Moreover, given that it was a bilateral contact, it goes without saying that there were no other participants in that contact, although that cannot prove, as the applicants claim, that there was no single and continuous infringement under Article 101 TFEU and Article 53 of the EEA Agreement.

368 In the fourth place, subsequent evidence, from a time when the collusive practices concerned both Dell and HP, such as HLDS’s internal email of 16 February 2007, cited in paragraphs 220 and 235 above, confirms that the applicants were aware of, or could at least have reasonably foreseen, the whole cartel.

369 Accordingly, the applicants cannot submit that they were unaware of the whole cartel or that they could not at least have reasonably foreseen it as of 23 June 2004.

370 Furthermore, the claim that the applicants could not be aware of the overall objective of the cartel because the HP-related conduct began only in November 2005 must be rejected. As the Commission states, the scope of the cartel extended to HP only as of 30 November 2005, and the Commission cannot therefore be required to establish that the applicants were aware of the HP-related conduct before it actually started.

371 Lastly, the applicants allege that their first contact relating to HP, on 20 June 2006, does not prove that the applicants and HLDS discussed the participation of other parties and thus the Commission failed to establish their awareness of the whole cartel or at least of the HP-related conduct.

372 However, again, it must be held, as is apparent from recital 186 of the contested decision, that the evidence preceding the contact in question, read together with the whole body of evidence, shows that, on 20 June 2006, the applicants knew or should have known of the whole cartel, including the HP-related conduct.

373 In the light of the foregoing, the applicants have not succeeded in proving that the Commission erred in determining the starting date of the infringement.

374 The sixth plea must therefore be rejected.

G. Seventh plea: absence of proof of the applicants’ participation in the concerted practices or anticompetitive agreements

375 The applicants claim, first of all, that the Commission has not proved to the requisite legal standard that the bilateral contacts that allegedly involved them in the single and continuous infringement that was found constituted illegal agreements within the meaning of Article 101(1) TFEU. They maintain, next, that the Commission has not proved to the requisite legal standard the existence of any concurrence of anticompetitive wills as regards each of the eight alleged bilateral contacts. They dispute, moreover, the fact that the Commission relied on the statements of the leniency applicants and challenge the probative value of those statements and also of the contemporaneous evidence of the facts, in particular the records

of telephone conversations. They maintain, lastly, that the bilateral contacts in which they are alleged to have taken part were mere information exchanges and that, consequently, the fine imposed on them must be reduced. That reclassification of their conduct could, in their submission, result in a subsequent action for damages.

376 The Commission disputes the applicants' arguments.

377 The applicants assert that the Commission has not established that their conduct constituted agreements within the meaning of Article 101(1) TFEU. In order to provide an answer to this plea, it is first of all necessary to recall the principles relating to the concept of an agreement or concerted practice and to the burden of proof on the Commission, next, to set out the findings made by the Commission in the contested decision, which form the basis of the applicants' criticisms, and, lastly, to examine each of the bilateral contacts disputed by the applicants, by distinguishing between (i) those relating to Dell and (ii) those relating to HP.

1. Outline of the principles

378 Under Article 101(1) TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with that market and are prohibited.

379 In order for there to be an agreement within the meaning of Article 101(1) TFEU, it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (judgments of 17 December 1991, *Hercules Chemicals v Commission*, T-7/89, EU:T:1991:75, paragraph 256, and of 20 March 2002, *HFB and Others v Commission*, T-9/99, EU:T:2002:70, paragraph 199).

380 An agreement within the meaning of Article 101(1) TFEU can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation (see, to that effect, judgment of 20 March 2002, *HFB and Others v Commission*, T-9/99, EU:T:2002:70, paragraphs 151 to 157 and 206).

381 The concept of a concerted practice refers to a form of coordination between undertakings which, without being taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them (judgments of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 115, and of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraph 158).

382 The criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the FEU Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the internal market (see, to that effect, judgment of 5 December 2013, *Solvay v Commission*, C-455/11 P, not published, EU:C:2013:796, paragraph 37 and the case-law cited).

383 In this respect, Article 101(1) TFEU precludes any direct or indirect contact between economic operators of such a kind as either to influence the conduct on the market of an actual or potential competitor or to reveal to such a competitor the conduct which an operator has decided to follow itself, or contemplates adopting, on the market, where the object or effect of those contacts is to restrict competition (judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 47; see also, to that effect, judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 116 and 117).

384 In relation to adducing evidence, according to settled case-law, the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal

standard the existence of the facts constituting an infringement (judgments of 17 December 1998, *Baustahlgewebe v Commission*, C-185/95 P, EU:C:1998:608, paragraph 58, and of 14 October 2004, *Dresdner Bank v Commission*, T-44/02, not published, EU:T:2004:299, paragraph 59).

385 Thus, the Commission must produce precise and consistent evidence to support the firm conviction that the infringement was committed (judgments of 28 March 1984, *Compagnie royale asturienne des mines and Rheinzink v Commission*, 29/83 and 30/83, EU:C:1984:130, paragraph 20, and of 8 July 2008, *Lafarge v Commission*, T-54/03, not published, EU:T:2008:255, paragraph 55). The evidence adduced by the Commission must therefore permit the conclusion beyond all reasonable doubt that there was an infringement (judgment of 14 October 2004, *Dresdner Bank v Commission*, T-44/02, not published, EU:T:2004:299, paragraphs 137 and 144).

386 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 (judgments of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, EU:C:2010:389, paragraph 47, and of 8 July 2004, *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 180). Furthermore, where the Commission has relied on documentary evidence in support of its finding of the existence of an anticompetitive agreement or practice, the burden is on the parties who are contesting that finding before the Court not only to put forward a plausible alternative to the Commission's view but also to allege that the evidence relied on in the contested decision to establish the existence of the infringement is insufficient (judgments of 8 July 2004, *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 187, and of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 52).

387 As regards the evidence which may be invoked in order to establish the infringement of Article 101 TFEU, the prevailing principle in EU law is the unfettered evaluation of evidence (judgments of 8 July 2004, *Dalmine v Commission*, T-50/00, EU:T:2004:220, paragraph 72, and of 12 July 2011, *Hitachi and Others v Commission*, T-112/07, EU:T:2011:342, paragraph 64).

388 The items of evidence on which the Commission relies in the decision at issue 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 (judgments of 14 July 1972, *Imperial Chemical Industries v Commission*, 48/69, EU:C:1972:70, paragraph 68, and of 8 July 2008, *BPB v Commission*, T-53/03, EU:T:2008:254, paragraph 185). Different pieces of evidence may thus reinforce each other (judgment of 8 July 2004, *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 275).

389 In addition, it should be remembered that, in practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, in that several years may have elapsed since the time of the events constituting the infringement and a number of the undertakings covered by the investigation have not actively cooperated with it. Whilst it is necessarily incumbent upon the Commission to establish that an unlawful agreement was concluded, it would be excessive also to require it to produce evidence of the specific mechanism by which that object was to be attained. Indeed, it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an unlawful agreement in circumstances in which the existence and anticompetitive purpose of the agreement had nevertheless been sufficiently established. The undertakings are able to defend themselves properly in such a situation, provided that they are able to comment on all the evidence adduced against them by the Commission (judgment of 8 July 2004, *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 203).

390 As regards the statements of other undertakings, no provision or general principle of EU law precludes the Commission from relying on them against the applicants. On the contrary, it is clear from the case-law that

particularly high probative value may be attached to statements which (i) are reliable, (ii) are made on behalf of an undertaking, (iii) are made by a person under a professional obligation to act in the interests of that undertaking, (iv) go against the interests of the person making the statement, (v) are made by a direct witness of the circumstances to which they relate, and (vi) were provided in writing deliberately and after mature reflection (judgments of 8 July 2004, *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraphs 205 to 210, and of 12 July 2011, *Hitachi and Others v Commission*, T-112/07, EU:T:2011:342, paragraph 71).

- 391 A statement by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings which have been similarly accused, generally cannot be regarded as constituting adequate proof of an infringement. However, where the statement from the undertaking which cooperates is particularly reliable, those circumstances justify a lesser degree of corroboration, both in terms of precision and depth. If a body of consistent evidence makes it possible to corroborate the existence and certain specific aspects of the collusion referred to in the statement made in the context of cooperation, that statement may in itself be sufficient to evidence other aspects of the decision at issue. In those circumstances, the Commission may rely exclusively on that statement, provided that the veracity of what has been claimed is not susceptible of doubts and the information in it is not vague (see, to that effect, judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraphs 123 to 126).
- 392 Those principles set out in paragraphs 378 to 391 above are applicable, by analogy, to Article 53(1) of the EEA Agreement.

2. *Analysis of the contacts*

(a) *The contacts disputed by the applicants concerning Dell*

(1) *The contacts of June 2004*

- 393 According to recitals 163 and 164 of the contested decision, HLDS and the applicants established a ranking agreement in relation to a Dell internet negotiation which took place on 23 June 2004.
- 394 The applicants submit that the contemporaneous evidence, in particular HLDS's internal email of 23 June 2004, shows only a 'suggestion to have a ranking agreement' with respect to a Dell procurement event. They add that only an HLDS oral statement of 18 March 2010 points to the existence of an agreement. The applicants claim that the post-auction reports show competition between HLDS and themselves, which demonstrates that there was no agreement within the meaning of Article 101 TFEU.
- 395 As a preliminary point, it should be pointed out that, as the Commission notes, the applicants do not contest the contact which took place between HLDS and themselves, but only that it gave rise to an agreement.
- 396 However, the HLDS email of 23 June 2004 sufficiently proves the existence of an agreement, inasmuch as it states 'HLDS takes 1st rank in one of August or September and Samsung takes 1st rank in the other month'. The HLDS oral statement merely corroborates that email, adding that HLDS had followed the applicants' proposal. In addition, it should be noted that, as the Commission states, without being challenged, the outcome of the auction was consistent with what was agreed between the two parties.
- 397 In addition, even if the existence of an agreement was not correctly established, as the applicants claim, the evidence proves that the applicants engaged in anticompetitive conduct, since they exchanged in confidential information about their future bidding behaviour with HLDS.

- 398 Accordingly, those arguments must be rejected.

(2) *The contacts of August 2004*

- 399 According to recital 165 of the contested decision, contacts took place between HLDS and the applicants, in particular between Mr C. and Mr L., the respective employees of those two undertakings, prior to the Dell internet negotiation planned for 25 August 2004.
- 400 In the applicants' submission, this contact is indicative of a mere proposal, an internal discussion within HLDS and an intention to further discuss the proposal with TSST.
- 401 According to the case-law cited in paragraph 380 above, an agreement within the meaning of Article 101(1) TFEU can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation.
- 402 In the present case, it is apparent from an HLDS internal report of 21 August 2004 that '[Samsung] suggested us to take 1st rank for 1 month and it takes 1st rank for two month[s] in CD-RW', while Mr C. suggested internally that 'if we pre-negotiate with Samsung ... Samsung takes 1st rank in October as well as December and we take 1st rank in November'.
- 403 Furthermore HLDS's oral statement confirms that Mr C. 'believes that [the applicants] and HLDS reached an agreement and achieved what they had hoped to achieve'.
- 404 It should be noted, as the Commission observes, that all this evidence shows that there was a concurrence of wills between HLDS and TSST as to the rigging of the future auctions, even if the specific rankings were still under discussion.
- 405 In any event, even if the existence of an agreement was not correctly established, the evidence proves that the applicants engaged in anticompetitive conduct as, again, they exchanged confidential information about their future bidding behaviour.
- 406 Their arguments must therefore be rejected.

(3) *The contacts of September 2004*

- 407 It is apparent from recital 167 of the contested decision that HLDS and Philips each concluded ranking agreements with the applicants in relation to Dell's internet negotiation for Slim Combo conducted on 15 September 2004.
- 408 In the first place, regarding the agreement with Philips, the applicants contend that the evidence is insufficient to support the Commission's allegation. In particular, they submit that the conduct of Mr R. P., of Intellimark, cannot be imputed to them as, according to a PLDS oral statement, he was not in a position to influence the price. The applicants add that they bid aggressively by undercutting Philips significantly for November while for December the outcome was inconsistent with the alleged agreement found.
- 409 Those claims cannot be upheld, however.
- 410 First, since Intellimark and the applicants formed one undertaking in the context of the cartel at issue (see paragraphs 349 to 358 above), the Commission was entitled to impute Intellimark's conduct to the applicants.
- 411 Second, as the Commission observes, the Philips internal email of 13 September 2004 sent by Mr R., global account manager for Dell, to Philips' Dell team, which included Mr L. K., demonstrates the agreement between the applicants and Philips. This email is worded as follows:

'Dear Team, I will not be able to call in due to me flying at the time of the auction. [L.] has [R. P.'s] number from Samsung [and] if he needs to call him, call him. I spoke with [R. P. of Samsung] this afternoon and the agreement is still in place if HLDS does [not] start bidding down the price. Samsung does not want to finish 3rd.'

412 Moreover, PLDS's oral statement relating to the abovementioned email confirms, as the Commission asserts, the existence of an agreement. That statement reads as follows:

'[B. R. (global account manager for Dell)] explained he had discussions and an agreement about the ranking with [R. P. (Intellimark)] prior to this auction. '[B. R. (global account manager for Dell)] commented that he had made a typo in the e-mail. According to [him] the message should have been "the agreement is still in place if HLDS does not start bidding down the line eh down the price". '[B. R. (global account manager for Dell)] explained the agreement was that PLDS would take first place and Samsung would take second place in the auction. This meant that Samsung would not continue to bid the price down in an effort to beat PLDS, except however in the event that HLDS would start bidding down the price.'

413 It should be noted that the fact, relied on by the applicants, that Mr L. K. (Philips' Dell team) does not recall the agreement cannot invalidate the information contained in the email of 13 September 2004, which is also addressed to him, and in the PLDS oral statement designating an agreement.

414 Moreover, the same PLDS oral statement shows that Mr L. K. (Philips' Dell team) was privy to anticompetitive contacts, since it is stated therein as follows:

'V. L. also recalled [B. R.] (global account manager for Dell) saying during some of the conference calls of the Dell sales team that he received information from competitors. Other persons who attended these calls were G. L., L. K. and R. P.'

415 Lastly, competitors understood that Mr R. P. (Intellimark employee) had the power to represent the applicants, as confirmed by the abovementioned email and a PLDS oral statement.

416 In the second place, as regards the agreement with HLDS, the applicants claim that, for the November internet negotiation, the mere fact that they did not take first rank is insufficient to show an agreement because TSST lacked capacity for the first rank. As regards the December internet negotiation, the behaviour of the parties was inconsistent with the existence of an agreement since, according to a post-auction email of 16 September 2004, HLDS stopped bidding not because of an alleged ranking agreement, but because it could not keep up with the intense bidding.

417 However, that argument cannot be accepted.

418 The HLDS internal email of 16 September 2004 shows that HLDS and TSST agreed as to their ranking in the November and December internet negotiations. Thus, that email is worded as follows:

'... after thirty minutes from the beginning, QSI [together with Philips] did not bid any more and it was confirmed that the remaining bidders are only our company and TSST. Then, TSST called us. It was that since QSI is not bidding any more and since it will compromise for November, our company should compromise the December to TSST. From our company's perspective, so long as we can maintain the price of November to December and [take] the second place, there will be no loss, and thus, we agreed. Thus, [the] November auction ended with the result that our company maintained 1st [place] and that TSST maintained the second [place]. ...When the auction for December started, our company did not reduce the price and observed ... TSST taking the first place by lowering its price. However, QSI which was placed ... third without bidding in November, started to bid continuously to take the first place against TSST. ... One puzzling thing is the reason why QSI, which did not bid in November, started to fight by a margin of 1 cent against TSST. We have tried to call, but we found out that [B.] participated in the auction not from Austin, but Taiwan. Therefore, the background on the above is still unknown.'

419 It is apparent from the foregoing that, even if the applicants accepted the second rank for the November internet negotiation because of a lack of necessary capacity, this does not undermine the existence of an agreement at all. By contrast, it must be stated, as the Commission observes, that this shows that it was in line with the applicants' business situation. In that regard, it should be pointed out that it is apparent from the documents annexed to the application that, according to the HLDS oral statement, 'the purpose of [the

applicants'] call was to suggest that HLDS and [the applicants] stop competing with each other, thereby avoiding a further drop in bidding prices for November 2004 and leaving rank #1 to HLDS', and that 'this was not a big deal for [the applicants] because [they were] lacking capacity to target rank #1 for November 2004 anyway'.

420 As regards the outcome of the December internet negotiation, the email of 16 September 2004 shows that it was part of the agreement between HLDS and the applicants. Even if, as the applicants claim, that agreement was not implemented, it is sufficient to note that such lack of implementation is irrelevant for an infringement by object.

421 Lastly, as was already stated in respect of the contacts of June and August 2004, in paragraphs 397 and 405 above, it must be held that, even if the existence of an agreement was not correctly established, the evidence proves that the applicants engaged in anticompetitive conduct, since HLDS, Philips and the applicants exchanged confidential information about their future bidding behaviour.

422 The applicants' arguments must be rejected.

(4) The contacts of November 2004

423 According to recital 171 of the contested decision, the Commission found that, in November 2004, HLDS and the applicants concluded a ranking agreement in relation to Dell's internet negotiation for HH CD-RWs and HH DVDs.

424 The applicants submit that the existence of a ranking agreement is unsubstantiated by the evidence. They state that no contemporaneous documents show that HLDS had accepted such a proposal and that the post-auction internal HLDS email of 4 November 2004 shows that the outcome for the January and February 2005 supply does not match the terms of the alleged proposal.

425 The applicants' arguments cannot be accepted.

426 In the first place, it should be noted that the HLDS internal email of 3 November 2004 states as follows:

'TSST is more focusing on HH CD-RW than HH DVD. In other words, it regards 1st rank in HH DVD for 2 months to be quite burdensome, but its main office sent a guideline to take 1st rank in HH CD-RW for both of the 2 months. Thus it proposed to take 1st rank in HH DVD-ROM for 1 month each with HLDS, if Sony/Lite-On stays in 3rd rank without price competition. Since it has to take 1st rank in HH CD-RW in both 2 months, it is not able to [negotiate].'

427 The Commission adds that an HLDS oral statement confirmed that HLDS agreed with the proposal. That statement reads as follows:

'In his status report, Mr [C.] also explained to his management why he thought it made sense to accept TSST's proposal. ... In a recent interview, Mr [C.] confirmed that HLDS had agreed with TSST's proposal.'

428 In the second place, it must be held that, contrary to the applicants' claims, TSST's second ranking for HH DVD-ROMs for both January and February 2005 does not contradict the existence of an agreement. It is apparent from the email of 3 November 2004 that the applicants did not insist on ranking first for both January and February for DVD-ROMs but only for HH CD-RWs and expressed a reservation about Sony/Lite-On's behaviour.

429 In addition, HLDS's internal email of 4 November 2004 confirms that the applicants were likely to rank first for CD-RWs, stating as follows:

'In [the] HH CD-RW auction ... TSST claimed to be 1st rank in both January and February.'

430 Lastly, although the applicants submit that their aggressive bidding contradicts the existence of an agreement, it must be stated, as the Commission observes, that Sony/Lite-On's undercutting explains why Sony/Lite-On ranked first in the February 2005 auction.

431 In any event, even if the existence an agreement was not correctly established, the evidence proves that the applicants engaged in anticompetitive conduct, as HDSL and TSST exchanged confidential information about their future bidding behaviour.

432 The applicants' arguments must be rejected.

(5) The contacts of March 2005

433 In recital 177 of the contested decision, the Commission found that on 3 and 4 March 2005 HLDS and the applicants reached a ranking agreement in relation to Dell's internet negotiation for Slim CD-ROMs.

434 The applicants submit that the HLDS oral statement supporting this conclusion is not substantiated by contemporaneous evidence. In their view, the bidding records indicate competition between the two parties as both companies made six bids and first place changed hands nine times. Similarly, the applicants deem the phone records irrelevant because in their view they do not provide any indication as to their content.

435 In the first place, it should be noted, in the light of the case-law cited in paragraphs 390 and 391 above, that the HLDS oral statement underlying this contact is particularly reliable since it is very detailed and the information relating to the contacts with the applicants identifies the individuals involved and the content of the contact. In addition, the information was provided by a direct witness, namely Mr C., the HLDS representative who participated in the contact at issue. Thus, this oral statement must be considered to have a significant probative value.

436 In the second place, it must be stated that the applicants do not contest the existence of contacts with HLDS. In their pleadings, the applicants merely deny any anticompetitive activity, whereas they have submitted no possible alternative explanation for their contacts ascertained by the phone records. Given that the participants and subject matter of this contact were identical and proximate in time to other similar contacts for Dell procurement events, the Commission correctly found that this contact was anticompetitive (see, to that effect, judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 243).

437 In the third place, the outcome of the bid is consistent with the agreement described by the HLDS oral statement. Contrary to the applicants' claims, the phone records show phone calls before and after the auctions. As the Commission observes, the phone records show calls at 19:04, 20:33, 21:12 and 22:18. The bidding for May took place between 19:31 and 20:30, while the bidding for June took place between 22:54 and 23:42.

438 It follows that the Commission proved to the requisite legal standard the anticompetitive nature of those contacts.

439 In the light of the foregoing, the Commission's findings in relation to the contacts concerning Dell must be confirmed..

(b) The contested contacts concerning HP

(1) The contacts of August 2008

440 In recitals 244 to 246 of the contested decision, the Commission found that PLDS and the applicants had numerous telephone contacts in relation to the electronic requests for quotations for HH DVD-ROMs conducted by HP around 20 August 2008. In particular, the Commission explained that such telephone

contacts were reported on internally by Mr J.-C. L., a PLDS employee, as is apparent from the email of 16 August 2008, in the following terms:

‘[I t]alked to TSST and [they] stated that they will not bid aggressively on HH SATA DVD in Q408 but they will try to maintain 40-45% [total available market] share’.

441 Moreover, according to recital 244 of the contested decision, on 18 August 2008, the same PLDS employee added as follows:

‘I meant TSST will not bid DVD with very low price. Their target is still 40–45% ... This is the message I got when I talked to TSST account manager. Will have further discussion during the eAuction tonight.’

442 The applicants consider that neither of these emails reflects any commitment or ranking agreement and thus no agreement was reached between TSST and PLDS. In their view, the wording ‘Will have further discussion during the eAuction tonight’ contradicts the idea of an agreement.

443 As is apparent from the case-law cited in paragraph 380 above, an agreement within the meaning of Article 101(1) TFEU can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition, even if the specific features of the restriction envisaged are still under negotiation

444 In this case, it should be noted that the related PLDS oral statements explain the contact between PLDS and TSST as follows:

‘[Such a contact] reflects general communication with TSST in which TSST stated “that they will not bid aggressively” on the upcoming [electronic request for quotation] ... [J.-C. L.] stated that TSST would be happy with the status quo if PLDS did not bid aggressively.’

445 Therefore, PLDS’s contemporaneous internal email and the related oral statements gathered by the Commission prove that TSST and the applicants agreed on restricting competition by not bidding aggressively on that occasion. As the Commission states, the need to discuss further simply indicates that the specific features of the agreement were still under negotiation.

446 In any event, even if the existence of an agreement was not established, the evidence proves that PLDS and the applicants exchanged confidential information about their future bidding behaviour, which is also prohibited under Article 101 TFEU, as is apparent from the case-law cited in paragraph 383 above.

(2) *The electronic request for quotations of October 2008 for OPPs*

447 According to recital 250 of the contested decision, PLDS, HLDS, Quanta and the applicants had pricing discussions in relation to the HP OPP request for a quotation. It is apparent from this recital that Quanta’s internal report of 24 October 2008 reads:

‘In order to protect the price [at a] certain level, suppliers have the consensus to keep the price no lower than USD 24.25.’

448 According to the applicants, the Commission failed to prove the existence of an agreement involving them because the abovementioned Quanta internal report does not provide any specific information about them.

449 In that regard, it should be pointed out, as the Commission notes, that that report specifies, right at the beginning, that there are ‘4 Key competitors: PLDS, TSST, HLDS and [Quanta]’. Therefore it was obvious from the context who the suppliers concerned were.

450 In addition, as the Commission observes, HLDS’s internal email of 24 October 2008, that is the same day as the abovementioned report, shows that the applicants had contacts with their competitors as follows:

‘After a thorough confirmation, the current status of our competitors is as below ...’

451 Moreover, although HLDS’s oral statement states that HLDS failed to reach an agreement with the applicants and that the applicants declared that they wanted to compete freely, the internal HLDS email of 24 October 2008 shows that the applicants engaged at least in an exchange of commercially sensitive information. It is stated as follows in that internal email:

‘TSST is saying that even if the price goes down to the [USD] 24.3-24.2 level it will still proceed, but this cannot be trusted. We tried to cooperate with TSST, but they said that they wanted to do a free competition. They are currently expressing that they will try to secure as much of the product volume as they can.’

452 Although it is true that the existence of an agreement was not established by the documents of October 2008, the fact remains that the evidence proves that the applicants exchanged confidential information about their intended pricing and strategy for the next auction. Moreover, those contacts corroborate the ‘modus operandi’ of the anticompetitive conduct of August 2008 and of the other contacts subsequent to October 2008 examined in the context of this plea, which constitute instances of anticompetitive conduct under Article 101 TFEU.

453 The applicants’ arguments must be rejected.

(3) *The contacts of November 2008*

454 In recitals 261 to 263 of the contested decision, the Commission found that PLDS and the applicants agreed on ranking and prices to be submitted in relation to a request for quotation for HH SATA DVD-ROMs.

455 The applicants admit that the contemporaneous evidence shows exchanges of future pricing intentions but not the existence of an agreement. In their view, the evidence demonstrates that these two parties engaged at most in ‘general communications’. Internal PLDS emails also show that PLDS did not wish to cooperate with the applicants. Moreover, the contemporaneous emails from Mr J.-C. L. demonstrate that he in fact did not know the applicants’ prices for DVD-ROMs. Moreover, the applicants state that the actual prices were different from those allegedly agreed on by the parties. Lastly, the applicants observe that only a PLDS oral statement refers to the conclusion of an agreement.

456 The applicants’ arguments cannot be accepted.

457 In the first place, it should be noted that an internal PLDS email of 11 November 2008 states as follows:

‘TSST agreed to co-work and will only reduce [USD] 0.05@1C09 — HH SATA DVD.’

458 It is apparent from that email that the applicants decided to enter into an agreement despite their fear that the agreement might be discovered by HP, as shown by a previous PLDS email of 6 November 2008, which stated as follows:

‘[I t]alked to TSST and he seems ... very afraid to [cooperate] this time [because] he [fears he] might los[e] his job if HP find[s] out.’

459 In addition, as the Commission observes, an email of 17 November 2008 confirms the existence of an agreement in these terms:

‘[I t]alked to TSST and they are also [under pressure] from HP to further reduce the pricing. TSST will co-work with PLDS as below: 1C09 Rank TSST 12.20 [number] 1 PLDS 12.22 [number] 2. This is the final pricing TSST agreed and will not further reduce the pricing no matter [how much] HP push.’

460 The contemporaneous evidence is corroborated by a PLDS oral statement, which states as follows:

‘An explicit agreement was reached between PLDS and TSST on the price for this event. In an e-mail, dated 11 November 2008 [J.-C. L.] wrote to [J. H.] and [P. S.] that TSST had agreed to co-work with PLDS with regard to 1C09 for HH DATA SATA DVD.’

461 In the second place, recital 261 of the contested decision explains that the Commission concluded that the two parties had reached an agreement as follows:

‘PLDS and TSST, as the only two participating companies, agreed on ranking and prices to be submitted in relation to [a request for quotation] for HH SATA DVD-ROM.’

462 Lastly, recital 263 of the contested decision correctly refers to ‘exchanges’ in relation to this contact because it gave rise to exchanges of information in addition to the agreement reached between the applicants and PLDS. The reference in a previous contact to ‘general communications’ between the applicants and PLDS does not preclude those two undertakings also having entered into agreements within the meaning of Article 101 TFEU.

463 Lastly, even if the existence of an agreement was not correctly established, the evidence proves that the applicants participated in anticompetitive conduct, since PLDS and the applicants exchanged confidential information about their future bidding behaviour.

464 In light of the foregoing considerations, the applicants’ seventh plea must be rejected in its entirety.

H. Eighth plea: breach of the right to good administration as a result of the excessive duration of the investigation

465 The applicants claim that the duration of the investigation was excessive in the light of the volume of the file, the number of parties involved, the involvement of only two customers, the relatively short duration of the single infringement alleged by the Commission and the absence of any exceptional circumstances that could justify a long investigation. They maintain that a finding by the Court that the duration of the investigation was excessive should result in the amount of the fine imposed being reduced by at least 5%, in the exercise of the Court’s unlimited jurisdiction.

466 The Commission disputes the applicants’ arguments.

467 According to settled case-law, compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the EU judicature ensures (see judgment of 19 December 2012, *Heineken Nederland and Heineken v Commission*, C-452/11 P, not published, EU:C:2012:829, paragraph 97 and the case-law cited).

468 The principle that an administrative procedure must be conducted within a reasonable time has been reaffirmed by Article 41(2) of the Charter of Fundamental Rights, under which ‘every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union’ (see judgment of 5 June 2012, *Imperial Chemical Industries v Commission*, T-214/06, EU:T:2012:275, paragraph 284 and the case-law cited).

469 Whether the time taken for a procedure is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity (see, to that effect, judgment of 20 April 1999, *Limburgse Vinyl Maatschappij and Others v Commission*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 126), and also, where relevant, to information or justification which the Commission may provide concerning the measures of investigation carried out during the administrative procedure.

470 It should nevertheless be pointed out that, for the purposes of the application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements, where it has been proved that the breach of that principle has adversely affected the rights of defence of the undertakings concerned. Except in that specific circumstance, failure to comply with the obligation to adopt a decision within a reasonable time cannot affect the validity of the administrative procedure under Regulation No 1/2003 (judgments of 9 June 2016, *CEPSA v Commission*, C-608/13 P, EU:C:2016:414, paragraph 61, and of 9 June 2016, *PROAS v Commission*, C-616/13 P, EU:C:2016:415, paragraph 74).

471 In the present case, it should be noted that the applicants merely request a reduction of the amount of the fine on account of the alleged breach of the reasonable time principle. They level no criticism against the Commission in relation to their rights of defence during the administrative procedure.

472 In that regard, it is sufficient to recall that, although an infringement by the Commission of the reasonable time principle can justify the annulment of a decision taken by it following an administrative procedure based on Article 101 or 102 TFEU, such an infringement of the reasonable time principle, if established, cannot lead to a reduction of the fine imposed (see judgment of 26 January 2017, *Villeroy & Boch v Commission*, C-644/13 P, EU:C:2017:59, paragraph 79 and the case-law cited).

473 The eighth plea must therefore be rejected.

I. Ninth plea: in the alternative, the Commission made errors when calculating the amount of the fine

474 By their ninth plea, the applicants claim that the Commission erred in determining the amount of the fine imposed on them. This plea is divided into three parts, alleging that the Commission ignored the fact that the applicants are single-product undertakings; that it failed to take into account other circumstances that reduce the gravity of TSST KR's individual conduct; and that it did not properly assess the particular circumstances of the infringement for the purpose of determining the general gravity coefficient.

1. First part: the Commission ignored the fact that the applicants are single-product undertakings

475 The applicants claim that, according to settled case-law, the sanctions must comply with the principle that penalties must be specific to the offender, which means that they must be tailored both to the specific features of each addressee and to its conduct. In addition, they maintain that point 37 of the Guidelines means that it must be ensured that fines have a sufficiently deterrent effect without being disproportionate, particularly in the case of companies with a relatively limited product portfolio. Thus, according to the applicants, the Commission ought to have recognised that their single-product nature and the fact that their activity consisted exclusively in developing and selling ODDs justified the application of a reduction in the amount of their fine, in particular by comparison with other participants in the cartel at issue. They conclude that, by not granting such a reduction, the Commission breached the principles of personal liability and equal treatment.

476 The Commission disputes those arguments and emphasises, in essence, that the case-law of the General Court has already rejected in the past the possibility that the single-product nature of an undertaking could be taken into account for the purposes of calculating the amount of the fine.

477 Point 37 of the Guidelines provides as follows:

‘Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.’

478 In the present case, the applicants claim that the Commission should have applied point 37 of the Guidelines and reduced the amount of their fine as they only produce a single product, namely ODDs.

- 479 However, in the first place, it must be observed that, apart from the generic formulation of such an argument, the applicants do not sufficiently substantiate the reasons which ought, in their submission, have led the Court to find that the Commission erred by failing to take into consideration their single-product nature for the purposes of reducing the amount of the fine and by failing to determine the amount of their fine on the basis of point 37 of the Guidelines.
- 480 In the second place, as the Commission notes, the General Court has expressly rejected in its case-law the proposition that the single-product nature of an undertaking's business must be considered a relevant factor for the calculation of the amount of the fine.
- 481 Thus, it is apparent from the case-law that the Commission is not obliged to take into account, in order to assess the gravity of the infringement, the relationship between the total turnover of an undertaking and the turnover produced by the goods which are the subject matter of the infringement. The fact that an undertaking participating in the cartel is smaller overall than the other participants does not affect the influence that its participation in the infringement may have on the market on which the infringement has taken place. Thus, the single-product nature of an undertaking's business is only a factual circumstance which does not in any way change the effect that the cartel may have had on the relevant market (see, to that effect, judgment of 8 July 2008, *Saint-Gobain Gyproc Belgium v Commission*, T-50/03, not published, EU:T:2008:252, paragraphs 93 and 94).
- 482 Moreover, the General Court has held that the Commission is not required, when determining the amount of fines, to ensure, where fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect any distinction between the undertakings concerned in terms of their overall turnover. Thus, the fact that the method of calculation set out in the Guidelines is not based on the overall turnover figures of the undertakings concerned and therefore allows disparities to appear between those undertakings as regards the relationship between their overall turnover figures and the amount of the fines imposed on them is irrelevant to an assessment of whether the Commission infringed the principles of equal treatment and that penalties should fit the individual offender. It is thus not contrary to those principles that an undertaking, the activities of which are more focused than others on the sale of goods or services connected directly or indirectly to the infringement, may receive a fine which represents a proportion of its overall turnover that is greater than that represented by the fines imposed respectively on each of the other undertakings in question (see, to that effect, judgment of 17 December 2014, *Pilkington Group and Others v Commission*, T-72/09, not published, EU:T:2014:1094, paragraphs 396 to 399).
- 483 It is apparent from the foregoing that it is not possible to accept the applicants' arguments by which they take issue with the Commission, when calculating the amounts of the fines imposed in the contested decision, for not adjusting those amounts by taking into account the difference between the applicants' overall turnover and the higher overall turnover of other cartel participants, or of the fact that the sale of ODDs represented a significantly higher proportion of the applicants' turnover by comparison to that of the other cartel participants.
- 484 In the third place, to the extent that the applicants base the complaints put forward in this part of the plea on the Commission's decision-making practice, it is sufficient to recall that, according to settled case-law of the Court of Justice, such a practice cannot itself serve as a legal framework for the imposition of fines in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (judgments of 21 September 2006, *JCB Service v Commission*, C-167/04 P, EU:C:2006:594, paragraphs 201 and 205, and of 7 June 2007, *Britannia Alloys & Chemicals v Commission*, C-76/06 P, EU:C:2007:326, paragraph 60). In the present case, it must be held that the applicants have not produced proof of such discrimination.

485 It follows that the single-product nature of the applicants' activities cannot justify recourse to the exception laid down in point 37 of the Guidelines. It is not therefore possible to establish any error by the Commission in the manner claimed by the applicants.

486 The first part of the ninth plea must therefore be rejected.

2. *Second part: the Commission ought to have taken into account certain circumstances that limited the gravity of TSST KR's individual conduct*

487 The applicants claim that the Commission ought to have taken significant additional factual circumstances into consideration that were relevant for the assessment of the individual gravity of TSST KR's conduct. In particular, this concerns, first, its absence of involvement in an outright bid-rigging arrangement, and its lack of awareness of the existence of such an arrangement concluded between other addressees of the statement of objections; second, the fact that TSST KR was not aware of all the participants in the infringement found by the Commission; third, the fact that none of the undertaking's senior management was involved in the conduct at issue; and, fourth, the fact that TSST KR did not adopt any measure to conceal its contacts with competitors, as the other addressees of the statement of objections did.

488 The Commission disputes those claims. It claims that it duly took the degree of gravity of the applicants' conduct into account when determining the amount of the fine to be imposed on them.

489 As a preliminary point, it should be borne in mind that, as is apparent from recitals 543 and 544 of the contested decision, to assess the gravity of the infringement, the Commission took particular account of the nature of that infringement, which consisted of coordinating prices in the area of ODDs. According to the Commission, such conduct justified, in the light of point 23 of the Guidelines, the application of a rate for gravity of 16%. In addition, the Commission took account of the fact that the cartel covered at least the whole territory of the EEA. The additional amount was also established as 16%, as is explained in recital 555 of the contested decision.

490 Moreover, it should be noted that the arguments put forward by the applicants in this part of the plea appear to confuse the different steps for determining the amount of the fine, inasmuch as they refer to both the determination of the gravity of the infringement and to the mitigating circumstances which apply in order to adjust the basic amount.

491 If the applicants' line of argument were to be understood as meaning that the Commission should have applied a lower rate for gravity to them than to the rest of the cartel participants due to circumstances which are individually applicable to them, it is sufficient to recall that the Court of Justice has held that the taking into account of differences between undertakings that have participated in a single cartel, for the purpose of assessing the gravity of an infringement, need not necessarily occur when the multipliers for the gravity of the infringement and for the additional amount are set but may occur at another stage in the setting of amount of the fine, such as when the basic amount of the fine is adjusted in the light of mitigating and aggravating circumstances under points 28 and 29 of the Guidelines (see, to that effect, judgments of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 106, and of 26 January 2017, *Laufen Austria v Commission*, C-637/13 P, EU:C:2017:51, paragraph 71 and the case-law cited).

492 As regards, first, the applicants' criticism that the Commission should have applied to them a rate for gravity lower than that of the other cartel participants, on account of their lack of awareness of certain features of the cartel, such as Sony's and Quanta's involvement, it should be recalled that it is apparent from the examination carried out in the context of the third part of the fifth plea (see paragraphs 279 to 346 above) that the Commission did not err in considering that the applicants were aware of Sony's and Quanta's involvement in the cartel or could at least have reasonably foreseen it. With respect to awareness of Sony's involvement, it should be pointed out that almost all the contacts demonstrated in paragraphs 284 to 330 above are from 2006 to 2008 and that, since TSST Japan left the market in December 2005, continuing only with reduced sales activities until early 2008, and that TSST KR gradually assumed the

sales activities of TSST Japan (see contested decision, recital 14), TSST KR cannot claim that it was unaware of Sony's involvement in the cartel. In addition, as regards TSST KR's awareness of Quanta's involvement, it was clearly established in paragraphs 331 to 346 above. Accordingly, it cannot be found that the applicants' actions in relation to the cartel should be considered lesser than those of the other addressees of the contested decision, as they claim.

493 As regards, second, the alleged failure to take account, in essence, of the applicants' competitive activity on the market, it must be recalled that, according to the case-law, the fact that an undertaking whose participation in a concerted practice with its competitors is established did not conduct itself in the market in the manner agreed with its competitors does not necessarily have to be taken into account, as a mitigating circumstance, when the amount of the fine to be imposed is determined. An undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (judgment of 25 October 2011, *Aragonesas Industrias y Energía v Commission*, T-348/08, EU:T:2011:621, paragraph 297).

494 As regards, third, both the fact that, in the applicants' submission, TSST KR's senior management was not involved in the infringing conduct alleged by the Commission and the fact that nothing proves that TSST KR had taken measures to conceal its alleged contacts with competitors, it must be stated that such circumstances cannot be regarded as factors capable of mitigating the assessment of the gravity of the infringement.

495 To the extent that the Commission correctly found that TSST KR employees participated in the price coordination, which is not disputed by the applicants in the context of this part of the plea, the fact that the contacts may not have been effected by senior or top level management, as the applicants claim, cannot have an effect on the finding of the gravity of the infringement. Nor do the applicants explain to what extent such a factor should be assessed for the purposes of determining the rate for gravity or applied as a mitigating circumstance to the basic amount.

496 Moreover, with respect to the applicants' claim that they did not conceal their conduct, it must be stated that, apart from the fact that that argument is not substantiated, non-concealment of anticompetitive conduct, in particular price coordination, is not capable of reducing the gravity of a form of conduct which remains one of the most harmful to competition on the market. Nor can such a factor justify a downward adjustment of the basic amount.

497 It is apparent from the foregoing that none of the claims made by the applicants supports a finding that the Commission erred when setting the rate for gravity at 16% or for not further reducing the basic amount by way of mitigating circumstances.

498 The second part of the ninth plea must therefore be rejected.

3. *Third part: errors in the determination of the rate for gravity*

499 The applicants maintain that the percentage applied by the Commission as the rate for gravity is too high. According to the applicants, that rate ought to have been set at 15%. They also claim that the cartel concerned by the present case is significantly different from those at issue in earlier Commission decisions where a rate of 16% was applied. The applicants maintain in that regard that the present cartel was not structured, as no rules governing pricing or volumes were established and, moreover, the conduct in question was implemented in only a very small number of Member States.

500 The Commission disputes the applicants' arguments.

501 To the extent that the applicants base the complaints put forward in this part of the plea on the Commission's decision-making practice, it is sufficient to recall that, as is apparent from paragraph 484 above, the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters. Decisions in other cases can give only an indication for the

purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same.

502 The applicants take issue with the Commission for not applying a rate of 15%, as in the ‘Bananas’ case, which, in their submission, had the same characteristics.

503 However, it must be stated that, in the abovementioned case, the geographic scope of the infringement covered only a certain number of Member States whereas, by contrast, in this case, as was already found in the examination of the third plea, the infringement covered at least the entire EEA. Consequently, since the applicants have not adduced proof of discrimination, their arguments must be rejected.

504 As regards the relevance of the gravity coefficient of 16% set by the Commission, it is apparent from paragraph 497 above that that coefficient was correctly set by the Commission and that none of the claims made by the applicants supports a finding of errors capable of justifying a reduction of that coefficient.

505 Accordingly, the third part of this plea must be rejected, as must the ninth plea in its entirety.

506 It is apparent from the foregoing that all the pleas put forward by the applicants must be rejected and that, accordingly, their claim for annulment must be rejected.

507 In addition, nothing in the documents before the Court indicates, in the light of the arguments and pleas raised by the applicants, that the Commission made an error justifying an alteration of the amount of the fine which was applied to them. In view of the foregoing and all the circumstances of the case, the applicants’ claim for variation must therefore also be rejected.

508 Consequently, the action must be dismissed in its entirety.

Costs

509 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 Toshiba Samsung Storage Technology Corp. and Toshiba Samsung Storage Technology Korea Corp. to bear their own costs and pay the costs incurred by the European Commission.**

Gratsias

Labucka

Ulloa Rubio

Delivered in open court in Luxembourg on 12 July 2019.

E. Coulon

D. Gratsias

Registrar

President

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Costs

* Language of the case: English.

1 This judgment is published in extract form.