

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2018 (*)

Table of contents

Legal context

Background to the dispute and the decision at issue

The procedure before the General Court and the judgment under appeal

Forms of order sought by the parties to the appeal

The appeal

The first to third grounds of appeal, relating to the finding of a restriction of competition by object

The first ground of appeal

- Arguments of the parties
- Findings of the Court

The second ground of appeal

- Arguments of the parties
- Findings of the Court

The third ground of appeal

- Arguments of the parties
- Findings of the Court

The fourth and fifth grounds of appeal, relating to the concept of a single and continuous infringement

The fourth ground of appeal

- Arguments of the parties
- Findings of the Court

The fifth ground of appeal

- Arguments of the parties
- Findings of the Court

The sixth ground of appeal, relating to the fine imposed on the appellants

Arguments of the parties
Findings of the Court

Costs

(Appeal — Agreements, decisions and concerted practices — European market for smart card chips — Network of bilateral contacts — Exchanges of commercially sensitive information — Restriction of competition ‘by object’ — Single and continuous infringement — Participation in the infringement and awareness, by a participant in some of the bilateral contacts, of the other bilateral contacts — Judicial review)

In Case C-98/17 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 24 February 2017,

Koninklijke Philips NV, established in Eindhoven (Netherlands),

Philips France, established in Suresnes (France),

represented by J.K. de Pree, A.M. ter Haar and T.M. Snoep, advocaten,

appellants,

the other party to the proceedings being:

European Commission, represented by A. Biolan, A. Dawes and J. Norris-Usher, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 February 2018,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By their appeal, Koninklijke Philips NV and Philips France SAS ask the Court to set aside the judgment of the General Court of the European Union of 15 December 2016, *Philips and Philips France v Commission* (T-762/14, not published, ‘the judgment under appeal’, EU:T:2016:738), by which the General Court dismissed their action for annulment of Commission Decision C(2014) 6250 final of 3 September 2014 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39574 — Smart Card Chips) (‘the decision at issue’) or, in the alternative, to cancel or reduce the fine imposed on them.

Legal context

- 2 Article 23 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) states, in paragraphs 2 and 3:

‘2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101 or 102 TFEU]; or

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3 As regards the calculation of the fines, points 20 to 23 of 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 2006 Guidelines’) provide:

- ‘20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.
21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.
22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
23. Horizontal price-fixing, market-sharing and output-limitation agreements ..., which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.’

4 Paragraphs 73 and 74 of the Guidelines on the applicability of Article [101 TFEU] to horizontal co-operation agreements (OJ 2011 C 11, p. 1, ‘the Horizontal Guidelines’) are worded as follows:

- ‘73. Exchanging information on companies’ individualised intentions concerning future conduct regarding prices or quantities ... is particularly likely to lead to a collusive outcome. Informing each other about such intentions may allow competitors to arrive at a common higher price level without incurring the risk of losing market share or triggering a price war during the period of adjustment to new prices ... Moreover, it is less likely that information exchanges concerning future intentions are made for pro-competitive reasons than exchanges of actual data.
74. Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object ... In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities. ...’

Background to the dispute and the decision at issue

5 The background to the dispute and the essential elements of the decision at issue as apparent from paragraphs 1 to 40 of the judgment under appeal may be summarised as follows for the purposes of this case.

6 On 22 April 2008, Renesas Technology Corp. and its subsidiaries (‘Renesas’) informed the Commission of the existence of a cartel in the smart card chip sector and submitted an application for immunity from fines pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; ‘the Leniency Notice’). On 28 March 2011, after carrying out on-the-spot inspections at the premises of several companies in the sector and sending them requests for information, the Commission initiated proceedings, pursuant to Article 11(6) of Regulation No 1/2003, against, first, the appellants, second, Renesas, and, third, Samsung Electronics Co. Ltd and Samsung Semiconductor Europe GmbH (together, ‘Samsung’).

7 In April 2011, the Commission initiated settlement discussions, in accordance with Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the

Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18) with Renesas, Samsung and the appellants. Those discussions were discontinued in October 2012.

- 8 On 18 April 2013, the Commission sent a statement of objections to Renesas, Hitachi Ltd, Mitsubishi Electric Corp., Samsung, Infineon Technologies AG ('Infineon') and the appellants. The hearing was held on 20 November 2013.
- 9 On 3 September 2014, the Commission adopted the decision at issue.
- 10 By that decision, the Commission found that four undertakings, namely Infineon, the appellants, Renesas and Samsung, had participated in a single and continuous infringement of Article 101(1) TFEU and of Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement') in the smart card chip sector for the whole European Economic Area (EEA) ('the infringement at issue'). The Commission found that that infringement lasted from 24 September 2003 to 8 September 2005 and related to smart card chips.
- 11 The market for smart card chips consisted of two segments, namely that of chips for SIM cards, which are used mainly for mobile phones ('SIM chips'), and that of chips for non-SIM cards, for banking, security and ID ('non-SIM chips'). At the time of the infringement at issue, that market was characterised by a constant fall in prices, downstream pressure on prices from the largest customers of smart card chip manufacturers, imbalances in the demand/supply ratio resulting from an increase in demand, constant, rapid technological development and the structure of contract negotiations with customers.
- 12 The Commission took the view, as regards the main characteristics of the infringement at issue, that the cartel penalised was based on a set of bilateral contacts, which were weekly in 2003 and 2004, between the addressees of the decision at issue. According to the Commission, the participants in the infringement coordinated their pricing behaviour for smart card chips through contacts on pricing, including specific prices offered to major customers, minimum price levels and target prices, the sharing of views on the price evolution for the coming semester and pricing intentions, but also on production capacity and capacity utilisation, future market conduct as well as on contract negotiations vis-à-vis common customers. The timing of the cartel contacts, a list of which appears in Table 4 of the decision at issue, follows the timing of the business cycle. The Commission found the existence of links between those bilateral contacts on account of the object of those contacts and their dates. When those bilateral contacts took place, the undertakings made open references to other bilateral contacts being held among the participants to the infringement at issue and the information gathered was transmitted to competitors.
- 13 The Commission classified the infringement at issue as a single and continuous infringement. The collusive contacts were linked and complementary in nature. By interacting, they contributed to the realisation of the set of anticompetitive effects within the framework of a global plan having a single objective. According to the Commission, Samsung, Renesas and the appellants were aware of the entire infringement. However, Infineon was held responsible for the infringement only in so far as it participated in collusive arrangements with Samsung and Renesas, as there was no evidence that it had contacts with the appellants or that it had the subjective perception of participating in the whole of the infringement at issue.
- 14 Finally, the Commission held that the behaviour of the undertakings in question had the object of restricting competition in the European Union and that it had an appreciable effect upon trade between Member States and between contracting parties of the EEA Agreement.
- 15 For the purposes of calculating the fines imposed pursuant to Article 23(2) of Regulation No 1/2003 and the 2006 Guidelines, the Commission found that the infringement at issue had been committed intentionally. In order to calculate the basic amount, that institution applied a proxy for the annual value of sales based on the actual value of sales made of cartelised products by the undertakings during the months of their active participation in the infringement at issue. The Commission applied a gravity multiplier of 16% for the infringement at issue. As regards the duration of that infringement, it took account of 11

months and 14 days in the case of the appellants, 18 months and 7 days in Infineon's case, 23 months and 2 days in the case of Renesas and 23 months and 15 days in the case of Samsung. It applied a factor of 16% of the value of sales by way of additional amount.

- 16 On account of mitigating circumstances, the Commission granted Infineon a 20% reduction in the amount of the fine because it was responsible for the infringement at issue only in so far as it participated in collusive arrangements with Samsung and Renesas, and not with the appellants. Pursuant to the Leniency Notice, the Commission granted Renesas immunity from fines and granted Samsung a 30% reduction in the amount of the fine.
- 17 In Article 1 of the decision at issue, the Commission found that the following undertakings participated in a single and continuous infringement of Article 101(1) TFEU and of Article 53 of the EEA Agreement in the smart card chip sector for the whole EEA:
- Infineon, from 24 September 2003 until 31 March 2005, 'for its coordination with Samsung and Renesas' (Article 1(a));
 - the appellants, from 26 September 2003 until 9 September 2004 (Article 1(b));
 - Renesas, from 7 October 2003 until 8 September 2005 (Article 1(c)); and
 - Samsung, from 24 September 2003 until 8 September 2005 (Article 1(d)).
- 18 In Article 2 of that decision, the Commission imposed fines of EUR 82 784 000 on Infineon (Article 2(a)), EUR 20 148 000 on the appellants (Article 2(b)), EUR 0 on Renesas (Article 2(c)) and EUR 35 116 000 on Samsung (Article 2(d)).

The procedure before the General Court and the judgment under appeal

- 19 By application lodged at the Registry of the General Court on 13 November 2014, the appellants brought an action for annulment of the decision at issue in so far as it concerns them or, in the alternative, for the cancellation or reduction of the amount of the fine which had been imposed on them.
- 20 In support of their application, the appellants put forward nine pleas. By their first three pleas, they challenged the Commission's assessment that they had infringed Article 101 TFEU and Article 53 of the EEA Agreement as regards, first, the existence of a restriction of competition by object, second, the inclusion of non-SIM chips within the scope of the infringement at issue and, third, the concept of a single and continuous infringement. Their fourth to sixth pleas essentially related to the conduct of the Commission's investigation. By their seventh to ninth pleas, they challenged the amount of the fine that had been imposed on them by the decision at issue.
- 21 By the judgment under appeal, the General Court rejected those pleas and, therefore, dismissed the appellants' action in its entirety.

Forms of order sought by the parties to the appeal

- 22 By their appeal, the appellants claim that the Court should:
- set aside the judgment under appeal;
 - annul the decision at issue in so far as it concerns them; and/or
 - annul or reduce the amount of the fine imposed on the appellants in that decision, and

- order the Commission to pay the costs at first instance and on appeal;

23 The Commission contends that the Court should:

- dismiss the appeal;
- in the alternative, reject the request that the Court of Justice reduce the fine imposed on the appellants, and
- order the appellants to pay the costs.

The appeal

24 In support of their appeal, the appellants put forward six grounds of appeal. By their first three grounds of appeal, the appellants challenge the General Court's assessment that there was a restriction of competition by object. The fourth and fifth grounds of appeal relate to the General Court's assessment that there was a single and continuous infringement. The sixth ground of appeal concerns the General Court's assessment of the amount of the fine imposed on the appellants.

The first to third grounds of appeal, relating to the finding of a restriction of competition by object

25 By the first to third grounds of appeal, the appellants challenge the General Court's assessment, in paragraphs 50 to 141 of the judgment under appeal, that there was a restriction of competition by object on the grounds that it applied the wrong legal standard when establishing such a restriction, that it exceeded its unlimited jurisdiction and that the reasoning in its judgment was contradictory, in breach of its obligation to state reasons.

The first ground of appeal

- *Arguments of the parties*

26 By their first ground of appeal, the appellants complain that the General Court applied the wrong legal standard when establishing a restriction of competition by object.

27 In their submission, it is apparent from the case-law of the Court of Justice that the essential legal criterion for finding such a restriction is based on the finding that the type of conduct at issue reveals in itself a sufficient degree of harm to competition. In order to assess the degree of harm of the conduct at issue, it is necessary to take into consideration all relevant aspects of the economic or legal context in which that conduct takes place.

28 In this respect, in the judgment 20 January 2016, *Toshiba Corporation v Commission* (C-373/14 P, EU:C:2016:26, paragraphs 27 to 29), the Court drew a distinction between two types of restrictions by object. Certain types of conduct reveal by their very nature a sufficient degree of harm to competition, so that the analysis of the economic and legal context of which the conduct at issue forms a part may be limited to what is strictly necessary. Other types of conduct may only be considered to constitute a restriction by object in so far as they reveal a sufficient degree of harm to competition, following a full analysis of that context.

29 In the present case, in the first place, the General Court failed to assess whether the conduct at issue was of a type that, by its very nature, reveals a sufficient degree of harm to competition. The General Court merely set out the reasons why the conduct at issue was in its view capable of influencing the commercial conduct of competitors but did not explain in what respect that conduct is of a type that reveals in itself and by its very nature a sufficient degree of harm. By reference to the Horizontal Guidelines, the appellants add that the information exchanged in the present case did not concern individual data regarding intended future prices or quantities, the exchange of which could be considered to constitute an infringement by object, but

that it was of a general and ad hoc nature. They refer, in that regard, to paragraphs 83, 84, 89, 113, 121, 122 and 134 of the judgment under appeal.

30 In the second place, the appellants submit that the General Court should have carried out a full analysis of the economic and legal context of which the conduct at issue formed a part in order to determine whether that conduct revealed a sufficient degree of harm to competition. However, the General Court failed to carry out such an analysis and merely ascertained whether the conduct could have been harmful to normal competition in view of that context, as is apparent inter alia from paragraphs 68 to 71 of the judgment under appeal. In particular, the General Court should have taken account of the need to continuously adapt pricing to that of Atmel Corporation ('Atmel'). It should also have ascertained whether the information exchanged actually influenced the conduct of the undertakings, assessed whether that information provided useful indications of future conduct and, lastly, taken account of the specific characteristics of the market for non-SIM chips.

31 In the third place, whilst observing that parties' intentions are not a necessary element in establishing a restriction of competition by object but may nevertheless be taken into account for that purpose, the appellants complain that the General Court failed to properly take into consideration and distorted their intentions in paragraph 80 of the judgment under appeal. First, they claim that they stated that it had been Samsung's rather than their objective to improve Samsung's market position through the information exchanges. Second, the General Court was not entitled to infer the existence of an anticompetitive object from Samsung's intentions.

32 The Commission contests all those arguments.

– *Findings of the Court*

33 By their first ground of appeal, the appellants essentially claim that the General Court applied the wrong legal standard when assessing whether there was a restriction of competition by object in the present case.

34 In that regard, it should be borne in mind that, according to the case-law of the Court, the essential legal criterion for ascertaining whether an agreement or a concerted practice involves a restriction of competition 'by object', for the purposes of Article 101(1) TFEU, is the finding that such an agreement or practice reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects (see, to that effect, judgment of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 104 and the case-law cited).

35 In order to determine whether a type of coordination between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object', regard must be had, inter alia, to its content, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgments of 5 December 2013, *Solvay Solexis v Commission*, C-449/11 P, not published, EU:C:2013:802, paragraph 36; of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 117 and the case-law cited; and of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 105 and the case-law cited).

36 In the present case, after recalling in essence that case-law in paragraph 58 of the judgment under appeal, the General Court examined, in paragraphs 67 to 141 of that judgment, the appellants' arguments aimed at challenging the existence of a restriction of competition by object. In that regard, it took account of the context of the market for smart card chips, as set out in paragraph 70 of that judgment, and assessed whether, as it essentially stated in paragraph 76 of that judgment, the information exchanged revealed, by its very nature, a sufficient degree of harm to competition that it could be considered to result in a restriction of competition by object.

- 37 In this respect, it is apparent from the General Court's detailed findings that, in the light of the context of the market for smart card chips, the bilateral discussions between competitors at issue were capable of enabling them to slow down the price decrease inherent in that market and did in fact pursue that objective. According to those same findings of the General Court, inasmuch as the information exchanged during those discussions between the competitors related to their pricing intentions and their production capacities, it was sensitive information from the point of view of competition which was capable of influencing directly the commercial strategy of the competitors or was capable of affecting normal competition.
- 38 In so doing, contrary to the arguments put forward by the appellants, the General Court followed the case-law set out in paragraphs 34 and 35 of this judgment. The General Court examined the content of the bilateral discussions between the competitors, including the nature of the information exchanged, assessed the objectives pursued by the undertakings that participated in those discussions and took account of the context of the market on which those discussions took place.
- 39 In that regard, in the first place, it should be observed that, contrary to the appellants' submission, it is apparent in particular from the findings set out in paragraphs 56, 63 and 71 of the judgment under appeal and from the analysis of each of the bilateral contacts that they challenge that the General Court examined whether the exchange of information at issue revealed, by itself and by its very nature, a sufficient degree of harm and that it explained its reasons for finding that that was the case. Since those reasons were sufficient to find the existence of a restriction of competition by object, the General Court was not required to examine in greater depth the degree of harm.
- 40 The appellants' argument, based on the Horizontal Guidelines and on the premiss that the information exchanged was of a general rather than individual nature, is irrelevant in that regard. That premiss, which the General Court indeed rejected, in particular in paragraph 85 of the judgment under appeal, falls within the scope of a factual assessment. In that regard, it should be recalled that, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal lies on points of law only. The General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. The appraisal of those facts and evidence does not, therefore, save where they have been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (judgments of 9 October 2014, *ICF v Commission*, C-467/13 P, not published, EU:C:2014:2274, paragraph 26, and of 16 February 2017, *Tudapetrol Mineralölerzeugnisse Nils Hansen v Commission*, C-94/15 P, not published, EU:C:2017:124, paragraph 46). Since the appellants have not established or even alleged such a distortion, their argument is inadmissible.
- 41 In the second place, first of all, by their claim that the General Court could not merely find that the information exchanged was capable of influencing the conduct of the undertakings without setting out the reasons why it actually influenced that conduct, the appellants complain that the General Court failed to examine the effects of the bilateral contacts. However, according to the Court's case-law, there is no need to consider the effects of a concerted practice where its anticompetitive object is established (judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 30). That line of argument cannot therefore succeed.
- 42 Next, the appellants cannot complain that the General Court failed to take account of the alleged need for the competitors to continuously adapt their pricing to that of Atmel. As the Commission correctly observes, that argument, which entails assessments of fact falling within the General Court's exclusive jurisdiction, was not raised before that court. According to settled case-law, since, in an appeal, the jurisdiction of the Court of Justice is confined to a review of the findings of law on the pleas and arguments debated before the General Court, a party cannot raise for the first time before the Court of Justice an argument that it did not put forward before the General Court (see, to that effect, judgments of 8 November 2016, *BSH v EUIPO*, C-43/15 P, EU:C:2016:837, paragraph 43, and of 13 December 2017, *Telefónica v Commission*, C-487/16 P, not published, EU:C:2017:961, paragraph 84). Accordingly, the argument relating to Atmel's pricing is inadmissible.

- 43 Lastly, nor can the appellants complain that the General Court failed to take account of the alleged specific conditions of the market for non-SIM chips. In their first plea raised before the General Court, which it assessed in paragraphs 50 to 141 of the judgment under appeal, the appellants in no way challenged the relevance, for those chips, of the characteristics of the market as set out by the Commission in recital 59 of the decision at issue and recalled by the General Court in paragraph 70 of the judgment under appeal. That argument is therefore inadmissible under the case-law cited in the previous paragraph of this judgment.
- 44 That finding cannot be called into question by the fact that, as they observed in reply to a question put by the Court of Justice at the hearing, the appellants had referred to certain ‘commercial differences’ between SIM chips and non-SIM chips in their second plea raised before the General Court relating to the alleged incorrect inclusion of non-SIM chips in the scope of the cartel found by the Commission. First, apart from a vague allusion to those differences, the appellants had not specifically challenged the relevance of those market characteristics. Second, it should be pointed out that the merits of the General Court’s assessment of the second plea raised before it are in no way called into question in this appeal.
- 45 In the third place, as regards the appellants’ argument that their intentions were insufficiently taken into account and that they were distorted, it should be observed that that argument is directed against paragraph 80 of the judgment under appeal. However, that paragraph, which starts with the words ‘as a preliminary point’, sets out a ground which is preliminary to the grounds relating to the detailed assessment of the disputed bilateral contacts, and has no bearing on that assessment. Moreover, as the appellants themselves acknowledge, it has been held that, although nothing prevents the Commission or the Courts of the European Union from taking account of the parties’ intentions, that intention is not a necessary factor in determining whether a type of coordination between undertakings is restrictive (see, to that effect, judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 118 and the case-law cited). In those circumstances, their argument must be rejected as ineffective.
- 46 Consequently, the first ground of appeal must be rejected in its entirety.

The second ground of appeal

– *Arguments of the parties*

- 47 By their second ground of appeal, the appellants complain that the General Court exceeded the bounds of its unlimited jurisdiction by altering the constituent elements of the infringement determined by the Commission. In the appellants’ submission, in paragraphs 79 and 104 of the judgment under appeal, the General Court considered that in order to find a restriction of competition by object it was sufficient that only one of the bilateral contacts in which they had participated constituted a restriction of competition by object. The General Court held that each of those bilateral contacts constituted a separate infringement. By contrast, the Commission had found that the contacts as a whole, rather than each contact individually, had an anticompetitive object and stated, in recital 277 of the decision at issue, that it would be artificial to split up such continuous conduct into several separate infringements.
- 48 The Commission disputes that line of argument.

– *Findings of the Court*

- 49 It should be noted that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court’s exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 71).

50 In that regard, it must be stated that the Courts of the European Union cannot alter the constituent elements of the infringement lawfully determined by the Commission in the decision at issue either in the context of the review of legality or when exercising their unlimited jurisdiction. According to the Court's case-law, those courts cannot, in the context of the review of legality referred to in Article 263 TFEU, substitute their own reasoning for that of the author of the contested act. The unlimited jurisdiction enjoyed by the General Court on the basis of Article 31 of Regulation No 1/2003 concerns solely the assessment by that Court of the fine imposed by the Commission (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraphs 73 and 77).

51 In the present case, in paragraphs 79 and 104 of the judgment under appeal, the General Court essentially took the view that the finding of the anticompetitive nature by object of a single bilateral contact, namely that of 26 September 2003, was sufficient to consider that the Commission had been right to conclude that the practices at issue constituted a restriction of competition by object. In paragraphs 105 to 140 of that judgment, the General Court nevertheless examined, in turn and for the sake of completeness, each of the four other contacts disputed by the appellants.

52 By examining in turn each of the five disputed bilateral contacts, the General Court assessed systematically the appellants' arguments by which they challenged, before the General Court, the Commission's assessments relating to each of those contacts. In those circumstances, it cannot be considered that the General Court altered the constituent elements of the infringement at issue.

53 The second ground of appeal must therefore be rejected.

The third ground of appeal

– Arguments of the parties

54 By their third ground of appeal, the appellants essentially claim that, by giving contradictory reasoning in its judgment, the General Court infringed the obligation to state reasons for its decisions.

55 First, although the General Court found that the contact that they had with Samsung between 18 and 20 November 2003 ('the fourth contact') was not anticompetitive and not unlawful, it was wrong to consider, in paragraphs 129 and 130 of the judgment under appeal, that that contact was able to corroborate the finding that unlawful contacts had taken place and mentioned, in paragraphs 176 and 287 of that judgment, that the appellants participated in five bilateral contacts of an anticompetitive nature.

56 Second, the appellants criticise the General Court's assessment, which is in their view inappropriate and contradictory, of the various exchanges of information. They submit that the General Court, in taking the view that the information exchanged during the fourth contact was not sufficiently precise to constitute a restriction of competition by object, even though, in their submission, that information does not differ meaningfully from the information exchanged during other contacts, which was recognised by the General Court as constituting restrictions of competition by object, without stating the reasons for such a distinction, gave contradictory reasoning in its judgment. In that regard, they compare the information exchanged during the various contacts in relation to (i) production capacities and (ii) pricing direction.

57 The Commission contests all those arguments.

– Findings of the Court

58 First, it should be pointed out that, in paragraph 130 of the judgment under appeal, the General Court found that the fourth contact was on its own insufficient to establish the existence of a restriction of competition by object, whilst taking the view that that contact could corroborate the finding that the appellants had participated in unlawful information exchanges. In so doing, contrary to the appellants' arguments, the General Court did not in any way contradict itself, but included that contact, which is not

intrinsically anticompetitive, with other contacts in the body of evidence establishing the existence of a restriction of competition by object.

59 Such an approach is consistent with the case-law that the existence of anticompetitive practices or agreements must, in most cases, be inferred from a number of coincidences or indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgment of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 51 and the case-law cited).

60 Second, as regards the alleged contradiction between the fact that, according to the General Court, the fourth contact was not anticompetitive and the reference, in paragraphs 176 and 287 of the judgment under appeal, to five anticompetitive contacts, it should be pointed out that paragraph 287 of that judgment in no way classifies as anticompetitive contacts the five contacts which are mentioned in that paragraph and whose existence is not disputed, so that the appellants' argument has no factual basis in this respect. Moreover, the reference to the five anticompetitive contacts in paragraph 176 of that judgment results at most from a clerical error which, in any event, had no effect on the General Court's substantive assessment of the arguments relating to whether there was a single and continuous infringement liability for which could be imputed to the appellants.

61 Third, in so far as the appellants complain that the General Court contradicted itself in the assessment of the anticompetitive nature of the information exchanged on the occasion of the fourth contact and of the other disputed contacts, it should be pointed out that, in its assessment of the facts, the General Court considered, in paragraph 129 of the judgment under appeal, that that fourth contact had given rise to exchanges of information which 'were not as specific ... as during earlier contacts', namely the first three contacts. Moreover, it is apparent from paragraph 134 of that judgment that, during the fifth contact, information more specific than that discussed during the fourth contact was exchanged.

62 In so far as the appellants have not claimed that that assessment by the General Court was vitiated by a distortion of the facts, it must be held that the General Court did not contradict itself in finding that, in view of the nature of the information exchanged during the fourth contact, that contact could not on its own be considered a restriction of competition by object, unlike the other unlawful contacts.

63 Consequently, the third ground of appeal must be rejected in its entirety.

The fourth and fifth grounds of appeal, relating to the concept of a single and continuous infringement

64 By their fourth and fifth grounds of appeal, the appellants dispute the General Court's assessments relating to the existence of a single and continuous infringement and to their participation in such an infringement, respectively.

The fourth ground of appeal

– *Arguments of the parties*

65 By their fourth ground of appeal, directed against paragraphs 179 to 191 of the judgment under appeal, the appellants complain that the General Court made a manifest error of assessment and, therefore, distorted the evidence placed in the case file in taking the view that the existence, claimed by Samsung in its oral statements, of a common objective of the single and continuous infringement found support in other evidence. They submit in essence that the evidence mentioned in paragraphs 184, 185 and 187 of that judgment clearly does not support that claim.

66 Thus, it is apparent from the oral statement of Renesas, referred to in paragraph 184 of the judgment under appeal, that Renesas merely wished to understand the reasons for the price erosion but did not seek to slow down such erosion. The Renesas internal report, mentioned in paragraph 185 of that judgment, merely states that smart card chip makers, which are not moreover precisely identified, agreed that they wished to

avoid price erosion and not to coordinate their conduct so as to avoid such price erosion. The oral statements of NXP Semiconductors NV referred to in paragraph 187 of that judgment merely provide a factual description of market conditions. In its oral statements mentioned in the same paragraph, Renesas only broadly indicated that it was interested in ‘gaining a better understanding of the market’.

67 The Commission contests all those arguments.

– *Findings of the Court*

68 By their fourth ground of appeal, the appellants essentially claim that the General Court distorted the evidence on the basis of which it found the existence of the common objective pursued by the undertakings which participated in the single and continuous infringement.

69 It is apparent from the case-law of the Court of Justice recalled in paragraph 40 of this judgment that, since the General Court has exclusive jurisdiction to assess the evidence, the appraisal of that evidence does not, save where it has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal.

70 There is distortion where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect. It is for appellants to indicate precisely the evidence which has been distorted and show the errors of appraisal which have allegedly been made (see, to that effect, judgments of 17 June 2010, *Lafarge v Commission*, C-413/08 P, EU:C:2010:346, paragraphs 16 and 17, and of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraphs 47 and 48).

71 In the present case, in the context of examining whether there was a common objective for the purpose of classifying the infringement at issue as a single and continuous infringement, the General Court essentially held, in paragraphs 183 and 186 of the judgment under appeal, that the participants in that infringement pursued a common objective consisting in limiting the falls in prices resulting from Samsung’s aggressive pricing policy.

72 That assessment of the General Court is based on statements by Renesas and Samsung, which are mentioned in paragraph 184 of the judgment under appeal. In that regard, the General Court observed that, according to the statement of Renesas, one of the reasons underlying the contacts at issue was to gain a better understanding of the extent of the price fall. The General Court also specified that Samsung had stated that the purpose of the exchange of information between its employees and its competitors was to slow down the price decrease inherent in the smart card market. The General Court found that that common objective was corroborated by a report of a Renesas employee, which is referred to in paragraph 185 of that judgment, according to which ‘most [chip] makers agree[d] they wish[ed] to avoid further significant price erosion ...’. The General Court added, in paragraph 187 of that judgment and in response to a line of argument put forward by the appellants, that, if, as was apparent from the statements of NXP Semiconductors and of Renesas, the purpose of the contacts between competitors was ‘to gain a better understanding of the market’, that could not have had an aim other than to seek to limit the fall in prices on that market.

73 It must be stated that the appellants do not challenge the account of the substantive content of that evidence as set out in paragraphs 184, 185 and 187 of the judgment under appeal. They merely challenge the assessment carried out by the General Court on the basis of that evidence.

74 Moreover, it should be pointed out that the appellants’ arguments do not support the conclusion that the General Court’s assessment that the undertakings which participated in the infringement sought to contain price erosion on the market appears to be manifestly incorrect for the purpose of the case-law recalled in paragraph 70 of this judgment.

75 The fourth ground of appeal must therefore be rejected.

The fifth ground of appeal– *Arguments of the parties*

76 By their fifth ground of appeal, the appellants criticise paragraphs 200 to 205 of the judgment under appeal inasmuch as they are vitiated by an error of law and a distortion of the evidence.

77 In the first place, by inferring, in paragraph 205 of that judgment, the appellants' participation in a single and continuous infringement from the finding of their awareness of the anticompetitive actions of their competitors, the General Court applied the wrong legal standard, in disregard of its own case-law. Such participation could be found only if it were established that the undertaking in question was aware of the fact that the contacts were intended to contribute to achieving the cartel's overall plan and of the general scope and essential characteristics of the cartel as a whole.

78 However, in the present case, the appellants possessed no information which would have enabled them to understand the general scope and essential characteristics of the cartel between Samsung and Renesas, as they were unaware that their competitors were communicating on a structural, almost weekly basis, and that they had the common objective of slowing down the price fall in the SIM chip market. Moreover, the appellants were not aware that their competitors were communicating about non-SIM chips.

79 In the second place, the assessments made in paragraphs 202 and 203 of the judgment under appeal are vitiated by a distortion of the evidence. First, it clearly does not follow from the internal email of 29 September 2003 that Samsung had provided the appellants with Infineon's prices and capacities. Samsung only shared with the appellants Infineon's alleged increase in yield. Second, Renesas' internal handwritten notes of 17 October 2003 clearly illustrate that the appellants did not receive any information from Renesas, but provided very limited information on Samsung to Renesas, which suggests that they did not know that Samsung and Renesas were exchanging sensitive information directly.

80 The Commission contests all those arguments.

– *Findings of the Court*

81 By their fifth ground of appeal, the appellants essentially dispute the General Court's assessment of their participation in the single and continuous infringement on the market for smart card chips.

82 In the first place, the appellants claim that the General Court applied the wrong legal standard, which differs from that resulting from its own case-law, for the purpose of assessing their participation in that infringement.

83 In that regard, it must be stated that the General Court essentially recalled, in paragraphs 171 and 173 of the judgment under appeal, the case-law of the Court of Justice, according to which an undertaking which has participated in a single and complex infringement, by its own conduct, which meets the definition of an agreement or concerted practice having an anticompetitive object within the meaning of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may also be responsible for the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (judgments of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 42, and of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 157).

84 Moreover, in paragraph 174 of the judgment under appeal, the General Court also noted that, according to its own case-law, the undertaking concerned must therefore be aware of the general scope and the essential

characteristics of the cartel as a whole. It is in accordance with that case-law that it found, in paragraph 178 of that judgment, that it was necessary to ascertain, in particular, whether the appellants could be considered to have participated in the infringement at issue, on account of their awareness of the general scope and the essential characteristics of that infringement as a whole. Lastly, the General Court found, in paragraph 202 of that judgment, that the Commission had not erred in taking the view that the appellants were aware, for the purposes of that case-law, of the unlawful discussions in which their competitors participated in their absence. After adjudicating, in paragraph 204 of that judgment, on an argument of the appellants regarding their awareness of the discussions on non-SIM chips, the General Court found, in paragraph 205 of that judgment, that the Commission had established to the requisite legal standard that the appellants had been aware of the anticompetitive actions of their competitors.

85 It is thus apparent from reading paragraphs 174, 178 and 202 of the judgment under appeal together that the General Court specifically applied the legal standard resulting from its own case-law, which the appellants accuse it of disregarding.

86 Accordingly, the appellants' line of argument alleging that the wrong legal standard was applied is the result of a misreading of the judgment under appeal.

87 As regards the merits of the General Court's assessment of whether the appellants were in fact aware of the offending conduct planned or put into effect by other undertakings in pursuit of the objectives of the single and continuous infringement, it should be made clear that this is a question of fact which, other than in the case of a distortion, falls outside the jurisdiction of the Court of Justice on appeal in accordance with the case-law cited in paragraph 40 of this judgment.

88 In the second place, the appellants claim that the General Court distorted the evidence that it examined in paragraphs 202 and 203 of the judgment under appeal.

89 In paragraph 202 of that judgment, the General Court found that, as is apparent from the examination of the first plea raised before it, at the meetings of 26 September and 16 October 2003, the appellants were informed, first by Samsung, then by Renesas, of the bilateral discussions relating to prices and capacities that Samsung and Renesas had had earlier with their competitors, and Samsung and Renesas relayed to those competitors the information on prices and capacities that they had been sent at the time of earlier contacts. In paragraph 203 of that judgment, it rejected the appellants' argument that they were unaware of the anticompetitive nature of the contacts that Samsung had with its competitors, on the ground that they had been informed by Samsung, in particular at the meeting of 26 September 2003, of the discussions on prices and capacities that Samsung had had with Infineon.

90 However, the evidence relating to the meeting of 16 October 2003 clearly shows, on the contrary, that it was the appellants that had relayed to Renesas information received earlier from their competitors.

91 It is thus apparent that the General Court presented the content of that evidence incorrectly.

92 However, the appellants in no way dispute the General Court's finding that sensitive information received earlier from a competitor was in fact relayed to other competitors. Thus, it is apparent from paragraphs 81 to 83 of the judgment under appeal, which are not the subject of this appeal, that the appellants did not dispute before the General Court the finding, in recital 91 of the decision at issue, that, at the meeting of 26 September 2003, Samsung had informed them of the exchanges with Infineon and had communicated to them information relating to those two competitors' capacities and to an increase in Infineon's yield. Moreover, the appellants themselves assert before the Court of Justice that, at the meeting of 16 October 2003, they relayed to Renesas information regarding Infineon, as is indeed found in paragraph 110 of the judgment under appeal.

93 In those circumstances, the complaint alleging distortion of the evidence as that distortion was found in paragraph 90 of this judgment is ineffective.

94 Moreover, as regards the assessment in paragraph 204 of the judgment under appeal, by which the General Court rejected the appellants' argument relating to their lack of awareness of their competitors' discussions regarding non-SIM chips on the ground that, as was found in the context of the second plea for annulment brought before it, the anticompetitive practices at issue concerned both SIM chips and non-SIM chips, it must be stated that the appellants allege neither a distortion of the factual elements in that regard nor an error of law by the General Court of that second plea. It was only at the hearing before the Court of Justice that, for the first time and belatedly, the appellants submitted that that latter assessment related not to the awareness of the discussions between the competitors, but to the subject matter of the discussions in which they were directly involved. In the light of those matters, the appellants' line of argument relating to paragraph 204 of the judgment under appeal must be considered in part inadmissible and in part ineffective.

95 Consequently, the fifth ground of appeal must be rejected in its entirety.

The sixth ground of appeal, relating to the fine imposed on the appellants

Arguments of the parties

96 By their sixth ground of appeal, the appellants claim that the General Court infringed the 2006 Guidelines and the principle of proportionality when setting the amount of the fine.

97 They submit that, by holding that the application of a gravity multiplier of 16% was proportionate to the infringement at issue on the grounds that that infringement consisted, in particular, in the coordination of prices and of future capacities and that it extended to the entire territory of the EEA, the General Court infringed points 20 and 22 of the 2006 Guidelines and the principle of proportionality. It thus failed to take into consideration all circumstances relevant to the objective gravity of the infringement and the relative gravity of the appellants' participation.

98 As regards the objective gravity of the infringement at issue, the appellants submit that the General Court should have had regard to the strictly bilateral nature of the contacts, which could only have amounted to exchanges of information and not to price-fixing arrangements and to the fact that, given that Atmel did not participate at all, the ad hoc involvement of Infineon and the appellants and the appellants' lack of involvement in the second half of the infringement, the contacts at issue could not have had any impact on the market.

99 As regards the relative gravity of their participation in the infringement at issue, the appellants submit that the General Court should have taken into account that it participated in only five contacts, that the information they shared with Renesas and Samsung could have contributed only *de minimis* to the structured information exchanges and that the contacts were all carried out at the initiative of Samsung or Renesas.

100 The Commission disputes this line of argument.

Findings of the Court

101 It must be recalled that the General Court alone has jurisdiction to examine how in each particular case the Commission assessed the gravity of unlawful conduct. In an appeal, the purpose of review by the Court of Justice is, first, to examine to what extent the General Court took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Article 101 TFEU and Article 23 of Regulation No 1/2003 and, second, to consider whether the General Court responded to a sufficient legal standard to all the arguments raised in support of the claim for cancellation or reduction of the fine (judgment of 26 January 2017, *Laufen Austria v Commission*, C-637/13 P, EU:C:2017:51, paragraph 58).

- 102 In the present case, the General Court essentially held, in paragraphs 313, 314, 316 and 317 of the judgment under appeal, that, on account of the very nature and of the geographic scope of the infringement at issue, the Commission was entitled to find that a gravity multiplier of 16% was proportionate. It found, in paragraph 317 of that judgment, that the matters raised by the appellants, on the assumption that they were proved, and relating to the facts that the contacts at issue were bilateral and rare, that they consisted merely in exchanges of information and not price-fixing agreements, that the appellants had not participated in all aspects of the infringement at issue and had played only a minor role, had no bearing on that assessment. In paragraph 321 of that judgment, the General Court moreover rejected the appellants' claim for the reduction of that multiplier on account of its alleged inappropriateness; that claim was based on the same arguments as those put forward in support of the challenge to the lawfulness of the gravity multiplier.
- 103 First, the General Court thus complied with the case-law of the Court of Justice that, having regard to point 23 of the 2006 Guidelines, a gravity multiplier of 16% is warranted in view of the very nature of the infringement at issue, since, as the General Court noted, it is among the most harmful restrictions of competition for the purpose of point 23 of the 2006 Guidelines and that rate is among the lowest rates on the scale of penalties prescribed for such infringements under those guidelines (see, to that effect, judgment of 26 January 2017, *Aloys F. Dornbracht v Commission*, C-604/13 P, EU:C:2017:45, paragraph 75).
- 104 Second, contrary to the appellants' arguments, the General Court expressly took account of the matters raised by the appellants relating to the bilateral nature of the contacts, to the subject matter of those contacts and to the ad hoc involvement in the infringement at issue, by correctly rejecting, in the light of the case-law cited in the previous paragraph of this judgment, their relevance in determining the gravity multiplier. It is moreover common ground that, before the General Court, the appellants merely challenged the determination of the gravity multiplier, without claiming the existence of mitigating circumstances which might have led to a reduction of the amount of the fine imposed.
- 105 It should be added that, although it is true that, in the judgment under appeal, the General Court did not refer to the appellants' argument alleging that, when evaluating the gravity of the infringement, the Commission should have taken into consideration the lack of effect of the contacts on the market, that omission is ineffective in the light of the case-law cited in paragraph 103 of this judgment.
- 106 Moreover, before the General Court, the appellants did not claim that, when assessing the gravity of the infringement at issue, the General Court was required to take account of Atmel's complete lack of participation, on account both of the fact that the contacts took place at the initiative of Samsung or Renesas and of the fact that the appellants were allegedly not involved in the second half of the infringement. Their argument that, during that assessment, the General Court should have taken into account those three factual elements is therefore inadmissible at the appeal stage, in accordance with the case-law cited in paragraph 42 of this judgment.
- 107 Third, in so far as the appellants allege that the General Court infringed the principle of proportionality by refusing to reduce the gravity multiplier of 16% set by the Commission, it should be recalled that, according to settled case-law of the Court of Justice, it is not for the latter, when ruling on points of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law. Accordingly, only where the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, does it have to find that the General Court erred in law, on account of the inappropriateness of the amount of a fine (judgment of 30 May 2013, *Quinn Barlo and Others v Commission*, C-70/12 P, not published, EU:C:2013:351, paragraph 57 and the case-law cited). However, the appellants have failed to show why the amount of the fine imposed on them is excessive, to the point of being disproportionate.
- 108 Consequently, it is necessary to reject the sixth ground of appeal and, therefore, the appeal in its entirety.

Costs

- 109 In accordance with Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 110 As the Commission has applied for costs against the appellants and the appellants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the appeal;**

- 2. Orders Koninklijke Philips NV and Philips France SAS to pay the costs.**

von Danwitz

Vajda

Juhász

Jürimäe

Lycourgos

Delivered in open court in Luxembourg on 26 September 2018.

A. Calot Escobar

T. von Danwitz

Registrar

President of the Fourth
Chamber

* Language of the case: English.