

JUDGMENT OF THE GENERAL COURT (Ninth Chamber, Extended Composition)

29 September 2021 [\(*\)](#)(1)

(Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Concerted practice – Exchanges of sensitive business information – Territorial jurisdiction of the Commission – Restriction of competition by object – Statement of objections – Point 13 of the 2006 Guidelines on the method of setting fines – Value of sales – Obligation to state reasons – Proportionality – Equal treatment – Single and continuous infringement – Gravity of the infringement – Public distancing – Mitigating circumstances – Unlimited jurisdiction)

In Case T-342/18,

Nichicon Corporation, established in Kyoto (Japan), represented by A. Ablasser-Neuhuber, F. Neumayr, G. Fussenegger and H. Kühnert, lawyers,

applicant,

v

European Commission, represented by B. Ernst, T. Franchoo, C. Sjödin and F. van Schaik, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for, primarily, annulment of Commission Decision C(2018) 1768 final of 21 March 2018 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors), in so far as it concerns the applicant, and, in the alternative, a reduction in the amount of the fine imposed on the applicant by that decision,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

composed of M.J. Costeira (Rapporteur), President, D. Gratsias, M. Kancheva, B. Berke and T. Perišin, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 22 October 2020,

gives the following

Judgment

I. Background to the dispute

A. *The applicant and the sector concerned*

1 The applicant, Nichicon Corporation, is a company established in Japan which manufactures and sells aluminium electrolytic capacitors. Until 6 February 2013, the applicant also manufactured and sold

tantalum electrolytic capacitors.

- 2 The infringement at issue concerns aluminium electrolytic capacitors and tantalum electrolytic capacitors. Capacitors are electrical components that store energy electrostatically in an electric field and are used in a wide variety of electronic products such as personal computers, tablets, telephones, air conditioners, refrigerators, washing machines, automotive products and industrial appliances. The customer base is therefore very diverse.
- 3 Electrolytic capacitors, and more specifically aluminium electrolytic capacitors and tantalum electrolytic capacitors, are products in respect of which price is an important parameter of competition.

B. The administrative procedure

- 4 On 4 October 2013, Panasonic and its subsidiaries submitted an application for a marker to the European Commission under points 14 and 15 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; ‘the 2006 Leniency Notice’), providing information regarding the existence of an alleged infringement in the electrolytic capacitors sector.
- 5 On 28 March 2014, under Article 18 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), the Commission sent requests for information to a number of undertakings operating in the electrolytic capacitors sector, including the applicant.
- 6 On 4 November 2015, the Commission adopted a statement of objections, which was addressed to the applicant.
- 7 The addressees of the statement of objections, including the applicant, were heard by the Commission at a hearing which took place from 12 to 14 September 2016.

C. The contested decision

- 8 On 21 March 2018, the Commission adopted Decision C(2018) 1768 final relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.40136 – Capacitors) (‘the contested decision’).

1. The infringement

- 9 By the contested decision, the Commission found that there had been a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) in the electrolytic capacitors sector, in which nine undertakings or groups of undertakings, namely Elna, Hitachi AIC, Holy Stone, Matsuo, NEC Tokin, Nippon Chemi-Con (‘NCC’), Rubycon, Sanyo (designating Sanyo and Panasonic) and the applicant (collectively, ‘the cartel participants’) participated (recital 1 and Article 1 of the contested decision).
- 10 The Commission stated, in essence, that the infringement at issue, covering the whole EEA, had taken place between 26 June 1998 and 23 April 2012 and had consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors (recital 1 of the contested decision).
- 11 The cartel was, in essence, organised through multilateral meetings, generally held in Japan every one or two months at senior sales manager level, and every six months at higher management level, including the presidents (recitals 63, 68 and 738 of the contested decision).
- 12 Initially, between 1998 and 2003, the multilateral meetings were held under the name ‘Electrolytic Capacitor(s) Circle’ or ‘Electrolytic Capacitor Conference’ (‘the ECC meetings’). Subsequently, between 2003 and 2005, they were held under the name ‘Aluminium Tantalum Conference’ or ‘Aluminium

Tantalum Capacitors group' ('the ATC meetings'). Lastly, between 2005 and 2012, they were held under the name 'Market Study Group' or 'Marketing Group' ('the MK meetings'). In parallel with the MK meetings, and complementing those meetings, 'Cost Up' or 'Condenser Up' meetings ('the CUP meetings') were held between 2006 and 2008 (recital 69 of the contested decision).

13 In addition to those multilateral meetings, the cartel participants also engaged in ad hoc bilateral and trilateral contacts when necessary (recitals 63, 75 and 739 of the contested decision) (collectively, 'the anticompetitive exchanges').

14 In the context of the anticompetitive exchanges, the cartel participants exchanged information regarding pricing and future pricing, information regarding future price reductions and the ranges for those reductions, and information regarding supply and demand, including information in relation to future supply and demand, and, in some instances, concluded, implemented and monitored price agreements (recitals 62, 715, 732 and 741 of the contested decision).

15 The Commission considered that the cartel participants' conduct constituted a form of agreement and/or concerted practice which pursued a common objective, namely avoiding price competition and coordinating their future conduct with regard to the sale of electrolytic capacitors, thereby reducing uncertainty on the market (recitals 726 and 731 of the contested decision).

16 The Commission concluded that that conduct had a single anticompetitive aim (recital 743 of the contested decision).

2. The applicant's liability

17 The Commission held the applicant liable on account of its direct and continuous participation in the cartel from 26 June 1998 to 31 May 2010, but its liability did not extend to the MK meetings (recitals 760, 761, 955 and 1023 of the contested decision, as well as Article 1(f) thereof).

3. The fine imposed on the applicant

18 Article 2(i) of the contested decision imposes a fine of EUR 72 901 000 on the applicant.

4. The calculation of the amount of the fine

19 In order to calculate the amount of the fines, the Commission applied the methodology set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines') (recital 980 of the contested decision).

20 In the first place, in order to determine the basic amount of the fine imposed on the applicant, the Commission took into account the value of sales during the last full business year of participation in the infringement, in accordance with point 13 of the 2006 Guidelines (recital 989 of the contested decision).

21 The Commission calculated the value of sales using sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced to customers established in the EEA as a basis (recital 990 of the contested decision).

22 In addition, the Commission calculated the relevant value of sales separately for the two categories of products, namely aluminium electrolytic capacitors and tantalum electrolytic capacitors, and applied separate duration multipliers to each (recital 991 of the contested decision). As regards the applicant, the Commission applied multipliers of 11.93 (corresponding to the period from 26 June 1998 to 31 May 2010) for aluminium electrolytic capacitors and 10.36 (corresponding to the period from 29 October 1999 to 9 March 2010) for tantalum electrolytic capacitors (recital 1007, Table 1, of the contested decision).

23 The Commission set the proportion of the value of sales to be taken into account in order to reflect the gravity of the infringement at 16%. In that regard, it considered that horizontal price coordination

‘arrangements’ were, by their very nature, among the most serious infringements of Article 101 TFEU and Article 53 of the EEA Agreement and that the cartel covered the whole EEA (recitals 1001 to 1003 of the contested decision).

24 The Commission applied an additional amount of 16% under point 25 of the 2006 Guidelines in order to ensure that the fine imposed would have a sufficiently deterrent effect (recital 1009 of the contested decision).

25 The Commission therefore set the basic amount of the fine to be imposed on the applicant at EUR 75 156 000 (recital 1010 of the contested decision).

26 In the second place, on account of mitigating circumstances, the Commission granted a 3% reduction in the basic amount of the fine imposed on the applicant, since its participation in the MK meetings was not established and there was no proof that it had been aware of those meetings (recital 1023 of the contested decision).

27 Accordingly, the Commission set the amount of the fine to be imposed on the applicant at EUR 72 901 000 (recital 1139, Table 3, of the contested decision).

5. The operative part of the contested decision

28 The contested decision provides as follows with regard to the applicant:

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 in the electrolytic capacitors sector covering the whole EEA, which consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour:

...

(f) [the applicant] from 26 June 1998 to 31 May 2010, but whose liability does not extend to the MK meetings;

...

Article 2

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

...

(i) [the applicant]: EUR 72 901 000;

...’

II. Procedure and forms of order sought

29 By application lodged at the Court Registry on 30 May 2018, the applicant brought the present action.

30 On 28 September 2018, the Commission’s defence was lodged at the Court Registry.

31 The reply and the rejoinder were lodged at the Court Registry on 7 December 2018 and 28 February 2019 respectively.

- 32 On a proposal from the Second Chamber, the General Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the case to a Chamber sitting in extended composition.
- 33 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Ninth Chamber (Extended Composition), to which the present case was consequently assigned.
- 34 On a proposal from the Judge-Rapporteur, the General Court (Ninth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, invited the parties to lodge certain documents.
- 35 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 22 October 2020.
- 36 Following the death of Judge Berke on 1 August 2021, the three Judges whose signatures are affixed to the present judgment continued the deliberations, in accordance with Article 22 and Article 24(1) of the Rules of Procedure.
- 37 The applicant claims, in essence, that the Court should:
- primarily, annul the contested decision in so far as it is applied to the applicant;
 - in the alternative, and in any event, substitute its own appraisal for that of the Commission as regards the amount of the fine imposed on the applicant and reduce that amount;
 - order the Commission to pay the costs.
- 38 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.

III. Law

A. The admissibility of Annex C2 submitted at the stage of the reply

- 39 The Commission contends, in the rejoinder, that Annex C2, submitted by the applicant at the stage of the reply, must be declared inadmissible, in accordance with Article 85(2) of the Rules of Procedure, in so far as the applicant has not provided any justification for that delay.
- 40 Article 85(1) of the Rules of Procedure provides that ‘evidence produced or offered shall be submitted in the first exchange of pleadings’. Nevertheless, Article 85(2) of the Rules of Procedure states that ‘in reply or rejoinder a main party may produce or offer further evidence in support of his arguments, provided that the delay in the submission of such evidence is justified’.
- 41 Annex C2 consists of a table which reproduces, by region and for the period from October 2010 to October 2011, the applicant’s sales of pencil capacitors to Sony.
- 42 At the hearing, in response to a question from the Court, the applicant merely stated that it had not previously had access to that document.
- 43 It should be noted, first, that the information contained in that document relates to a period well before the date on which the application was lodged, secondly, that that document is intended to support an argument

already set out by the applicant in the application, and, thirdly, that it does not seek to invalidate evidence produced by the Commission in the defence.

44 Accordingly, there is no justification for the delayed submission of that annex for the purposes of Article 85(2) of the Rules of Procedure. There is therefore no need to take that annex into consideration for the purpose of assessing the legality of the contested decision.

B. Substance

45 In support of the action, the applicant relies on five pleas in law in support of both its primary head of claim, seeking annulment of the contested decision, and its alternative head of claim, seeking a reduction in the amount of the fine imposed on it.

46 By the first, second and third pleas, the applicant disputes the Commission's conclusion that there was a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement in the electrolytic capacitors sector throughout the EEA for a period of almost 14 years. The first plea alleges material errors of fact as regards the geographic scope of the anticompetitive exchanges. The second plea alleges errors of law regarding, first, the finding of a single and continuous infringement and, second, the applicant's participation in that infringement. The third plea alleges that the Commission lacked jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement.

47 By its fourth plea, the applicant disputes the fine imposed on it. That plea alleges manifest errors of assessment in the calculation of the amount of the fine.

48 By the fifth plea, alleging infringement of the right to be heard, the applicant disputes the legality of the procedure for establishing the infringement.

49 In so far as the applicant is simultaneously submitting applications for annulment of the contested decision and for variation of the amount of the fine imposed on it, it should, as a preliminary point, be borne in mind 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 (see judgment of 26 September 2018, *Philips and Philips France v Commission*, C-98/17 P, not published, EU:C:2018:774, paragraph 49 and the case-law cited).

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 case-law of the Court of Justice, 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 judgment of 26 September 2018, *Philips and Philips France v Commission*, C-98/17 P, not published, EU:C:2018:774, paragraph 50 and the case-law cited).

1. The head of claim seeking annulment of the contested decision

51 As a preliminary point, it should be borne in mind that, 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 prohibited as incompatible with the internal market.

- 52 In the contested decision, the Commission concluded not only that there was an agreement, but also that there had been concerted practices contrary to Article 101 TFEU.
- 53 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. 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. 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 (see judgment of 12 July 2018, *Viscas v Commission*, T-422/14, not published, EU:T:2018:446, paragraphs 40 and 41 and the case-law cited).
- 54 According to settled case-law, the concepts of ‘agreement’ and ‘concerted practice’ within the meaning of Article 101(1) TFEU are intended to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves. It is therefore sufficient that proof of the constituent elements of either of those forms of infringement referred to in that provision has been established in order in any event for it to apply (see judgment of 12 July 2018, *Viscas v Commission*, T-422/14, not published, EU:T:2018:446, paragraph 43 and the case-law cited).
- 55 In the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them the Commission cannot be expected to characterise the infringement precisely as an agreement or a concerted practice, as in any event both those forms of infringement are covered by Article 101 TFEU (see judgment of 17 May 2013, *MRI v Commission*, T-154/09, EU:T:2013:260, paragraph 164 and the case-law cited).
- 56 The twofold characterisation of the infringement as an agreement ‘and/or’ concerted practice must be understood as referring to a complex whole comprising a number of factual elements some of which were characterised as agreements and others as concerted practices for the purposes of Article 101(1) TFEU, which lays down no specific category for a complex infringement of this type (see judgment of 17 May 2013, *MRI v Commission*, T-154/09, EU:T:2013:260, paragraph 165 and the case-law cited).
- 57 It should also be borne in mind that the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings under Articles 101 and 102 TFEU, which are subject to in-depth review by the Courts of the European Union, in law and in fact, in the light of the pleas raised by the applicant at first instance and taking into account all the relevant elements submitted by the latter. However, in the context of that review, the Courts of the European Union may in no circumstances substitute their own reasoning for that of the author of the contested act (see judgment of 25 July 2018, *Orange Polska v Commission*, C-123/16 P, EU:C:2018:590, paragraph 105 and the case-law cited).
- 58 It is in the light of those considerations that the pleas in law set out in the application, inasmuch as they seek annulment of the contested decision, must be examined.

59 The fifth plea in law, alleging infringement of the right to be heard, will be examined first.

(a) *The fifth plea in law, alleging infringement of essential procedural requirements*

- 60 The applicant, in essence, complains that the Commission infringed its rights of defence on the ground that, first, the customer names, an element of fact of major importance for the defence of its rights, which were not contained in the statement of objections of 4 November 2015, were sent to it in a letter of facts and not a supplementary statement of objections and, second, the two-week period that was prescribed for it to reply to the letter of facts of 4 May 2016, to which an unredacted version of the statement of objections was attached, was insufficient for it to be able to defend itself effectively.

- 61 The Commission disputes the applicant's arguments.
- 62 As a preliminary point, it should be noted that the Commission adopted the statement of objections on 4 November 2015. Between 12 November and 17 December 2015, the addressees of that statement of objections were given access to most of the file by means of a DVD. Both the statement of objections and the DVD contained redactions concealing the names of customers which the Commission had agreed to treat as 'provisionally confidential'. Following requests for access made by several addressees of the statement of objections, the Commission supplemented the first DVD with two other DVDs, which were made available to all the addressees of the statement of objections on 4 March and 26 April 2016, in order to provide access to the redacted customer names.
- 63 By its first argument, the applicant submits that, instead of sending it a letter of facts to which a new, unredacted version of the statement of objections and Annex 1 thereto was attached, the Commission should have sent it a supplementary statement of objections on the ground that the customer names were an element of fact of major importance and one necessary for its defence.
- 64 According to the case-law, in all proceedings in which penalties, 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 fully complied with even if the proceedings in question are administrative proceedings. In proceedings for infringement of the competition rules, it is the statement of objections which constitutes the essential procedural safeguard in this respect. Thus, observance of the rights of the defence requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it. In that regard, it should also be borne in mind that, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and provided that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In so doing, the Commission provides them with the necessary elements to defend themselves not only against a finding of infringement but also against being fined for that infringement (see judgment of 26 October 2017, *Global Steel Wire and Others v Commission*, C-457/16 P and C-459/16 P to C-461/16 P, not published, EU:C:2017:819, paragraphs 139 to 142 and the case-law cited).
- 65 Although it is true that the statement of objections of 4 November 2015 did not contain the customer names, the applicant does not dispute that it provided a sufficient description of the products covered by the cartel, the market players and the sector concerned, the dynamics and the operation of the cartel, its geographic scope, the period concerned and the duration of the infringement. Nor does it dispute that that statement indicated the main evidence on which the Commission intended to rely, the legal classification of that evidence and the factors likely to be taken into account in assessing the gravity of the infringement.
- 66 Therefore, the redaction of the customer names had no effect on the fact that the statement of objections enabled the applicant to have at its disposal the principal elements of fact and of law which were essential in order to exercise its rights of defence.
- 67 Moreover, the act of making the customer names visible does not constitute a new objection raised by the Commission or a factor capable of altering the intrinsic nature of the infringement of which the applicant is accused, but merely a clarification in respect of which it was certainly necessary that the applicant be able to express its views, but which did not entail, for the Commission, an obligation to issue a supplementary statement of objections.
- 68 In that regard, it should be borne in mind that, in order to observe the rights of defence of the addressees of a decision concerning competition matters, the Commission is required to send a second statement of objections only when it intends to take into account, in the decision that it will adopt, an objection which

was not covered by the first statement of objections (see, to that effect, judgment of 27 February 2014, *LG Display and LG Display Taiwan v Commission*, T-128/11, EU:T:2014:88, paragraph 110 and the case-law cited).

69 In the light of the foregoing, it is necessary to reject the applicant's claim that the Commission should have drawn up a supplementary statement of objections.

70 By its second argument, the applicant submits that, in view of the importance of the customer names, the statement of objections which was attached to the letter of facts of 4 May 2016 constituted, in essence, a new statement of objections which therefore required that the applicant be given a minimum period of four weeks to reply thereto. Therefore, it maintains that the two-week period it was given to do this was insufficient for the purpose of being able properly to defend itself.

71 However, as has been concluded above, the act of making the customer names visible was neither a new objection raised by the Commission nor a factor capable of altering the intrinsic nature of the infringement of which the applicant was accused, with the result that the applicant cannot claim that the statement of objections attached to the letter of facts of 4 May 2016 constituted a new statement.

72 In addition, as the Commission recalls in its written pleadings, even if the letter of 4 May 2016 constituted a supplementary statement of objections, paragraph 110 of the Commission notice on best practices for the conduct of proceedings under Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6) states that a shorter time limit than the minimum time limit of four weeks will typically be set for the purpose of replying to a supplementary statement of objections.

73 Moreover, the period that the Commission must grant an undertaking to provide its observations on a letter setting out the facts should take account of the relative complexity and the volume of the evidence submitted (judgment of 15 December 2016, *Infineon Technologies v Commission*, T-758/14, not published, EU:T:2016:737, paragraph 60).

74 First, it has been observed in paragraph 62 above that the Commission had supplemented the first access-to-file DVD with two other DVDs, which had been made available to all the addressees of the statement of objections on 4 March and 26 April 2016, in order to provide access to the redacted customer names. Moreover, that evidence led the Hearing Officer, in his final report of 16 March 2018, to conclude that the provision of DVDs and the sending of the letter of facts of 4 May 2016 had enabled the addressees of that statement effectively to exercise their procedural rights. In those circumstances, it has not been shown that the two-week period prescribed to the applicant was insufficient to guarantee its rights of defence.

75 Second, it should be noted that it was open to the applicant to request an extension of the two-week time limit by reasoned request addressed to the Commission, in accordance with paragraph 111 of the Commission notice on best practices for the conduct of proceedings under Articles 101 and 102 TFEU, which it failed to do. It could also, as the Commission remarks in its written pleadings, have submitted an oral argument at the hearing held from 12 to 14 September 2016.

76 Thus, it must be concluded that the fact that the Commission granted the applicant only a two-week time limit to reply to the letter of facts cannot be regarded as an infringement of the applicant's rights of defence.

77 Accordingly, the applicant's argument that the Commission should have issued a supplementary statement of objections must be rejected.

78 The fifth plea in law must therefore be rejected.

(b) *The first plea in law, alleging material errors of fact*

- 79 By this plea, the applicant submits, in essence, that the Commission made incorrect findings of fact as regards its participation in the various anticompetitive exchanges. Those errors of assessment led the Commission to conclude that there had been an infringement of Article 101 TFEU, where, in reality, no infringement by object covering the EEA was committed.
- 80 The Commission disputes the applicant's arguments.
- 81 In that regard, it should be borne in mind that, according to settled case-law, the burden of proving an infringement of Article 101 TFEU rests on the Commission. It is required to produce sufficiently precise and consistent evidence to support the conviction that the infringement was committed (see judgment of 12 July 2018, *Hitachi Metals v Commission*, T-448/14, not published, EU:T:2018:442, paragraph 117 and the case-law cited).
- 82 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement (see judgment of 12 July 2018, *Hitachi Metals v Commission*, T-448/14, not published, EU:T:2018:442, paragraph 118 and the case-law cited).
- 83 It is also necessary to take into account that anticompetitive activities take place clandestinely, meetings are held in secret, the associated documentation is reduced to a minimum and the evidence discovered by the Commission is normally only fragmentary and sparse, and, accordingly, in most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgment of 12 July 2018, *Hitachi Metals v Commission*, T-448/14, not published, EU:T:2018:442, paragraph 119 and the case-law cited).
- 84 Moreover, as anticompetitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the economic operators concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted (see judgment of 12 July 2018, *Hitachi Metals v Commission*, T-448/14, not published, EU:T:2018:442, paragraph 120 and the case-law cited).
- 85 In practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, in so far as 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. While it is necessarily incumbent upon the Commission to establish that an unlawful price-fixing 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 were able to base its argument on the vagueness of the information produced with regard to the operation of an illegal agreement in circumstances in which the existence and anticompetitive purpose of the agreement had nonetheless 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 (see judgment of 12 December 2014, *Eni v Commission*, T-558/08, EU:T:2014:1080, paragraph 36 and the case-law cited).
- 86 It is in the light of those considerations that it must be determined whether the Commission erred in its assessment of the anticompetitive nature and geographic scope of the exchanges in which the applicant participated.
- 87 In the present case, it should be noted that the Commission stated, in recital 744 of the contested decision, that the applicant had participated, between 26 June 1998 and 31 May 2010, in 52 multilateral meetings and 6 bilateral or trilateral contacts, that is to say, a total of 58 anticompetitive contacts. In the application, the applicant puts forward specific arguments only in respect of 12 contacts.

88 It should also be noted that the applicant does not deny having participated in the various meetings and contacts at issue, with the exception of three contacts. Instead, the applicant disputes, for all those meetings and contacts, the anticompetitive nature and geographic scope of the discussions which took place during those meetings and contacts.

89 In that regard, the applicant puts forward, in essence, two recurrent complaints. First, it maintains that the Commission relied on unreliable, uncorroborated evidence from a single source. The anticompetitive nature of numerous meetings and contacts is based solely on the statements made by the undertakings involved, made in order to benefit from a reduction in the amount of the fine, and on their minutes of the meetings. In accordance with the case-law, those statements constitute sufficient proof of the existence of an infringement only if they are corroborated by other evidence. The minutes of the meetings are thus far from proving by themselves an infringement by object covering the EEA. Second, it argues that the information exchanged at the meetings and contacts at issue does not constitute a restriction of competition by object within the meaning of the judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* (C-286/13 P, EU:C:2015:184). That information merely consists of comments of a general nature regarding price levels or the expression of rules based on experience and does not express any intention as to pricing behaviour or conduct on the market.

90 Those two recurring complaints call, *in limine litis*, for a number of general observations.

(1) *The probative value and reliability of the evidence*

91 In that regard, it is sufficient to recall that, first, the mere fact that the information was submitted by an undertaking which made a leniency application does not call its probative value into question.

92 According to settled case-law, there is no provision or general principle of EU law which prohibits the Commission from using statements against an undertaking which have been provided by other undertakings involved in the infringement. Statements made pursuant to the 2006 Leniency Notice cannot therefore be regarded as devoid of probative value on that ground alone (see, by analogy, judgment of 5 June 2012, *Imperial Chemical Industries v Commission*, T-214/06, EU:T:2012:275, paragraph 58 and the case-law cited).

93 It is true that some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is understandable, since they might tend to play down the importance of their contribution to the infringement and maximise that of others. However, given the inherent logic of the procedure provided for in the 2006 Leniency Notice, the fact of seeking to benefit from the application of that notice in order to obtain a reduction in the amount of the fine does not necessarily create an incentive for the other participants in the cartel in question to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the undertaking seeking to benefit, and thereby jeopardise its chances of benefiting fully under the 2006 Leniency Notice (see, by analogy, judgment of 5 June 2012, *Imperial Chemical Industries v Commission*, T-214/06, EU:T:2012:275, paragraph 59 and the case-law cited).

94 In particular, when a person admits that he or she committed an infringement and thus admits the existence of facts going beyond those whose existence could be directly inferred from the documents in question, that implies, a priori, in the absence of special circumstances indicating otherwise, that that person has resolved to tell the truth. Thus, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (see judgment of 5 June 2012, *Imperial Chemical Industries v Commission*, T-214/06, EU:T:2012:275, paragraph 60 and the case-law cited).

95 Statements made by undertakings in the context of their applications for leniency must, nonetheless, be assessed with caution and, in general, cannot be accepted without corroboration (see judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 119 and the case-law cited).

- 96 According to settled case-law, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence (see judgment of 5 June 2012, *Imperial Chemical Industries v Commission*, T-214/06, EU:T:2012:275, paragraph 61 and the case-law cited).
- 97 Secondly, the sole criterion relevant in evaluating the evidence adduced is its reliability. According to the generally applicable rules regarding evidence, the reliability and, thus, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliable nature of its content (see, to that effect, judgment of 13 July 2018, *Stührk Delikatessen Import v Commission*, T-58/14, not published, EU:T:2018:474, paragraphs 72 and 73 and the case-law cited).
- 98 Moreover, the reliability of the documentary evidence cannot be called in question by the fact that it originates from the author of the corporate statement (see, to that effect, judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 184).
- 99 Thirdly, there is no principle of EU law which precludes the Commission from relying on a single item of documentary evidence in order to conclude that there has been an infringement, provided that its probative value is undoubted and that the item in question itself definitely attests to the existence of the infringement in question (see judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 122 and the case-law cited).
- 100 It is true that that assumption does not apply, as a general rule, to mere statements by an accused undertaking, which, in so far as they are contested by other undertakings concerned, must be corroborated by additional and independent evidence (judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 123).
- 101 However, that rule can be qualified in a case where the statement from the undertaking which cooperates is particularly reliable, since, in those circumstances, a lesser degree of corroboration is required, both in terms of precision and depth (judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 124).
- 102 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 contested decision. 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 judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 125 and the case-law cited).
- 103 Moreover, even if the statement of an undertaking is not corroborated in terms of the specific facts to which it attests, it may have a certain probative value in corroborating the existence of the infringement, as part of a body of consistent evidence used by the Commission. In so far as a document contains specific information corresponding to that contained in other documents, it must be considered that those items of evidence reinforce each other (see judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 126 and the case-law cited).
- 104 Furthermore, the Commission must be able to apply conclusions drawn from periods where the evidence is fairly solid to other periods where the gap between the various pieces of evidence is perhaps larger. There will therefore need to be a particularly good explanation in order to convince a court of law that in a particular phase of a series of meetings things occurred which were completely different from what had transpired at earlier and subsequent meetings when those meetings were attended by the same people, took place under similar external conditions and indisputably had the same purpose (judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 127).

(2) *The anticompetitive nature of the information exchanged*

- 105 In that regard, first, it is worth bearing in mind that, according to the case-law, 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 or she intends to adopt on the internal market (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 119 and the case-law cited).
- 106 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, nonetheless, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 120 and the case-law cited).
- 107 The Court of Justice has therefore held that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 121 and the case-law cited).
- 108 In particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 122 and the case-law cited).
- 109 The General Court has already held that the provision of sensitive business information, such as an exchange of future price increases, has – where that information is given to one or more competitors – an anticompetitive effect inasmuch as the independence of the undertakings concerned in their conduct on the market is modified as a result. Where such practices occur, the Commission is not obliged to prove their anticompetitive effects on the relevant market if they are capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the internal market (see judgment of 16 September 2013, *Wabco Europe and Others v Commission*, T-380/10, EU:T:2013:449, paragraph 78 and the case-law cited).
- 110 Secondly, the concept of a concerted practice, as it derives from the actual terms of Article 101(1) TFEU, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 126 and the case-law cited).
- 111 In that regard, the Court of Justice has held that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. In particular, the Court of Justice has concluded that such a concerted practice is caught by Article 101(1) TFEU, even in the absence of anticompetitive effects on the market (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 127 and the case-law cited).

- 112 It is thus apparent from the case-law that the provision of sensitive business information, such as the exchange of information regarding pricing, including future pricing, and information regarding supply and demand, including in relation to future supply and demand (in particular production volumes or increases or decreases in shipments), makes it possible to reduce uncertainty as to the conduct of competitors on the market and to create conditions of competition which do not correspond to the normal conditions of the market and, consequently, gives rise to a concerted practice having as its object the restriction of competition, within the meaning of Article 101(1) TFEU.
- 113 It is in the light of those observations that the specific evidence put forward by the applicant seeking to challenge the anticompetitive nature and geographic scope of each of the exchanges at issue must be examined.
- 114 The exchanges at issue may be divided into three sets of exchanges. The first set relates to the ECC meetings, which took place between 1998 and 2003. The second set relates to a bilateral contact in April/May 2005 and to a CUP meeting of 13 December 2006. The third set relates to contacts that took place after 10 November 2008.
- (i) *The ECC meetings which took place between 1998 and 2003*
- *The meeting of 26 June 1998*
- 115 The applicant submits, in essence, that, first, it cannot be established either from the Japanese original of the minutes of the meeting or the translation of those minutes into English that the discussions concerned the European customer Thomson. Only Rubycon's corporate statement associates 'T Company', mentioned in the minutes, with 'Thomson'. Moreover, Rubycon's statement contains no reasoning as to why the expression 'T Company' should be understood as referring to Thomson rather than a Japanese customer, as this was a meeting in Japan. In any event, the minutes of the meeting are not sufficient to establish that the discussions concerned Europe. The applicant also emphasises that it neither invoiced nor shipped any capacitors for Thomson within the EEA in the 1999/2000 business year or the 2001/2002 business year. Second, it cannot be established from the minutes of the meeting that the applicant shared information with the other participants in the meeting concerning the prices which it intended to charge on the market. It is not therefore possible to classify the applicant's conduct as an infringement by object.
- 116 The Commission disputes the applicant's arguments.
- 117 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statement, reproduced, in essence, in recitals 109 to 111 of the contested decision, that, first of all, Elna, NCC, Rubycon, the applicant and other participants had agreed on a future price for the European customer Thomson, a French electronic goods manufacturer. More specifically, it had been agreed by all the participants in the meeting to grant Thomson, in response to its price reduction request, a price reduction of between 0 and 3%. The applicant then complained about the prices charged by Elna in Italy. Lastly, a participant in the meeting complained about the prices charged by the applicant in the United Kingdom.
- 118 It should be observed, in the present case, that, first, the minutes of the meeting originate from one of the participants in the infringement. Secondly, that document was drawn up *in tempore non suspecto*, and it could not be envisaged, at the time when it was drawn up, that it might be brought to the attention of third parties. Thirdly, as is stated in recital 80 of the contested decision and footnote 132 thereto, the meeting was an 'ECC Foreign Trade' meeting, which is not disputed by the applicant. As is apparent from Rubycon's corporate statement, reproduced, in essence, in recitals 80 and 81 of the contested decision, the participants in those meetings exchanged information regarding the prices charged for certain customers headquartered outside Japan and future prices in general, as well as information regarding the status of their orders in terms of products or regions of the world, including Europe. Fourthly, the applicant does not dispute that the letters 'E', 'R' and 'N' which appear in the minutes refer to Elna, Rubycon, and the applicant itself, respectively. Fifthly, the minutes record discussions concerning, first, an agreement between the participants regarding the price reduction which should be granted to a customer, next, a

complaint by the applicant regarding the prices charged by 'E' in Italy and, lastly, a complaint by one of the participants regarding the prices charged by the applicant in the United Kingdom.

- 119 In addition, as the Commission rightly states in the defence, the fact that certain participants in the meeting, including the applicant, complained about the low prices charged within the EEA by other participants in the meeting shows that there was an agreement or concerted practice between those undertakings regarding prices within the EEA. That conclusion is borne out by the fact that the applicant, in response to the complaint concerning it, undertook an 'investigation'.
- 120 It must therefore be held that the minutes of the meeting, on which the Commission relied in order to find that the information exchanged at that meeting was of an anticompetitive nature, highlight the existence of a joint intention to coordinate prices within the EEA between the participants, within the meaning of the case-law referred to in paragraphs 105 to 111 above.
- 121 That finding cannot be called into question by the applicant's arguments.
- 122 In the first place, it is necessary to reject the argument that Rubycon's corporate statement does not set out any reasoning as to why the expression 'T Company' should be understood as referring to Thomson rather than a Japanese customer, as this was a meeting in Japan, as well as the argument based on the fact that, in the minutes of the meeting of 16 October 1997, the name Thomson appeared in full and not in the form of the expression 'T Company'.
- 123 In that regard, first, it should be pointed out that the explanation relating to the identity of 'T Company' was given by the undertaking which was responsible for the minutes of the meeting, which tends to make that explanation particularly reliable.
- 124 Secondly, as has been noted in paragraph 118 above, the applicant does not dispute that that meeting was a 'Foreign Trade' meeting and that, in those meetings, the participants exchanged information relating to their activities outside Japan.
- 125 Thirdly, it should be noted that the minutes of the meeting of 16 October 1997 to which the applicant refers in the application in order to support its claim relate to a meeting prior to the infringement period. Therefore, that item of evidence is not such as to shed light on the functioning of the meetings during the infringement period. Moreover, the fact that 'Thomson' was written in full in those minutes does not mean that the letter 'T' in the minutes in question does not refer to the French electronic goods manufacturer Thomson.
- 126 Fourthly, even if, as the applicant maintains in its written pleadings, 'T Company' does not refer to Thomson, that does not make it possible to reject the finding, set out in paragraph 120 above, that the information exchanged was of an anticompetitive nature and covered the EEA.
- 127 In the second place, it is necessary to reject the argument that the applicant did not invoice or dispatch any capacitors within the EEA for Thomson's customers in the 1999/2000 business year or the 2001/2002 business year. Even if the applicant did not make sales in the EEA to customers who were the subject of the discussions that took place during that meeting, that fact alone does not preclude the finding that, by exchanging sensitive business information, the applicant reduced uncertainty as to the foreseeable conduct of competitors and brought about conditions of competition which did not correspond to normal market conditions.
- 128 In the third place, in so far as the applicant maintains that the minutes of the meeting, on which the Commission relied in order to find that the information exchanged was of an anticompetitive nature, are, first, insufficient to establish that that meeting covered the EEA and, second, insufficiently corroborated, since the Commission referred, in order to do so, solely to Rubycon's corporate statement, those arguments must be rejected, in the light of the case-law referred to in paragraphs 92 to 104 above.

– *The meeting of 5 November 1998*

129 The applicant submits, in essence, that the two extracts taken from the minutes of the meeting drawn up by Rubycon do not express any intention on the part of NCC and Elna as to the pricing behaviour which they intended to adopt in Europe. There is therefore no evidence of an infringement by object covering the EEA. The first extract is merely a general comment regarding price levels and the expression of a general rule based on experience. That statement does not express any intention on the part of NCC as to its pricing behaviour and its conduct on the market. The second extract concerns only the region covered by the Association of South-East Asian Nations (ASEAN) and not Europe, as is confirmed by Rubycon's corporate statement.

130 The Commission disputes the applicant's arguments.

131 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statement, referred to in recitals 113 to 115 of the contested decision, that, during that meeting, first, NCC informed the applicant and the other cartel participants of its pricing intentions in Europe. It is apparent from those minutes that, second, Elna expressed its concerns regarding the fact that the decrease in the United States dollar price was not limited to the region covered by the ASEAN, but extended throughout the world, so that it was necessary to take early measures.

132 As regards the first extract, the applicant disputes the Commission's interpretation of the information exchanged by NCC in connection with the meeting, according to which:

'b) Europe

...

Seeing double digits in price negotiations for next year and falling demand is leading to falling prices.'

133 In that regard, it should be noted, first, that the information contained in that extract concerns Europe, which is not disputed by the applicant. Secondly, contrary to the applicant's assertions, that information does not constitute a general comment regarding price levels or the expression of a general rule based on experience. Even though no precise figures are given in the minutes, that information nevertheless discloses to the other participants the content of the negotiations in which NCC was engaged with its customers for the following year and its decision or intention concerning its own conduct on the European market with regard to pricing. Thirdly, if that meeting had not taken place, the other participants would not have been able to obtain that information, which was confidential and capable of directly influencing their commercial strategy.

134 It follows from the foregoing considerations that NCC provided the other participants in the meeting at issue with sensitive business information relating to its future pricing strategy, which was capable of removing uncertainty as to the prices which it intended to charge within the EEA the following year.

135 As regards the second extract, the applicant complains that the Commission presented the extract – 'there is a fear that the reduced [US dollar] price will not be limited to the [region covered by the ASEAN] but [will] spread worldwide, so it is necessary to take some form of early measures' – out of context. That extract corresponds to the second bullet point of a paragraph entitled 'b) [ASEAN]', the first bullet point of which is as follows:

'Starting to see [US dollar] price reduction requests in [the region covered by the ASEAN] due to large fluctuation in the Malaysia dollar (Specifically, Sony's name was mentioned).'

136 In that regard, it should be noted that that extract mentions the need to take early measures because of the concern that the decrease in the US dollar price would not be limited to the region covered by the ASEAN,

but would spread worldwide. Measures which are intended to prevent the decreases in price found in the region covered by the ASEAN from spreading worldwide necessarily concern the EEA.

137 Moreover, the assertion that Rubycon's corporate statement confirms that the early measures in question did not concern Europe must be rejected. It is not apparent from that statement that Rubycon specified that the measures at issue did not concern Europe. In that statement, Rubycon merely indicated that Elna had called upon the other participants in the meeting to take early measures in order to limit price reduction requests from the region covered by the ASEAN.

– *The meeting of 18 December 1998*

138 The applicant submits, in essence, that the extract taken from the minutes of the meeting of 18 December 1998 drawn up by Rubycon, referred to in recital 118 of the contested decision, does not enable it to be established that the applicant participated in an infringement by object covering the EEA.

139 The Commission disputes the applicant's arguments.

140 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statement, reproduced, in essence, in recital 118 of the contested decision, that, during that meeting, at the part reserved for the 'situation at each company', one of the participants, Company M, informed the others that a visible drop was beginning in Europe concerning the current and future situation with regard to supply and demand. The same participant also stated that it would start to handle the euro settlement from April of the following year onwards.

141 As regards the phrase 'a visible drop is beginning', referred to by the Commission, it should be noted that, contrary to the applicant's assertions, that phrase specifically concerns the European market. As can be seen from Rubycon's minutes, after outlining developments with regard to its orders in the region covered by the ASEAN, in Taiwan and in the United States, Company M added 'Europe – a visible drop is beginning'.

142 It must be inferred from this that, by that information, Company M informed the other participants in the meeting of the state of its orders in Europe and not of the general market situation.

143 It must therefore be held that, contrary to the applicant's assertions, the participants in the meeting exchanged individualised and sensitive information at that meeting, which was not of a general nature and was capable of directly influencing their commercial strategy and reducing the degree of uncertainty as to the operation of the market in question.

144 As regards the second sentence of the extract referred to by the Commission, namely 'with respect to the euro settlement, we will provide support from April of next year', it should be noted that, first, the applicant does not dispute that the information shared by Company M concerned the arrangements for payment and, more specifically, the acceptance of payments in euros from April 1999 onwards. Secondly, as the Commission remarks in the defence, the fact that the euro had been introduced as a non-fiat currency from 1 January 1999 did not necessarily mean that a Japanese undertaking would accept payments in that currency and that it would accept them from April 1999 onwards.

145 It must be inferred from this that, by that information, Company M communicated to the other participants the pricing and commercial strategy which it intended to pursue on the market following the introduction of the euro. Such information is inherently sensitive and confidential and not, as the applicant claims, public.

146 It must therefore be held that, contrary to the applicant's assertions, the participants in the meeting exchanged individualised and sensitive information at that meeting which was capable of directly influencing their conduct on the market in question.

147 In the light of all the foregoing considerations, it must be held that the information exchanged at that meeting extended to the EEA and was of an anticompetitive nature, within the meaning of the case-law referred to in paragraphs 105 to 111 above.

– *The meeting of 29 October 1999*

148 The applicant submits, in essence, that the extract from Rubycon's minutes relating to the meeting of 29 October 1999, referred to in recital 122 of the contested decision, was merely a comment from Company M concerning its situation and not a request addressed to the other participants asking them to restrict their supply. Moreover, that information, in particular against the background of a market in which the products are so diverse, is not a disclosure of information regarding prices which constitutes a restriction of competition by object within the meaning of the judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission* (C-286/13 P, EU:C:2015:184). Furthermore, the applicant argues that its statements at that meeting did not concern Europe in any way. Rubycon's corporate statement confirms that the discussions regarding pricing concerned Taiwan. Furthermore, the applicant did not make any sales to Nokia in the EEA either during the business year in which the meeting took place or in the following business year.

149 The Commission disputes the applicant's arguments.

150 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statement, reproduced, in essence, in recitals 121 and 122 of the contested decision, that the participants in the meeting exchanged information relating to tantalum electrolytic capacitors concerning two European customers, Nokia and Ericsson. More specifically, as can be seen from the extract from the minutes referred to in recital 122 of the contested decision, one of the participants stated that it had increased the price of tantalum chips by 40% for those two European customers, but that this would not be sufficient unless the supply was restricted.

151 In that regard, it should be noted, as the Commission does, that, first, although it is indeed apparent from the minutes of the meeting that the 40% increase in the price of tantalum electrolytic capacitors concerned a previous increase, such information, even if it was no longer current, remained, by its very nature, sensitive and confidential and was still capable of influencing the future strategy of the other participants in the meeting. Secondly, the second part of the information, relating to the fact that the price increase would not be sufficient unless supply was restricted, referred to the future intentions of the author of that statement as regards the supply of tantalum electrolytic capacitors to Nokia and Ericsson, and more specifically to its intention to restrict the supply of those products to those customers.

152 It therefore follows from the foregoing that the participants in the meeting exchanged individualised and sensitive information at that meeting, which was capable of directly influencing their conduct on the market.

153 Furthermore, it should be noted that that information concerned two European customers, the Finnish undertaking Nokia and the Swedish undertaking Ericsson.

154 The information exchanged at the meeting of 29 October 1999 therefore extended to the EEA and was of an anticompetitive nature, within the meaning of the case-law referred to in paragraphs 105 to 111 above.

155 That finding cannot be called into question by the applicant's arguments.

156 First, it is necessary to reject the argument that Company M did not ask the other participants also to restrict their supply. It is sufficient to note that the fact that Company M did not ask the other participants to restrict their supply has no bearing on the finding that the information exchanged was such as to reduce or remove the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings was restricted.

157 Secondly, it is necessary to reject the argument that the minutes of the meeting do not refer to any reaction by the applicant to the information shared, so that no objectionable conduct can be imputed to it. Indeed, as is apparent from the case-law referred to in paragraphs 105 to 111 above, the mere disclosure of sensitive business information to competitors amounts to a prohibited practice, since it removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information.

158 Thirdly, it is necessary to reject the argument that the applicant's statements did not concern Europe, with the result that that meeting cannot establish the existence of an anticompetitive practice concerning the EEA. It is sufficient to note that the fact that the applicant's statements did not concern Europe has no bearing on the finding that the information shared by Company M concerned two European customers and was of an anticompetitive nature, within the meaning of the case-law referred to in paragraphs 105 to 111 above.

159 Moreover, the argument that Rubycon's corporate statement confirms that the price increase applied to Nokia and Ericsson by Company M concerned Taiwan has no basis in fact. That statement in no way refers to Nokia and Ericsson. It refers, without further details, to discussions between the participants regarding efforts to increase the price of 'LB capacitors' supplied to Taiwan.

160 Fourthly, for the same reasons as those set out in paragraph 127 above, it is necessary to reject the argument that the applicant did not invoice or dispatch any capacitors to Nokia in the EEA during the period at issue.

– *The meeting of 17 December 1999*

161 The applicant submits, in essence, that the two extracts from Rubycon's minutes relating to the meeting of 17 December 1999, referred to in recitals 125 and 126 of the contested decision, make no reference to Europe and are too general to enable the companies' conduct on the market to be inferred.

162 The Commission disputes the applicant's arguments.

163 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statement, reproduced, in essence, in recitals 124 to 126 of the contested decision, that the participants in the meeting exchanged information relating, in particular, to their pricing behaviour concerning their foreign customers and their pricing intentions. More specifically, according to an extract from those minutes referred to in recital 125 of the contested decision, one of the participants stated that it '[had] not [decreased] the price for Company S [and did] not intend to decrease the prices for other manufacturers either'. Moreover, according to another extract, reproduced in recital 126 of the contested decision, Elna also informed the other participants that it was 'negotiating price increase by several percent with overseas customers'.

164 In the first place, the applicant disputes the Commission's interpretation of the expression 'overseas customers', according to which that expression includes customers in the EEA.

165 It should be noted, in the present case, first, that the expression 'overseas customers' does not refer to any specific customer. That expression appears to be used generically, with the result that there is nothing to exclude customers in the EEA. Secondly, it is not apparent from the various minutes and internal notes relating to the various exchanges that the cartel participants excluded the EEA from the discussions concerning the situation on markets outside Japan. Thirdly, the applicant does not dispute that the cartel participants, who used that expression during the various exchanges, were present on the EEA market at the time when those exchanges took place. Fourthly, it is apparent from recitals 671 and 679 of the contested decision that, in numerous ATC and MK meetings, the expression 'overseas customers' included customers in the EEA, which is not disputed by the applicant. As the Commission remarks, there is nothing to indicate that the meaning of that expression was different when it was used in connection with the ECC meetings, a fortiori in the case of meetings forming part of the same overall plan and bringing together the same participants.

- 166 In those circumstances, in accordance with the case-law referred to in paragraphs 83 and 84 above, the Commission could logically consider that the expression ‘overseas customers’ covered the EEA in the present case.
- 167 The evidence put forward by the applicant to show that that expression referred exclusively to customers in the region covered by the ASEAN cannot call that conclusion into question.
- 168 First, contrary to the applicant’s assertions, the phrase in Rubycon’s minutes stating that ‘the [participants] should support one another for the price increase negotiation in process in [the ASEAN region]’, cannot be interpreted as a request concluding the exchange of information on which the Commission relies in recitals 124 to 126 of the contested decision. It is sufficient to note, in that regard, that that sentence appears in point 2(d) of the minutes, in a section entitled ‘General Information’, whereas the information relied on by the Commission appears in point 1(b) of the minutes, in a section entitled ‘Situations of attendees’.
- 169 Second, the applicant cannot rely on the use of that expression in the minutes of the meeting dated 18 December 1999, which were drawn up on the day after the meeting in question. Contrary to the applicant’s assertions, it is apparent from those minutes only that that expression included Korea and Taiwan; not that it was limited to countries in the ASEAN.
- 170 In the second place, the applicant disputes the Commission’s conclusion that the expressions ‘Company S’ and ‘other manufacturers’, set out in the extracts ‘did not decrease the price for Company S’ and ‘do not intend to decrease the prices for other manufacturers, either’, refer to Sony and the European market.
- 171 As regards the expression ‘Company S’, it should be noted that, first, the explanation relating to the identity of that company was given by the undertaking which was responsible for the minutes of the meeting, which tends to make it particularly reliable. Secondly, several cartel participants confirmed, in their corporate statements, that Sony had manufacturing plants in the EEA and that they had made sales to Sony in the EEA during the infringement period.
- 172 In those circumstances, in accordance with the case-law referred to in paragraphs 83 and 84 above, the Commission could reasonably consider that the expression ‘Company S’ referred to Sony.
- 173 As regards the geographic scope of the information exchanged, first of all, it has been noted in paragraph 171 above that a number of the cartel participants confirmed that Sony had manufacturing plants in the EEA and that they had made sales to Sony in the EEA during the infringement period. Next, it is apparent from the minutes of the meeting of 25 May 2000, in particular from the extracts ‘they raised prices 10%-15% in Europe’ and, ‘especially, S Company raised LB at least 20% so orders are stopped’, that the information exchanged relating to ‘S Company’/‘Company S’ at other ECC meetings related to Europe. Lastly, it should be noted that the expression ‘other manufacturers’, set out in the extract in question, does not refer to any specific manufacturer. That expression appears to be used generically, with the result that there is nothing to exclude manufacturers in the EEA. It is not apparent from the various minutes and internal notes relating to the various exchanges that the cartel participants excluded manufacturers in the EEA from the discussions.
- 174 In those circumstances, in accordance with the case-law referred to in paragraphs 83 and 84 above, the Commission could reasonably consider that the information exchanged concerned the EEA.
- 175 That conclusion cannot be called into question by the applicant’s arguments seeking to demonstrate that, even if the expression ‘Company S’ were to refer to Sony, this would not mean that the meeting at issue concerned the EEA.
- 176 First, contrary to the applicant’s assertions, the fact that the information relating to Sony, exchanged at the meeting of 5 November 1998, concerned the region covered by the ASEAN does not mean that the

information exchanged concerning that company in connection with other meetings also concerned the region covered by the ASEAN.

177 Second, the argument that it is apparent from Rubycon's corporate statement that the information exchanged in connection with the meeting of 25 May 2000 concerned Taiwan has no factual basis. As has been noted in paragraph 173 above, the information exchanged concerning Sony in connection with that meeting concerned Europe, as can be inferred from, inter alia, the following extract from those minutes:

'They raised prices 10%-15% in Europe. Especially, S Company raised LB at least 20% so orders are stopped.'

178 In the third place, the applicant submits that the information exchanged was general and could not, therefore, be regarded as capable of removing uncertainties on the part of the persons concerned as to the date, extent and details of the changes in conduct on the market which were to be implemented by the undertakings concerned.

179 In that regard, it should be noted that, first, by the information that it was 'negotiating price increase by several percent with overseas customers', the participant in the meeting in question provided the other participants with information regarding the content of the negotiations which it was in the process of conducting with its foreign customers and the conduct which it had decided to adopt with regard to those customers in terms of pricing.

180 Secondly, by the information that it had 'not [decreased] the price for Company S' and did 'not intend to decrease the prices for other manufacturers, either', the participant in the meeting in question provided the other participants with information regarding its pricing behaviour concerning a specific and common customer, as well as its intentions concerning other manufacturers.

181 It must therefore be held that the participants in the meeting exchanged individualised, sensitive and confidential information at that meeting which was capable of directly influencing their commercial strategy and reducing the degree of uncertainty as to the operation of the market in question.

182 It follows that, contrary to the applicant's assertions, the information exchanged was not general in nature and was of an anticompetitive nature, within the meaning of the case-law referred to in paragraphs 105 to 111 above.

– *The other meetings*

183 The applicant argues, in essence, that, due to space constraints, which prevent it from putting forward for all the ECC meetings the arguments which it submitted for the first five of those meetings in order to illustrate the weaknesses in the Commission's reasoning, it should be noted in any event that Rubycon clearly indicated in its corporate statement that the subsequent meetings also had no connection with the EEA. At the hearing, the applicant stated that the arguments put forward in connection with those five ECC meetings were valid for all the ECC meetings.

184 The Commission disputes the applicant's arguments.

185 The applicant submits that the errors of assessment made by the Commission, to which it referred in detail in connection with its objection to the first five ECC meetings, are also to be found in the subsequent ECC meetings, so that, if the Commission had correctly assessed the evidence, it would have withdrawn, in relation to the applicant, its allegation of a single and continuous infringement by object covering the EEA in respect of all those meetings.

186 In that regard, it has been concluded, following the examination of each of those first five meetings, that the Commission was fully entitled to consider that the information exchanged during those meetings

extended to the EEA and was of an anticompetitive nature, within the meaning of the case-law referred to in paragraphs 105 to 111 above.

187 It follows that the applicant's argument must be rejected, without there being any need to rule on the objection of inadmissibility raised by the Commission in relation to the applicant's line of argument.

188 Moreover, the applicant submits that Rubycon indicated in its corporate statement that the information exchanged at the subsequent ECC meetings, in particular the meetings of 7 November and 5 December 2003, had no connection with the EEA.

189 The applicant relies, in that regard, on an extract from a part of Rubycon's statement, entitled 'Summary of the main evidence', which contains no such indication. On the contrary, in that extract, sent to the Court at its request, Rubycon stated that the price agreements to be applied to specific types of aluminium electrolytic capacitor were generally concluded in the light of three specific challenges faced by the manufacturers and that the third of those challenges, linked to price increases in relation to fluctuations in the yen (JPY) exchange rate, as addressed at the meetings of 7 November and 5 December 2003, directly concerned the European Union.

190 It follows that the applicant's claim that Rubycon indicated in its statement that the ECC meetings which were held until 2003, and more particularly the meetings of 7 November and 5 December 2003, were unrelated to the EEA is manifestly incorrect and must therefore be rejected.

(ii) The bilateral contact of April/May 2005 and the CUP meeting of December 2006

– The bilateral contact with NEC Tokin of April/May 2005

191 The applicant submits, in essence, that, in accordance with the case-law, NEC Tokin's corporate statement alone cannot constitute sufficient proof of the existence of that contact and, a fortiori, of the infringement at issue. Moreover, the Commission failed to take account of exculpatory evidence, such as the sworn statements of its employees and NEC Tokin's statement of 3 March 2015, in which NEC Tokin stated that the bilateral contacts identified in its corporate statement concerned Asia to a very large extent or even exclusively. Moreover, it did not itself make any sales to Canon within the EEA during the period in question.

192 The Commission disputes the applicant's arguments.

193 It is apparent from NEC Tokin's corporate statement of 30 October 2014, reproduced, in essence, in recitals 271 and 272 of the contested decision, that NEC Tokin and the applicant, in connection with a bilateral contact dated April/May 2005, exchanged information regarding the price of manganese capacitors and tantalum capacitors to be offered to Canon.

194 By its first argument, the applicant submits that, in accordance with the case-law, the Commission cannot, in the absence of corroborating evidence, rely solely on NEC Tokin's corporate statement in order to establish that contact and, a fortiori, the infringement at issue.

195 However, in the light of the case-law referred to in paragraphs 99 to 102 above, that argument must be rejected. The only relevant criterion for assessing the evidence adduced is its reliability. The Commission may rely exclusively on a corporate statement, provided that the veracity of what has been claimed in that statement is not susceptible of doubts and the information in it is not vague.

196 In the present case, it should be noted that, first, the information contained in NEC Tokin's corporate statement of 30 October 2014 is in no way worded vaguely, but, on the contrary, contains a significant level of detail, which makes it possible to identify the form of contact, the period covered, the persons concerned, the customer concerned, the product in question and the nature of the information exchanged. Secondly, that information originates from a direct witness of the contact at issue, namely the NEC Tokin

employee who participated in that exchange. Thirdly, that statement runs counter to NEC Tokin's interests, since, by that statement, NEC Tokin acknowledges that it participated in an anticompetitive contact.

197 Moreover, as the Commission stated in its defence, since the applicant did not dispute, during the administrative procedure, the very existence of that contact, such a decision not to dispute its existence is capable of constituting additional evidence.

198 As regards the sworn statements of three of the applicant's employees that, in essence, no member of the sales department had any contact with one of NEC Tokin's employees, during the period at issue, concerning Canon, it is sufficient to note that those statements were drawn up after the contested decision was adopted for the purpose of defending the applicant's interests before the Court, and that, in view of the fact that there are no adverse consequences under criminal law should those statements prove to be false, they cannot be treated in the same way as statements made under oath before a court or before a public prosecutor in connection with an investigation (see, to that effect, judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraph 133 and the case-law cited).

199 Consequently, the Commission was right to take the view that the information contained in NEC Tokin's statement was reliable to a certain degree.

200 By its second argument, the applicant disputes the geographic scope of the contact. It maintains, in that regard, that the Commission failed to take into consideration NEC Tokin's statement of 3 March 2015, in which it stated, in paragraph 15 thereof, that the information exchanged concerning Canon related to Asia.

201 However, first, although it is indeed apparent from paragraph 15 of NEC Tokin's statement of 3 March 2015 that the bilateral contacts identified by NEC Tokin in that statement concerned sales intended essentially or exclusively for Asia, it is also apparent from that same paragraph that this concerned only certain capacitors supplied to specific customers. The applicant's argument is therefore based on an unjustified extrapolation of the information contained in that statement.

202 Secondly, in paragraph 30 of that statement, NEC Tokin specified that, in 'only some' cases, supplies had been made to manufacturing plants which were not on the incomplete list attached to that statement. Therefore, it must necessarily be inferred from this, *a contrario*, that, in the other cases, the information exchanged in connection with those contacts did in fact relate to supplies made to plants on that list, which includes only plants located within the EEA, including, in particular, Canon's manufacturing plants in France and Germany.

203 Thirdly, contrary to the applicant's assertions in the reply, paragraphs 24 and 27 of the statement at issue made by NEC Tokin do not show that any contact concerning Canon did not relate to Europe. First, as the Commission points out, although, in paragraph 24 of that statement, that undertaking indicates that 'sales ... in ... the EEA ... are handled by NEC Tokin Europe', its European subsidiary, it is also apparent from that paragraph that it sometimes dealt with sales in the EEA itself. Second, as the Commission has also remarked, it is apparent from the penultimate sentence of paragraph 27 of that statement that the last sentence of that paragraph, which states that, 'as far as NEC Tokin is aware, no other Japanese capacitor manufacturer sells to these customers', concerned only customers who were not mentioned in NEC Tokin's statements. Consequently, that sentence could not apply to Canon.

204 Fourthly, for the same reasons as those set out in paragraph 127 above, it is necessary to reject the argument that the applicant did not make any sales to Canon in the EEA during the period at issue.

205 In the light of those considerations, the applicant's argument that the information exchanged concerning Canon related only to Asia must therefore be rejected. Consequently, its claim that a contact which does not cover sales in the EEA cannot establish the continuous nature of the infringement must also be rejected as manifestly lacking any factual basis. In any event, in the light of the case-law referred to in paragraph 82 above, such a claim is wholly unfounded.

– *The CUP meeting of 4 July 2006*

- 206 The applicant submits that the evidence relating to that meeting does not support the conclusion that it concerned Europe.
- 207 The Commission disputes the applicant's arguments.
- 208 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statement, reproduced, in essence, in recitals 299 to 303 of the contested decision, that the participants in the meeting exchanged information at that meeting regarding, first, the response to be given to Sony's letter concerning the substances harmful to the environment contained in their respective products and, second, their pricing intentions concerning products containing lead, capacitors for Sony rear projection televisions, and chip capacitors. In particular, NCC disclosed its intention to increase its prices for those products for the foreign market.
- 209 First of all, it should be noted that the applicant does not dispute that the CUP meetings had a global reach and that they therefore necessarily included the EEA. Nor does it dispute that the first topic discussed at the meeting concerned the response to be given to the letter which Sony had sent to them and through which Sony sought to ascertain whether their products complied with Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ 2003 L 37, p. 19), which required the Member States to ensure that, from 1 July 2006, new electrical and electronic equipment put on the European market did not contain lead or other hazardous substances.
- 210 Next, it is apparent from the minutes of the meeting, read in the light of Rubycon's corporate statement, that, first, Sony's letter to the participants came from Sony Europe, secondly, the price increase for products containing lead was part of the same discussion as that concerning Sony's letter, and, thirdly, NCC informed the other participants that it did not intend to grant the price reduction request made by Sony Europe in respect of certain aluminium electrolytic capacitors and that it intended to increase the price of capacitors used in the 'Reapro Troy II' television screens produced by Sony and the price of aluminium electrolytic chip capacitors for foreign customers.
- 211 Lastly, the information contained in Rubycon's statement comes from the notes taken by its representative at the meeting. According to the case-law, it is necessary to attach great importance to the fact that documents were drawn up in close connection with the events or by a direct witness of those events (see, to that effect, judgment of 16 June 2015, *FSL and Others v Commission*, T-655/11, EU:T:2015:383, paragraph 183 and the case-law cited).
- 212 It follows that the Commission was fully entitled to take the view that the information exchanged at that meeting had a connection with the EEA.
- 213 That finding cannot be called into question by the applicant's arguments.
- 214 First, it is necessary to reject the argument that the price increase for products containing lead did not concern Europe, since it was no longer possible for those products to be marketed there following the entry into force of Directive 2002/95.
- 215 In that regard, first, it has been noted in paragraph 210 above that that increase was part of the same discussion as that concerning Sony Europe's letter. Second, the applicant's argument presupposes that all the participants complied with that directive as soon as it entered into force, which it has not demonstrated. Furthermore, certain documents in the file show that the participants intended to continue to supply products containing an undetectable amount of lead or to provide spare parts or repairs containing that substance.

- 216 Secondly, it is necessary to reject the argument that the increase in the price of capacitors for Sony rear projection televisions did not concern Europe, since, according to the information available, Sony's manufacturing plants for those products were located in Japan, Malaysia and Mexico, as is apparent from Annex A39 to the application.
- 217 In that regard, although the annex does indeed refer to manufacturing plants for those products located in Japan, Malaysia and Mexico, it must, however, be pointed out that, first, that annex takes the form of a news article which appeared on the internet on 27 December 2007, which contained information based on allegedly internal sources, the accuracy and reliability of which have thus not been demonstrated. Second, even if that information were assumed to be reliable, it merely asserts that, in December 2007, Sony's manufacturing plants for those products were located in Japan, Malaysia and Mexico.
- 218 Thirdly, it is necessary to reject the argument that the increase in the price of chip capacitors for foreign customers did not concern Europe, on the ground that, according to Rubycon's statement, the remainder of the meeting concerned supplies of capacitors to the 'BRICS countries' (Brazil, Russia, India and China) only.
- 219 The applicant bases that argument on the fact that, in its view, all the paragraphs of the statement following that in which the 'BRICS countries' market is mentioned for the first time must be understood as relating to that geographic area. However, that reading by the applicant is manifestly inconsistent with, first, its line of argument as referred to in paragraph 216 above, which, although relating to one of the paragraphs supposed to relate to the 'BRICS countries', tends to support the argument that the increase in the price of capacitors for Sony rear projection televisions related to Japan, Malaysia and Mexico and, second, the 'domestic market' reference in the paragraph relating to the increase in the price of chip capacitors.
- 220 Fourthly, it is necessary to reject the argument that the terms 'mitsumi' and 'Kihara special' in the minutes of the meeting, which refer to a Japanese company and to Sony's quality control service in Japan, support the applicant's claim that the discussions did not concern Sony Europe, but related to Japan.
- 221 In that regard, it should be noted that, first, the applicant provides no evidence in support of its claim that the terms 'mitsumi' and 'Kihara special' refer to a Japanese company and to Sony's quality control service in Japan. Second, it is clear from Rubycon's statement that NCC had informed the other participants that it did not intend to grant the price reduction request made by Sony Europe in respect of certain aluminium electrolytic capacitors. It is also clear from that statement that the terms 'mitsumi' and 'Kihara special' referred to two product models that NCC supplied to Sony.
- 222 In the light of all the foregoing considerations, the applicant's claim that the information exchanged at the meeting of 4 July 2006 did not concern Europe must be rejected as manifestly lacking any factual basis.

(iii) The contacts that took place after 10 November 2008

– The bilateral contacts with NEC Tokin in February and July 2009

- 223 The applicant complains that the Commission relied solely on NEC Tokin's corporate statement of 30 October 2014 in order to establish the existence of contacts with that undertaking and that it failed to take account of the oral statement made by that same undertaking on 3 March 2015.
- 224 The Commission disputes the applicant's arguments.
- 225 It is apparent from NEC Tokin's corporate statement of 30 October 2014, reproduced, in essence, in recitals 499 and 530 of the contested decision, that NEC Tokin and the applicant, in connection with two bilateral contacts in February and July 2009, exchanged information regarding the prices of manganese capacitors and tantalum capacitors to be offered to Sony.

- 226 By its first argument, the applicant submits that, in accordance with the case-law, the Commission cannot, in the absence of corroborating evidence, rely solely on NEC Tokin's corporate statement in order to establish those contacts and, a fortiori, the infringement at issue.
- 227 However, in the light of the considerations set out in paragraphs 195 to 197 above, the Commission was right to rely on NEC Tokin's corporate statement in order to establish the contacts in question. The applicant's argument must therefore be rejected.
- 228 By its second argument, the applicant disputes the geographic scope of those contacts. It submits that the Commission failed to take into consideration NEC Tokin's statement of 3 March 2015, in particular paragraph 15 thereof, in which it stated that the information exchanged concerning Sony related to Asia.
- 229 However, in the light of the considerations set out in paragraphs 201 and 202 above, the applicant's argument must be rejected.
- 230 That conclusion cannot be called into question by the applicant's other arguments.
- 231 First, the argument that the statement 'as far as NEC Tokin is aware, no other Japanese capacitor manufacturer sells to these customers', set out in paragraph 27 of NEC Tokin's corporate statement, shows that any contact concerning Sony did not relate to Europe must be rejected, in the light of the considerations set out in paragraph 203 above.
- 232 Secondly, the argument that the statement 'sales ... in ... the EEA ... are handled by NEC Tokin Europe', NEC Tokin's European subsidiary, set out in paragraph 24 of NEC Tokin's corporate statement, shows that any contact concerning Sony did not relate to Europe must be rejected, in the light of the considerations set out in paragraph 203 above.
- 233 In the light of all the foregoing considerations, the applicant's claim that the information exchanged during the bilateral contacts in February and July 2009 did not concern Europe must be rejected as manifestly lacking any factual basis.
- *The bilateral contact with NCC in July 2009*
- 234 The applicant claims, in essence, that, first of all, the contested decision infringes its rights of defence. Next, the evidence on which the Commission relied in order to establish that contact does not prove that anticompetitive discussions took place between the applicant and NCC. Lastly, that evidence indicates that the discussions concerned sales to Japan and not to Europe.
- 235 The Commission disputes the applicant's arguments.
- 236 It is apparent from an email sent by A from NCC on 31 July 2009 concerning 'Alpine 09/2H CD negotiations', reproduced, in essence, in recitals 534 and 535 of the contested decision, that NCC and the applicant, in connection with a bilateral contact in July 2009, exchanged information concerning the progress of price negotiations with Alpine Hungary.
- 237 In the first place, the applicant submits that the Commission infringed its rights of defence by relying in the contested decision, in order to establish the existence of that contact, on two documents (ID 1711 and ID 4112) which were not communicated to it during the administrative procedure. Consequently, those documents must be disregarded.
- 238 As a preliminary point, it should be borne in mind that, according to settled case-law, the right of access to the file, which is a corollary of the principle of respect for the rights of the defence, means that the Commission must provide the undertaking concerned with the opportunity to examine all the documents in the investigation file that may be relevant for its defence (see judgment of 16 June 2011, *Heineken*

Nederland and Heineken v Commission, T-240/07, EU:T:2011:284, paragraph 235 and the case-law cited).

- 239 These include 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 (see judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 236 and the case-law cited).
- 240 As regards incriminating evidence, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if that uncommunicated document had to be disallowed as evidence (see judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 237 and the case-law cited).
- 241 It should be noted that, in order to establish that contact, the Commission, as it states in the defence, relied in the contested decision only on the email sent by A from NCC on 31 July 2009. The two documents disputed by the applicant (ID 1711 and ID 4112) are mentioned, in recital 536 of the contested decision, only in order to refute the argument, raised by the applicant in its reply to the statement of objections, that that email did not establish with certainty the existence of an anticompetitive contact.
- 242 First, as regards Document ID 1711, it must be pointed out that the applicant does not dispute the Commission's contention that that document is the English translation of the email sent by A from NCC on 31 July 2009, or the fact that it had access to the original Japanese version of that email during the administrative procedure and that it had the opportunity to make its views known. In any event, it has been observed in paragraph 241 above that that document was relied on by the Commission only in order to refute an argument raised by the applicant in its reply to the statement of objections and not, as the applicant maintains, to establish the existence of that contact.
- 243 Secondly, as regards Document ID 4112, it is common ground between the parties that that document is NCC's reply to the second letter of facts. According to the case-law, the replies to the statement of objections are not part of the investigation file proper. The Commission is required to disclose those replies to other parties involved only if it transpires that they contain new incriminating or exculpatory evidence (see, by analogy, judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraphs 241 and 242 and the case-law cited).
- 244 A document cannot be regarded as an inculpatory document unless it is used by the Commission in support of its finding of an infringement by an undertaking. In order to establish a breach of its rights of defence, it is not sufficient for the undertaking in question to show that it was not able to express its views during the administrative procedure on a document used in a given part of the contested decision. It must demonstrate that the Commission used that document in the contested decision as further evidence of an infringement in which the undertaking participated (see judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 245 and the case-law cited).
- 245 It has been observed in paragraph 241 above that that document was relied on by the Commission only in order to refute an argument raised by the applicant in its reply to the statement of objections and not, as the applicant maintains, to establish the existence of that contact. In addition, the extract from NCC's reply to the second letter of facts, on which the Commission relied in support of its response to the applicant's argument, contains no new incriminating evidence concerning the applicant's participation in the infringement at issue.
- 246 In the light of those considerations, it must be held that the Commission, in the contested decision, did not rely, as against the applicant, on new incriminating evidence of which the applicant had not been informed

and in respect of which it had not been able effectively to make its views known.

- 247 Moreover, it should be noted that the applicant has not explained how that alleged omission infringes its rights of defence. In addition, even assuming that the extract from NCC's reply to the second letter of facts constituted a new item of incriminating evidence, the applicant has not shown, as it is required to do, that the result at which the Commission arrived in its decision would have been different if that uncommunicated document had to be disallowed as evidence (see, to that effect, judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 237 and the case-law cited).
- 248 In the light of all of the foregoing, the applicant's argument must therefore be rejected.
- 249 In the second place, the applicant submits that there is nothing in the email of 31 July 2009 to support the conclusion that A from NCC discussed with the applicant his intention to refuse Alpine's price reduction request. The applicant submits, in that regard, that the items of information specifying 'currently I'm in discussions with Mr Koriyama of [Company] N' and '[I'm] pushing forward with a zero response' in that email are not linked.
- 250 As a preliminary point, it should be noted that, first of all, the applicant does not dispute that the expression '[Company] N' in the email is a reference to the applicant. Next, it is common ground between the parties that the acronym 'CD' in the title of the email, namely 'Alpine 09/2H CD negotiations', refers to a price reduction request and that, in that context, the expression 'zero response', mentioned in that email, amounts to a refusal to grant that request. Lastly, the Commission acknowledges, in the defence, that it made an error of translation as regards the name Koriyama. That name in fact refers, as the applicant indicates, to the applicant's sales office in Koriyama (Japan) and not a person. Consequently, the extract 'currently I'm in discussions with Mr Koriyama of [Company] N', mentioned by the Commission, must, in reality, be understood as 'currently I'm in discussions with [Company] N's Koriyama sales office'.
- 251 It is apparent from that email that the two items of information, which, according to the applicant, have no connection between them, appear in the same sentence and are linked by the coordinating conjunction 'and'. In that context, the Commission could reasonably consider that that coordinating conjunction implied a logical relationship between those two elements and infer from that email that NCC and the applicant had exchanged information concerning Alpine's price reduction request.
- 252 Furthermore, as the Commission remarks in its written pleadings, that conclusion is confirmed by the email of 14 September 2009 sent by B, an employee of Europe Chemi-Con, a European subsidiary of NCC, appearing in the same chain of correspondence as the email of 31 July 2009. By that email, the subject of which is 'RE: Request for Alpine price confirmation' and which begins with 'regarding the 09 2H price negotiations with Alpine Hungary', B, in response to an email of the same day sent by A, stated that '[Company] N's initial response was zero' and 'they have an initial negotiation on 23rd'.
- 253 Moreover, that conclusion of the Commission cannot be called into question by the written statement submitted by C, who was responsible for the applicant's office in Koriyama during the period at issue. In that statement, C submits, in essence, that it is true that, in July 2009, he received a telephone call from A concerning chip capacitors for audio equipment for Alpine. However, he clearly told him that he could not discuss that matter with him. C also states that that call was the only one he received from A.
- 254 In that regard, it should be noted, as the Commission does, that that statement was made by an employee of the applicant, after the statement of objections was communicated and exclusively for the purpose of minimising the applicant's liability.
- 255 According to the case-law, documents found during the investigations have greater evidential value than statements drawn up *in tempore suspecto* by the representatives or former representatives of the undertakings under investigation which seek to mitigate their liability (see judgment of 11 July 2014, *Esso and Others v Commission*, T-540/08, EU:T:2014:630, paragraph 75 and the case-law cited).

- 256 Nor can the Commission's conclusion be called into question by the applicant's claim that A's email of 14 September 2009 shows that the information contained in the emails exchanged on that date was provided by Alpine and not by the applicant. Even if that claim were proved, the email of 31 July 2009 establishes to the requisite legal standard that NCC and the applicant regularly and directly exchanged sensitive and confidential information concerning Alpine's price reduction request and that, as illustrated by the last sentence of that email, NCC was planning, in the future, to coordinate with the applicant concerning the global price.
- 257 In the light of all the foregoing considerations, the Commission was right to consider that A's email of 31 July 2009 established to the requisite legal standard the anticompetitive nature of the contact at issue, within the meaning of the case-law referred to in paragraphs 105 to 111 above.
- 258 In the third place, the applicant disputes the geographic scope of that contact and submits that the evidence indicated that the information exchanged concerned Japan and not Europe.
- 259 In that regard, it should first of all be noted that, as can be seen from the contested decision, NCC itself acknowledged in its corporate statement that, in connection with the cartel, its European subsidiary, Europe Chemi-Con, had made sales to Alpine within the EEA. Next, the email of 31 July 2009 was sent, in copy, to three employees of Europe Chemi-Con, the European subsidiary of NCC. Lastly, as has been pointed out in paragraph 256 above, at the end of that email, A intended to coordinate with the applicant concerning the global price. Consequently, there was sufficient evidence to consider that that email, read in the light of NCC's corporate statement, concerned the EEA. Moreover, that fact is expressly apparent from the email of 14 September 2009 sent by B, one of Europe Chemi-Con's employees, which begins with the phrase 'regarding the 09 2H price negotiations with Alpine Hungary'.
- 260 In those circumstances, the Commission was fully entitled to take the view that the information exchanged during that contact had a connection with the EEA.
- 261 That finding cannot be called into question by the applicant's arguments.
- 262 First, it is necessary to reject the argument that the extract from A's email of 31 July 2009, which states that, 'going forward, [A] will try confirming with [the applicant] regarding the W/W [(global)] price', shows that the information exchanged related to Japanese domestic sales.
- 263 In that regard, it is sufficient to note that the fact that that sentence refers to future coordination between NCC and the applicant regarding the 'W/W [(global)] price' cannot, in itself, constitute evidence that the negotiations mentioned before that sentence concerned the Japanese market.
- 264 Secondly, it is necessary to reject the argument that the extract from A's email of 14 September 2009, which indicates that NCC had received a further price reduction request from Alpine, shows that the information in the email of 31 July 2009 also concerned Alpine Iwaki and not Alpine Hungary.
- 265 In that regard, it is sufficient to note that that assertion is manifestly at odds with B's email of 14 September 2009, which begins with 'regarding the 09 2H price negotiations with Alpine Hungary'. Moreover, as the Commission notes, the email from A refers to fluctuations in the 'exchange rate' and to 'forex [(foreign exchange)] corrections'. Those factors tend to suggest that the information in that exchange concerned the foreign market more than the Japanese market.
- 266 In the light of all the foregoing considerations, the applicant's claim that the information exchanged during that contact did not concern Europe must be rejected as manifestly lacking any factual basis.
- *The trilateral contact with NEC Tokin and Sanyo of 9 March 2010*
- 267 The applicant submits, in essence, that the Commission, first, demonstrated a misunderstanding of the burden of proof incumbent on it and, second, distorted the evidence.

- 268 The Commission disputes the applicant's arguments.
- 269 It is apparent from an email of 10 March 2010 sent by D from Sanyo and from Sanyo's corporate statement, reproduced, in essence, in recitals 583 and 584 of the contested decision, that NEC Tokin, Sanyo and the applicant, in connection with a trilateral contact dated 9 March 2010, exchanged information concerning their intention to increase the price of tantalum electrolytic capacitors.
- 270 In the first place, the applicant appears to be arguing that the Commission is required to show that each contact covered the EEA.
- 271 In that regard, it is sufficient to recall that, according to the case-law referred to in paragraphs 81 to 85 above, although the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the infringement was committed, 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. The existence of an anticompetitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.
- 272 In the second place, the applicant submits that the Commission distorted the evidence, in particular D's email, in concluding, in recital 585 of the contested decision, that 'there [was] nothing in the contemporaneous evidence that would imply that that contact [was] limited to Taiwan'. The applicant substantiates its claim by arguing that, first of all, it is clear from D's email that the information was exchanged, in Taiwan, between the local managers of NEC Tokin and the applicant. Next, the email refers several times to the Chinese New Year, which is a major public holiday in Taiwan, and its impact on commercial activity. Lastly, the oral statements of Panasonic and NEC Tokin confirm that the information exchanged was limited to Taiwan.
- 273 Although it is indeed apparent from that email that the information was exchanged in Taiwan, between the local managers of the two cartel participants, and that mention was made of the Chinese New Year and its commercial repercussions, those factors in no way preclude the possibility that the exchanges could have related to markets other than the Taiwanese market. In particular, it is apparent from that email that the principal manager of NEC Tokin's global sales promotion department, E, was present during that contact, which is not disputed by the applicant.
- 274 In addition, as the Commission remarks in its written pleadings, that email was addressed to, inter alia, I and F from Sanyo, who, like E, had commercial responsibilities at global level or, at the very least, commercial responsibilities which were not limited to Taiwan.
- 275 Moreover, contrary to the applicant's assertions, the oral statements of Panasonic and NEC Tokin do not confirm the interpretation that the information exchanged during that contact was limited to Taiwan. First, Panasonic's statement confirms only that that contact took place in Taiwan. Second, the information, taken from paragraph 23 of NEC Tokin's statement that, in essence, NEC Tokin Taiwan was not involved in sales in the EEA is irrelevant in the present case, since the information in D's email comes from a discussion with E, who was the principal manager of NEC Tokin's, and not NEC Tokin Taiwan's, sales promotion department. By contrast, it is apparent from paragraph 24 of that statement that NEC Tokin was sometimes responsible for sales in the EEA.
- 276 In the light of all the foregoing considerations, it is necessary to reject the applicant's claim that the information exchanged during that contact was limited to the Taiwanese market.
- *The trilateral contact with NCC and Rubycon of 31 May 2010*
- 277 The applicant submits, in essence, that the Commission cannot establish that it participated in the anticompetitive discussions concerning the EEA which took place during that contact exclusively on the basis of Rubycon's corporate statements.

- 278 The Commission disputes the applicant's arguments.
- 279 It is apparent from the minutes of the meeting drawn up by Rubycon and from its corporate statements, as well as from the applicant's reply to the Commission's request for information, reproduced, in essence, in recitals 599 to 604 of the contested decision, that, during a trilateral contact on 31 May 2010, NCC, Rubycon and the applicant exchanged information concerning the methodology used to calculate prices, the price range, and pricing. They also agreed on minimum prices to be offered to Sony for aluminium pencil capacitors. Lastly, they discussed the need to increase the price of supplies of capacitors to SSCS (Sony's purchasing service) in Hungary because of the weakness of the euro.
- 280 In the first place, the applicant submits that the Commission has not established to the requisite legal standard that it participated in those discussions.
- 281 In that regard, it should be noted that the applicant does not dispute the anticompetitive nature of the information exchanged during that contact, the intrinsic probative value of Rubycon's statements of 10 June and 16 October 2014, and the information contained in those statements. Instead, the applicant disputes the fact that the Commission may rely on those statements alone in order to establish that the applicant participated in those discussions.
- 282 In so far as the applicant asserts that Rubycon's statement of 10 June 2014 is insufficiently corroborated, since in order to corroborate that statement the Commission referred only to Rubycon's statement of 16 October 2014, that argument must be rejected, in accordance with the case-law referred to in paragraphs 97 and 98 above.
- 283 Moreover, it should be noted that, in the present case, Rubycon's statement of 16 October 2014 is in fact an explanatory document which sheds light on the meaning of the handwritten notes taken by G, one of Rubycon's two representatives during that contact. Those notes were drawn up *in tempore non suspecto*, without it being possible to consider, at the time when they were drawn up, that they might be brought to the attention of third parties not concerned by that contact by a direct witness of the discussions.
- 284 In those circumstances, the Commission was fully entitled to consider that the applicant's participation in those discussions had been established to the requisite legal standard. The applicant's reliance on the principle of the presumption of innocence must therefore be rejected.
- 285 That finding cannot be called into question by the applicant's arguments.
- 286 First, it is necessary to reject the argument that G's notes refer only to the passive participation of the applicant's representative in those discussions, so that no improper conduct can be imputed to him.
- 287 In that regard, it is sufficient to recall that, according to the case-law, the mere disclosure of commercially sensitive information between competing undertakings constitutes a prohibited practice, since it removes uncertainty as to the future conduct of a competitor and is thus capable of influencing, directly or indirectly, the strategy of the recipient of the information.
- 288 In addition, even supposing that the applicant's claim is proved, its silence, coupled with its failure publicly to distance itself from the content of the infringement or to report it to the administrative authorities, constitutes a passive mode of participation in that infringement which is capable of rendering the applicant liable (see judgment of 5 December 2006, *Westfalen Gassen Nederland v Commission*, T-303/02, EU:T:2006:374, paragraph 124 and the case-law cited).
- 289 Secondly, it is necessary to reject the argument that the applicant stated in its reply of 19 August 2014 that no discussion regarding prices took place during that contact.
- 290 It is sufficient to note, as the Commission does, that that reply, which is intended merely to mitigate the applicant's liability, cannot reduce the probative value of the documents found during the investigations

and the explanations given in relation to those documents (see, to that effect, judgment of 27 June 2012, *Coats Holdings v Commission*, T-439/07, EU:T:2012:320, paragraph 121 and the case-law cited).

291 In the second place, the applicant disputes the geographic scope of that contact. It submits that Rubycon specified in its statement of 20 March 2015 that the contacts concerning Sony between May 2010 and March 2014 had ‘no direct effect on supplies of capacitors in the EEA’.

292 However, first, although it is indeed apparent from Rubycon’s statement that the meetings that took place between May 2010 and March 2014 concerning Sony did not directly affect the supply of capacitors in the EEA, it nonetheless also specifies in that statement that it had no information as to whether the customers who had been discussed at those meetings were also customers of other participants and whether they obtained supplies from them of capacitors for the EEA. Moreover, NCC, one of the three participants in that contact, acknowledged, in its corporate statement, that, in connection with the cartel, its European subsidiary, Europe Chemi-Con, had made sales to Sony within the EEA.

293 Secondly, it should be noted that the applicant does not dispute the information, set out in recital 604 of the contested decision, that the participants also discussed, during that contact, the need to increase the price of supplies of capacitors to SSCS in Hungary by 20% because of the weakness of the euro.

294 In those circumstances, it is necessary to reject the applicant’s claim that the information exchanged during that contact did not concern Europe.

(iv) Conclusion

295 At the end of the examination set out in paragraphs 115 to 294 above, it must be held that the Commission established the applicant’s participation in a series of exchanges during which information regarding pricing and future pricing, information regarding future price reductions and the ranges for those reductions, and information regarding supply and demand, including information in relation to future supply and demand, was shared and, in some instances, price agreements were concluded, implemented and monitored. All the evidence analysed shows, to the requisite legal standard, that the applicant participated, during the exchanges at issue, in an infringement by object covering the EEA.

296 For each of the circumstances constituting that infringement, the Commission adduced evidence which is reliable and which, in a large number of cases, is directly corroborated by other evidence. The applicant’s participation in the cartel is apparent, first, from its participation in several meetings and collusive contacts and, second, from the reference to its name and its information in the various documents drawn up in close connection with those contacts. The applicant’s arguments based on an alleged distortion or ‘embellishment’ of the evidence are not well founded in the light of the analysis set out above.

297 In so far as, for certain acts constituting the infringement, the Commission relied on isolated items of evidence, which could not be corroborated directly by other evidence, it should be borne in mind that, where there is a body of consistent evidence showing participation in the cartel, there needs to be a particularly good explanation in order to show that in a particular phase of a series of meetings things occurred which were completely different from what had transpired at earlier and subsequent meetings (see, to that effect, judgment of 16 June 2011, *FMC Foret v Commission*, T-191/06, EU:T:2011:277, paragraphs 127 and 248).

298 In the light of the analysis carried out above, it must be held that the applicant has not put forward any argument capable of calling into question the evidence relied on against it by the Commission and raising doubts as to its participation in the infringement at issue. The application of the principle *in dubio pro reo*, according to which the person accused must be given the benefit of the doubt, relied on by the applicant, must therefore be rejected.

299 In the light of all those considerations, the first plea in law must be rejected as unfounded.

(c) *The second plea in law, alleging errors of law in relation to the finding of a single and continuous infringement and the applicant's liability for participation in that infringement*

- 300 By the present plea, the applicant submits that the Commission's findings are vitiated by errors both as regards the 'objective' aspect of the single and continuous infringement, namely the definition of its overall objective, and as regards the 'subjective' aspect of the infringement, namely the applicant's liability.
- 301 The plea may be divided into five parts.
- 302 In connection with the first part, the applicant submits that the Commission has not adduced evidence of the existence of a single and continuous infringement covering all sales of electrolytic capacitors to the EEA.
- 303 In connection with the second part, the applicant submits that the Commission wrongly held it liable for the bilateral and trilateral contacts which took place between the other cartel participants.
- 304 In connection with the third part, the applicant submits that the Commission wrongly held it liable for participation in a single and continuous infringement before 7 November 2003.
- 305 In connection with the fourth part, the applicant submits that the Commission wrongly held it liable for such participation after 10 November 2008.
- 306 In connection with the fifth part, the applicant submits, in the alternative, that the Commission was wrong to conclude that it had not publicly distanced itself from the infringement, whereas it withdrew from the ATC meetings on 16 February 2005, and that it had continued to participate in the infringement between 16 February 2005 and 13 December 2006.
- 307 As a preliminary point, it should be borne in mind that the concept of a single infringement covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim designed to distort competition or, yet again, in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, which are aware that they are participating in the common object) (see judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie v Commission*, T-446/05, EU:T:2010:165, paragraph 89 and the case-law cited).
- 308 According to settled case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition in the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (see judgment of 26 January 2017, *Villeroy & Boch v Commission*, C-644/13 P, EU:C:2017:59, paragraph 47 and the case-law cited).
- 309 The single objective pursued by the overall plan characterising a single and continuous infringement cannot be determined by a general reference to the distortion of competition in the market concerned by the infringement, since an impact on competition, whether it is the object or the effect of the conduct in question, constitutes an element consubstantial with any conduct covered by Article 101(1) TFEU. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of part of its meaning, since it would have the consequence that different instances of conduct which relate to a particular economic sector and are prohibited under Article 101(1) TFEU would have to be systematically characterised as constituent elements of a single infringement (see judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie v Commission*, T-446/05, EU:T:2010:165, paragraph 92 and the case-law cited).

310 Furthermore, for the purpose of characterising various instances of conduct as a single and continuous infringement, it is not necessary to ascertain whether they present a link of complementarity, in the sense that each of them 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 an overall plan having a single objective. By contrast, the condition relating to a single objective requires that it be ascertained whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the instances of conduct in fact implemented by other participating undertakings do not have an identical object or identical anticompetitive effect and, consequently, do not form part of an ‘overall plan’ as a result of their identical object distorting the normal pattern of competition within the internal market (see judgment of 26 January 2017, *Villeroy & Boch v Commission*, C-625/13 P, EU:C:2017:52, paragraph 58 and the case-law cited).

311 In the present case, the Commission considered that the various exchanges described in Section 4.3.6 of the contested decision formed part of an overall plan with a single anticompetitive aim. The aim pursued by the parties and transpiring from those exchanges was to avoid price competition and to coordinate their future conduct with regard to the sale of electrolytic capacitors, thereby reducing uncertainty on the market (recitals 730 and 731 of the contested decision).

312 That single anticompetitive aim was pursued through discussions regarding pricing, including future pricing, discussions regarding supply and demand, including future supply and demand (inter alia in relation to production volumes or increases or decreases in shipments) and, in some instances, price agreements were concluded, implemented and monitored (recitals 62 and 715 of the contested decision).

313 Although the cartel evolved over time and the multilateral meetings were held under different names (ECC meetings from 1998 to 2003, ATC meetings from 2003 to 2005, MK meetings from 2005 to 2012 and CUP meetings from 2006 to 2008), the Commission found that the aim had not changed. The infringement continued uninterrupted despite changes in the economic situation, changes in the organisational structure of some of the undertakings concerned and changes in the personnel involved in the conduct (recitals 70 to 75, 726, 732, 741 and 743 of the contested decision).

(1) The first part, relating to the lack of evidence of a single and continuous infringement covering all sales of electrolytic capacitors to the EEA

314 The applicant submits, in essence, that, because of the heterogeneous nature of capacitors and the specific nature of demand on the various geographic markets, the infringement, apart from the fact that it was not established by the Commission, could not cover all sales of electrolytic capacitors to the EEA.

315 This part may be divided into two complaints. The first complaint relates to the lack of evidence of a single and continuous infringement covering all sales of electrolytic capacitors. The second complaint relates to the lack of evidence of a single and continuous infringement covering all sales of electrolytic capacitors to the EEA.

(i) The first complaint, relating to the lack of evidence of a single and continuous infringement covering all sales of electrolytic capacitors

316 The applicant argues, as a preliminary point, that capacitors are highly diversified products, which are distinguished by a multitude of characteristics and for which there is no uniform market price, so that the infringement cannot cover all sales of electrolytic capacitors to the EEA. It submits, more specifically, that the evidence set out in recital 796 et seq. of the contested decision, on which the Commission relied in order to support its finding, is not capable of establishing to the requisite legal standard the existence of a single and continuous infringement which, taken as a whole, covered all sales of electrolytic capacitors.

317 The Commission disputes the applicant’s arguments.

- 318 As a preliminary point, it should be borne in mind that, in order to determine the products covered by a cartel, the Commission is not required to define the relevant market on the basis of economic criteria. It is the members of the cartel themselves who determine the products which are the subject of their discussions and concerted practices (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). The products covered by a cartel are determined by reference to the documentary evidence of actual anticompetitive conduct in respect of specific products (see, to that effect, judgment of 11 December 2003, *Adriatica di Navigazione v Commission*, T-61/99, EU:T:2003:335, paragraph 27).
- 319 It must also be emphasised that the Commission cannot, in that regard, rely on a presumption which is not substantiated by any evidence (see, to that effect, judgment of 28 November 2019, *ABB v Commission*, C-593/18 P, EU:C:2019:1027, paragraphs 44 and 45).
- 320 It is apparent, however, from the contested decision, and in particular from recital 736 thereof, that the Commission found, after examining all the anticompetitive exchanges and evidence relating thereto, that all the exchanges between the cartel participants covered either (i) aluminium electrolytic capacitors or tantalum electrolytic capacitors or (ii) both of those categories of electrolytic capacitors.
- 321 In recital 796 of the contested decision, the Commission, first, stated, in response to a complaint raised by the applicant during the administrative procedure and similar to the present complaint, that it was apparent from the anticompetitive exchanges that the discussions were not limited to certain subtypes of aluminium electrolytic capacitor or tantalum electrolytic capacitor.
- 322 As the Commission states in that recital, that failure to restrict the subject matter of the discussions is apparent not only from the meetings of 29 August 2002, 22 December 2006, 25 June 2008 and 20 December 2010, mentioned in the application, during which reference was made to a wide variety of aluminium electrolytic capacitors and/or tantalum electrolytic capacitors, but also from discussions relating specifically to the factors contributing to the determination of the selling price of the products, such as the increase in the cost of raw materials and fluctuations in exchange rates (see, by way of example, the meetings referred to in footnotes 1417 and 1418 to the contested decision). The content of those discussions was general and was intended to apply to all types of aluminium electrolytic capacitor or tantalum electrolytic capacitor.
- 323 Secondly, in recital 797 of the contested decision, the Commission found that the cartel participants had not introduced any limitation in their corporate statements as to the definition of the aluminium electrolytic capacitors or tantalum electrolytic capacitors covered by the cartel.
- 324 Thirdly, in recital 798 of that decision, the Commission stated that the majority of the representatives of the cartel participants were responsible for the manufacture and/or sale of aluminium electrolytic capacitors and tantalum electrolytic capacitors, and not a specific product line.
- 325 In the light of the case-law referred to in paragraphs 84, 318 and 319 above, the Commission, in the light of those findings, was right to take the view that the cartel covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors and, therefore, that the single and continuous infringement covered all those products.
- 326 That finding is not called into question by the applicant's arguments.
- 327 First, the applicant claims that the Commission in fact refers to four meetings only in order to maintain, in recital 796 of the contested decision, that the cartel covered all sales of electrolytic capacitors. It also adds that none of the exchanges mentioned in footnotes 1417 and 1418 to that recital concerned all sales of electrolytic capacitors.
- 328 However, the applicant misinterprets the contested decision, in particular recital 796 thereof. First, the Commission relies on more than four anticompetitive exchanges to support its conclusion that the cartel

covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors and not a specific capacitor subtype. Second, the Commission did not intend to demonstrate, in that recital, that the discussions during each exchange related to all sales of capacitors, but merely to substantiate its conclusion, citing by way of example the exchanges referred to in footnotes 1417 and 1418 thereto. That argument must therefore be rejected.

329 Secondly, the applicant submits that the fact that no limitation is laid down in the leniency statements as regards the products covered by the cartel is not sufficient evidence to establish that the infringement concerned all sales of electrolytic capacitors.

330 However, first, it has been pointed out in paragraph 318 above that, according to the case-law, it is the members of the cartel themselves who determine the products which are the subject of their discussions and concerted practices. Second, it is apparent from the preceding paragraphs that the Commission's conclusion is not based solely on the undertakings' leniency statements. That argument must therefore be rejected.

331 Thirdly, the applicant asserts that Annex II to the contested decision does not enable it to be established that the persons who participated in the cartel were generally responsible for all electrolytic capacitors, on the grounds, first, that that annex mentions only those persons' job titles, without providing details of their exact responsibilities, and, second, that the exchanges took place in Japan between Japanese employees, who were generally not responsible for sales to Europe.

332 However, it is sufficient to note that the fact that the details of the responsibilities of the persons concerned were not known does not preclude them from being able to exercise responsibilities in relation to all the goods covered, which, moreover, is not disputed by the applicant. Second, the fact that those persons were not, in general, responsible for sales to Europe does not preclude them from being responsible for occasional sales to Europe. In any event, it should be borne in mind that the persons mentioned on that list were the representatives of the cartel participants, so that they necessarily had responsibilities relating to the goods in question. That argument must therefore be rejected.

333 In the light of all the foregoing considerations, the present complaint must be rejected.

(ii) The second complaint, relating to a lack of evidence of a single and continuous infringement covering all sales of electrolytic capacitors to the EEA

334 The applicant submits that, as is apparent from Sections 3.1.18 and 3.1.20 of Annex D to its reply to the statement of objections, the discussions relating to customers, if they took place at all, concerned almost exclusively Asian undertakings and products sold mainly to Japan or on the Asian market.

335 The Commission disputes the applicant's arguments.

336 By that complaint, the applicant reasserts, in essence, that there was no link between the discussions which took place during the various exchanges and the EEA. It maintains in that regard, first, that the discussions concerned almost exclusively Japan or the Asian market, secondly, that it had not made any sales in the EEA to the customers who were the subject of those discussions, thirdly, that most of its customers in the EEA had never been mentioned during those exchanges and, fourthly, that those exchanges had taken place in Japan, between persons principally exercising responsibilities in respect of the Asian market.

337 It should be noted that the arguments put forward by the applicant in connection with that complaint are no different from those put forward in connection with the first plea in law, in which it has been concluded that the Commission was fully entitled to consider that, although the meetings and contacts took place in Japan, they either had a global reach, with the result that they included the EEA, or directly concerned the EEA.

- 338 In those circumstances, it must be concluded that the Commission did not err in finding that the single and continuous infringement covered the EEA.
- 339 Moreover, in the first place, it is apparent from the examination of paragraphs 115 to 294 above that, first, the cartel participants had exchanged information concerning customers in the EEA or customers with manufacturing plants in the EEA. Secondly, the cartel participants had coordinated their commercial policy, without geographic restrictions, depending on fluctuations in currency exchange rates, including the euro, and increases in the price of raw materials. Thirdly, the majority of the representatives of the cartel participants had commercial responsibilities globally, including in the EEA. Fourthly, none of the six leniency applicants had introduced a geographical limitation in its statement, which, moreover, is not disputed by the applicant. Fifthly, the cartel participants admitted in their statements that they had sold aluminium electrolytic capacitors and tantalum electrolytic capacitors in the EEA.
- 340 In the second place, in view of the global reach of the cartel and the fact that it was not limited to particular customers, as is apparent from the examination of paragraphs 115 to 294 above, it is of little importance that the evidence included references to customers to whom the applicant had not made any sales in the EEA.
- 341 In those circumstances, it is necessary to reject the applicant's claim that the Commission has not established to the requisite legal standard that the single and continuous infringement covered the EEA.
- 342 The present complaint must therefore be rejected, and, consequently, the first part of the present plea must be rejected in its entirety.

(2) The second part, relating to the applicant's lack of liability for the bilateral and trilateral contacts which took place between the other cartel participants

- 343 In the alternative, should the Court confirm the existence of a single and continuous infringement, the applicant submits that the Commission was wrong to hold it liable for the bilateral and trilateral contacts which took place between the other cartel participants following the ATC meeting of 16 February 2005 and following the CUP meeting of 10 November 2008. To that end, the Commission, notwithstanding the case-law, relied only on indirect evidence.
- 344 The Commission disputes the applicant's arguments.
- 345 As a preliminary point, it should be recalled that the Commission concluded, in recital 744 of the contested decision, that the applicant had participated, between 26 June 1998 and 31 May 2010, in 52 multilateral meetings and 6 bilateral or trilateral contacts. In recital 760 of that decision, the Commission found that the evidence showed that the applicant had directly participated in the ECC, ATC and CUP multilateral meetings and in the bilateral and trilateral contacts. Consequently, the Commission considered that, as regards the bilateral and trilateral contacts which took place between the other cartel participants following the ATC meeting of 16 February 2005 and following the CUP meeting of 10 November 2008, the applicant was aware of the offending conduct planned or put into effect by the other participants in pursuit of the same objectives or that it could reasonably have foreseen that conduct and was prepared to take the risk.
- 346 By its arguments, the applicant disputes, in essence, that conclusion.

- 347 In that regard, it should be borne in mind that, first, the agreements and concerted practices referred to in Article 101(1) TFEU necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. However, the mere fact that each undertaking takes part in the infringement in ways particular to it does not suffice to exclude its responsibility for the entire infringement, including conduct put into effect by other participating

undertakings but sharing the same anticompetitive object or effect (judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraphs 79 and 80).

- 348 Secondly, an undertaking which has participated in a single and complex infringement by its own conduct, which fell within 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 thus be responsible also in respect of 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. An undertaking may thus have participated directly in all the forms of anticompetitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole. On the other hand, if an undertaking has directly taken part in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk (see judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraphs 118 to 120 and the case-law cited).
- 349 Thirdly, such a conclusion is not contrary to the principle that responsibility for such infringements is personal in nature. It fits in with a widespread conception in the legal orders of the Member States concerning the attribution of responsibility for infringements committed by several perpetrators according to their participation in the infringement as a whole, which is not regarded in those legal systems as contrary to the personal nature of responsibility (judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 84).
- 350 In the present case, in the contested decision, the Commission made the following findings. First, the multilateral meetings and the bilateral or trilateral contacts formed part of an overall plan with a single anticompetitive aim. Secondly, the multilateral meetings constituted a platform for the parties to the cartel for the duration of the cartel. Thirdly, the bilateral or trilateral contacts complemented the multilateral meetings. Fourthly, the same persons participated in the bilateral or trilateral contacts and the multilateral meetings. Fifthly, because of their participation in the multilateral meetings, the parties to the cartel knew who the other cartel participants were and, accordingly, who they could contact if, for example, they wished to discuss issues relating to a specific customer. Sixthly, all the parties to the cartel had participated in the bilateral or trilateral contacts.
- 351 Moreover, in its written pleadings, the applicant does not dispute either those findings of the Commission or the fact that it participated in numerous multilateral meetings and bilateral and trilateral contacts.

352 Consequently, although, in view of the bilateral or trilateral nature of the contacts in which it had not participated, the applicant might not have been aware of all the details of those contacts, nevertheless it could not have been unaware of them or, at least, failed to foresee them. Because it had itself participated in such contacts, it was not unaware of the fact that the scope of the cartel extended beyond the multilateral meetings and also included the bilateral and trilateral contacts. The Commission was therefore fully entitled to consider that the applicant was aware or should have been aware of the existence of the bilateral or trilateral contacts which took place between the other cartel participants following the ATC meeting of 16 February 2005 and following the CUP meeting of 10 November 2008 and to hold the applicant liable for those contacts.

353 That finding cannot be called into question by the applicant's arguments.

354 First, it is necessary to reject the argument that the applicant's liability was established only on the basis of the multilateral meetings, which played a 'platform' role.

355 As has been observed in paragraph 345 above, the applicant's liability was established on the basis of a body of precise and consistent evidence, which certainly includes the multilateral meetings. It is apparent from recital 760 of the contested decision that the applicant was held liable on the ground that it had directly participated, first, in the multilateral meetings and, second, in the bilateral and trilateral contacts.

356 Secondly, it is necessary to reject the argument that the Commission infringed the applicant's rights of defence by suggesting, in recital 748 of the contested decision, that the CUP meetings had also served as a 'platform' facilitating the bilateral and trilateral contacts, even though, in paragraph 172 of the statement of objections, it had considered that no bilateral or trilateral contact had followed those meetings.

357 By that argument, the applicant appears to claim, in essence, that the imputation of liability for the bilateral and trilateral contacts was based solely on its participation in the CUP meetings. However, as has been observed in paragraph 345 above, the imputation of liability for bilateral or trilateral contacts is not based solely on its participation in the CUP meetings, but on the fact that it had directly participated in the multilateral meetings, on the one hand, and in the bilateral and trilateral contacts, on the other.

358 Thirdly, it is necessary to reject the argument that the contested decision does not identify any bilateral or trilateral contact in which the applicant participated at the CUP meetings, with the result that the Commission could not conclude that it was aware of the fact that the CUP meetings also included bilateral or trilateral meetings between the other participants.

359 That argument has no bearing on the finding that the applicant could not, given its participation in the bilateral and trilateral contacts, be unaware or fail to foresee that the scope of the cartel extended beyond the CUP meetings and also included the bilateral and trilateral contacts.

360 On the basis of all the foregoing considerations, the second part of the present plea must be rejected.

(3) The third part, relating to the lack of participation in a single and continuous infringement before 7 November 2003

361 The applicant notes, as a preliminary point, that, according to the case-law, it is for the Commission to adduce evidence of facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two specific dates. The applicant submits that, even if the Court were to uphold the Commission's findings in relation to the meetings held before 7 November 2003, their classification as a single and continuous infringement cannot be accepted in the light of the significant delays between some of those meetings, in particular between 18 December 1998 and 29 October 1999 and between 22 November 2000 and 19 September 2001. Moreover, the reliance, in paragraph 186 of the defence, on meetings that are not included in the contested decision is inadmissible.

362 The Commission disputes the applicant's arguments.

- 363 In that regard, it should be borne in mind that, depending on the circumstances, a single infringement may be continuous or repeated. Although the notion of a single infringement covers a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition and also individual infringements linked to one another by the same object and the same undertakings, the way in which the infringement was committed determines whether it may be categorised as a single, continuing infringement or a single, repeated infringement (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraphs 216 and 217 and the case-law cited).
- 364 With regard to a continuous infringement, the concept of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indication that the infringement was interrupted so far as concerns that undertaking. In that case, it will be able to impose a fine in respect of the whole of the infringement period, including the period in respect of which it does not have evidence of the participation of the undertaking concerned (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 218 and the case-law cited).
- 365 However, the principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 219 and the case-law cited).
- 366 Although the period separating two manifestations of infringing conduct is a relevant criterion in order to establish the continuous nature of an infringement, the fact remains that the question whether or not that period is long enough to constitute an interruption of the infringement cannot be examined in the abstract. On the contrary, it needs to be assessed in the context of the functioning of the cartel in question (see judgment of 10 November 2017, *Icap and Others v Commission*, T-180/15, EU:T:2017:795, paragraph 220 and the case-law cited).
- 367 In the present case, first, the Commission stated, in recital 60 of the contested decision, that the cartel participants had coordinated their conduct – from 26 June 1998 until 23 April 2012 – over a period of almost 14 years. In recital 744 of the contested decision, the Commission stated that the applicant had participated in the cartel – from 26 June 1998 until 31 May 2010 – over a period of almost 12 years.
- 368 Secondly, as can be seen from recitals 108 to 209 of the contested decision, the Commission observed that the applicant had participated in more than 21 multilateral meetings between 26 June 1998 and 7 November 2003.
- 369 Thirdly, it should be noted that the anticompetitive meetings and contacts formed part of an overall plan pursuing a single economic aim.
- 370 Fourthly, there is nothing in the file to indicate that, during the period in question, the applicant distanced itself from the cartel or withdrew from it or interrupted its participation.
- 371 In those circumstances, the 10-month gap between the meetings of 18 December 1998 and 29 October 1999, on the one hand, and between the meetings of 22 November 2000 and 19 September 2001, on the other, cannot call into question the continuous nature of the infringement and the applicant's participation therein. Since the entire cartel lasted almost 14 years and the applicant's participation therein lasted almost 12 years, the 10-month period between those meetings cannot be regarded as constituting an interruption of the infringement.

- 372 Consequently, the Commission did not err in finding that the cartel as a whole and the applicant's participation therein were continuous, including for the period prior to 7 November 2003.
- 373 On the basis of all the foregoing considerations, the third part of the present plea must be rejected, without there being any need to examine further the objection of inadmissibility raised by the applicant.
- (4) *The fourth part, relating to a lack of participation in a single and continuous infringement after 10 November 2008*
- 374 This part may be divided into two complaints. The first complaint relates to the applicant's liability being triggered for the period between 10 November 2008 and 31 May 2010. The second complaint relates to the Commission being time-barred from imposing penalties on the applicant.
- (i) *The first complaint, relating to the applicant's liability for the period between 10 November 2008 and 31 May 2010*
- 375 The applicant submits that, in the light of the evidence and the applicable law, it could not have been held liable beyond 10 November 2008, the date of the last CUP meeting.
- 376 The Commission disputes the applicant's arguments.
- 377 First, the applicant again submits that the Commission has not established to the requisite legal standard the existence of the five bilateral or trilateral contacts in which it is supposed to have participated after 10 November 2008 and their connection with the EEA.
- 378 It should be noted that that line of argument relied on by the applicant is no different from that put forward in connection with the first plea in law. It has been concluded, in paragraphs 223 to 294 above, that the Commission had established to the requisite legal standard, first, the existence of those contacts and the applicant's participation therein and, second, either that they had a global reach, so that they included the EEA, or that they directly concerned the EEA. That line of argument must, therefore, be rejected.
- 379 Secondly, the applicant again asserts that there is no evidence to show that it was aware of the bilateral or trilateral contacts between the other cartel participants during that period or that it could reasonably have foreseen them.
- 380 It should also be noted that that line of argument relied on by the applicant is no different from that put forward in connection with the second part of the present plea. It has been concluded, in paragraphs 343 to 360 above, that the Commission had rightly considered that the applicant was or could have been aware of the existence of such contacts. That line of argument must, therefore, be rejected.
- 381 Thirdly, the applicant submits that the evidence clearly shows that, following the CUP meeting of 10 November 2008, the participants in the MK meetings did not have information regarding its marketing strategy and viewed it as an external competitor and, thus, as no longer forming part of the cartel.
- 382 In that regard, it should be noted, as the Commission does, that the bilateral or trilateral contacts in which the applicant participated following the CUP meeting of 10 November 2008 took place with the participation of four of the nine cartel participants (NCC, NEC Tokin, Sanyo and Rubycon). It should also be borne in mind that, according to settled case-law, in a situation such as that at issue in the present case, the only way in which it can be concluded that an undertaking has definitively ceased to belong to the cartel is if it has publicly distanced itself from the content of the cartel (see judgment of 12 July 2018, *Silec Cable and General Cable v Commission*, T-438/14, not published, EU:T:2018:447, paragraph 150 and the case-law cited).
- 383 It is for the undertaking to prove its firm and unambiguous disapproval of the cartel by distancing itself from it publicly and, given that it is a means of excluding liability, that notion must be interpreted

narrowly. A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery (see judgment of 12 July 2018, *Silec Cable and General Cable v Commission*, T-438/14, not published, EU:T:2018:447, paragraph 151 and the case-law cited).

384 In the present case, the applicant has not pleaded, and a fortiori demonstrated, its firm and unambiguous disapproval of the cartel by distancing itself from it publicly after 10 November 2008. Thus, by participating in those contacts and by not publicly distancing itself from the cartel after 10 November 2008, the applicant demonstrated its continued commitment to the cartel.

385 Moreover, none of the evidence put forward by the applicant is capable of demonstrating that, following the CUP meeting of 10 November 2008, it abstained from pursuing the anticompetitive conduct concerned. It is not apparent from the evidence relied on that the applicant adopted competitive conduct on the market or, at the very least, that it clearly and substantially refused to fulfil its obligations relating to the implementation of the cartel to the point of disrupting its operation. In particular, the fact that the applicant may have been less willing to share information regarding its marketing strategy or that it may have engaged in more aggressive competition does not demonstrate conduct on the market capable of frustrating the anticompetitive effects of the infringement found.

386 The argument must therefore be rejected.

387 It follows from all the foregoing considerations that the Commission did not err in holding the applicant liable for its participation in the cartel for the period between 10 November 2008 and 31 May 2010.

388 The present complaint must therefore be rejected.

(ii) The second complaint, relating to the time-barring of the Commission

389 The applicant submits that, first, in so far as the Commission's findings concerning its participation in the infringement after 10 November 2008 are not established to the requisite legal standard, the Commission should have considered that its participation had ceased on 10 November 2008. Secondly, the first action taken by the Commission, within the meaning of Article 25(3) of Regulation No 1/2003, was the request for information of 28 March 2014. The applicant's participation in the infringement had therefore ceased more than five years prior to that request for information. The Commission is therefore time-barred from imposing penalties on the applicant. The granting of a marker to Panasonic on 9 October 2013 was not an action which interrupted the limitation period. That action cannot be compared to the granting of conditional immunity.

390 The Commission disputes the applicant's arguments.

391 In that regard, it should be borne in mind that, according to Article 25(1) and (2) of Regulation No 1/2003, the limitation period in respect of cartels, where they constitute continuous infringements, is five years from the day on which the infringement ceases.

392 Furthermore, according to Article 25(3) of that regulation, any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement interrupts the limitation period for the imposition of fines.

393 Having regard, first, to the conclusion set out in paragraph 387 above that the Commission did not err in holding the applicant liable for its participation in the cartel in respect of the period between 10 November 2008 and 31 May 2010, and, second, to the request for information of 28 March 2014 sent by the Commission to the applicant, which constitutes an action interrupting the limitation period, in accordance with Article 25(3) of Regulation No 1/2003, the second complaint must be rejected and, accordingly, the fourth part of the present plea must be rejected in its entirety.

(5) *The fifth part, relating to the lack of public distancing from the cartel and the lack of participation in the infringement between 16 February 2005 and 13 December 2006*

394 This part may be divided into three complaints. The first complaint relates to the applicant publicly distancing itself from the cartel. The second complaint relates to the applicant's participation in the cartel between 16 February 2005 and 13 December 2006. The third complaint relates to the fact of bringing the CUP meetings within the scope of the single and continuous infringement.

(i) *The first complaint, relating to public distancing*

395 The applicant submits, in essence, that the Commission should have considered that, by withdrawing from the ATC meetings, the applicant had publicly distanced itself from the cartel. It is apparent from the evidence that the applicant's withdrawal was clearly communicated to the other participants, who understood that that withdrawal was motivated by concerns relating to compliance with the rules governing cartels. The first MK meetings clearly show that the other cartel participants regarded it as an external competitor who did not subscribe to and did not comply with the decisions adopted at those meetings.

396 The Commission disputes the applicant's arguments.

397 In that regard, according to settled case-law, in a situation such as that at issue in the present case, the only way in which it can be concluded that an undertaking has definitively ceased to belong to the cartel is if it has publicly distanced itself from the content of the cartel (see judgment of 12 July 2018, *Silec Cable and General Cable v Commission*, T-438/14, not published, EU:T:2018:447, paragraph 150 and the case-law cited).

398 It is for the undertaking to prove its firm and unambiguous disapproval of the cartel by distancing itself from it publicly and, given that it is a means of excluding liability, that notion must be interpreted narrowly. A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery (see judgment of 12 July 2018, *Silec Cable and General Cable v Commission*, T-438/14, not published, EU:T:2018:447, paragraph 151 and the case-law cited).

399 It is the understanding which the other members of a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether it sought to distance itself from the unlawful agreement (see judgment of 12 July 2018, *Hitachi Metals v Commission*, T-448/14, not published, EU:T:2018:442, paragraph 132 and the case-law cited).

400 It must be held in the present case that the evidence submitted by the applicant in support of its claim does not show that it clearly and publicly distanced itself from the cartel and from its members.

401 First, in connection with the examination of the first plea and the other parts of the present plea, it has been found that, after its withdrawal from the ATC meetings on 16 February 2005, the applicant continued to participate in numerous other anticompetitive meetings and contacts. In those circumstances, the fact that the applicant ceased to attend the ATC meetings, even if this was because of alleged concerns as to the compliance of those meetings with EU law, is not capable of demonstrating that it clearly and publicly distanced itself from the cartel as a whole and from its members.

402 Secondly, that distancing cannot be established by the claim that the first MK meetings show that the participants in those meetings regarded the applicant as unconnected with the cartel. It is not apparent from the evidence relied on by the applicant that it adopted competitive conduct on the market demonstrating its withdrawal from the cartel or, at the very least, that it had clearly and publicly distanced itself from that cartel. On the contrary, it should be borne in mind that the applicant attended the CUP meetings, which were considered to be 'shadow' meetings held alongside the MK meetings and which brought together almost the same participants.

403 Moreover, as has already been observed, in essence, in paragraph 385 above, even if it were accepted that the applicant had adopted 'aggressive' commercial conduct on the market, such conduct would not show that it had adopted conduct capable of frustrating the anticompetitive effects of the cartel, particularly since it continued to participate in contacts whose anticompetitive object has been established.

404 Thirdly, it should be noted, as the Commission does, that the fact that, in March 2009, the participants in the MK meetings invited H, one of the applicant's representatives, to join them directly contradicts the claim that the applicant clearly and publicly distanced itself from the cartel and the claim that the other participants understood this. In that regard, it should be noted that the applicant's assertion that H was invited as an individual is hardly plausible, since it is apparent from the contested decision that, until May 2010, H represented the applicant during several other anticompetitive contacts.

405 Fourthly, it must be pointed out that the applicant did not inform the administrative authorities of the existence of the meetings from which it claims to have withdrawn, thus encouraging the continuation of the infringement and compromising its discovery.

406 It follows from the foregoing that the evidence relied on by the applicant may at most suggest that it attempted to avoid the risks associated with its participation in the cartel, but it does not show that the applicant distanced itself publicly and clearly from that cartel, as required by the case-law.

407 The applicant's complaint must therefore be rejected, without there being any need to examine the objection of inadmissibility raised by the applicant in respect of Annexes B2, B3, B9(a) to (g) and B10 to B13.

(ii) The second complaint, relating to the applicant's participation in the cartel between 16 February 2005 and 13 December 2006

408 The applicant submits, in essence, that the Commission wrongly considered that its participation in the cartel continued beyond 16 February 2005 on the ground that it had participated in a bilateral contact with NEC Tokin in April/May 2005 and in the CUP meeting of 4 July 2006.

409 The Commission disputes the applicant's arguments.

410 It can be seen from paragraphs 193 to 221 above that the applicant participated in a bilateral contact with NEC Tokin in April/May 2005 and in a CUP meeting on 4 July 2006 along with other cartel participants, during which anticompetitive information concerning Europe was exchanged. Consequently, those factors confirm that its participation in the cartel continued between 16 February 2005 and 13 December 2006.

411 That complaint must therefore be rejected, without there being any need to examine further the arguments put forward by the applicant.

(iii) The third complaint, relating to the fact of bringing the CUP meetings within the scope of the single and continuous infringement

412 The applicant submits, in essence, that the ATC meetings, from which it distanced itself, and the CUP meetings cannot be considered to form part of the same single and continuous infringement. First, those meetings are characterised by different objectives. The aim of the CUP meetings was to exchange information regarding the situation of certain customers, whereas the ATC meetings were established to facilitate the voluntary exchange of statistical data. Secondly, the CUP meetings concerned only aluminium electrolytic capacitors whereas the ATC meetings concerned aluminium electrolytic capacitors and tantalum electrolytic capacitors. Moreover, the representatives of the participants in those meetings are different. Thirdly, with the exception of information regarding Asian customers, the CUP meetings were mainly concerned with the Japanese market, whereas the ATC meetings concerned the foreign market and the Japanese market.

- 413 The Commission disputes the applicant's arguments.
- 414 As a preliminary point, it should be noted that the applicant's line of argument directly contradicts the arguments which it put forward in connection with the first complaint in the fourth part of this plea. In paragraph 97 of the application, the applicant submits that, 'based on a correct interpretation of the evidence and of the law, Nichicon's participation in a single and continuous infringement of EU competition law ended at the latest on 10 November 2008 (the date of the last CUP meeting)', an argument which it repeats in similar terms in paragraph 101 of the application.
- 415 It should once again be specified that, as is apparent from the case-law cited in paragraph 308 above, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision.
- 416 In that regard, as has been pointed out in paragraphs 311 to 313 above, in the contested decision, the Commission found that, first, all the meetings and contacts at issue formed part of an overall plan pursuing a single anticompetitive aim, namely to avoid price competition and to coordinate the future conduct of the participants with regard to the sale of electrolytic capacitors, thereby reducing uncertainty on the market. Secondly, as has been pointed out in paragraphs 12 and 13 above, the cartel operated on the basis of multilateral meetings, including the ECC, ATC, MK and CUP meetings, and ad hoc bilateral or trilateral contacts. During those contacts, the participants exchanged, inter alia, information regarding future pricing and information regarding future supply and demand for the products at issue. Thirdly, the anticompetitive exchanges, described in Section 4.3.6 of the contested decision, were complementary. In detail, the Commission noted that the same products were discussed during the contacts, that those contacts showed a coherent pattern, that they were global in nature and, to a large extent, that the same representatives of the cartel participants (or their successors, as the case may be) took part in those contacts, and that the cartel participants remained mainly the same for the duration of the cartel, with the same members participating in the cartel over a considerable period.
- 417 The applicant criticises the Commission for having brought the CUP meetings within the scope of the single and continuous infringement, even though they did not form part of the same overall plan as the other meetings, and in particular the ATC meetings from which it had distanced itself.
- 418 In that regard, first, the applicant does not dispute that the CUP meetings complemented the MK meetings and that they were regarded by the cartel participants as the 'shadow meetings' of the MK meetings, since they were generally held a week after those meetings and brought together most of their participants. Nor does it dispute that the CUP meetings were held in order to provide, with regard to pricing, a coordinated response to market developments linked, on the one hand, to the entry into force of Directive 2002/95 and, on the other, to the increase in the cost of raw materials and to currency fluctuations.
- 419 Secondly, it has been concluded, in connection with the first complaint in the first part of the present plea, that the Commission had not erred in finding that the discussions during the various anticompetitive exchanges concerned either (i) aluminium electrolytic capacitors or tantalum electrolytic capacitors or (ii) both. Consequently, the Commission had rightly considered that the single and continuous infringement covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors.
- 420 Thirdly, it has been concluded in connection with the first plea in law that the Commission had been fully entitled to find that, although the anticompetitive exchanges took place in Japan, they either had a global reach, with the result that they included the EEA, or directly concerned the EEA. In those circumstances, it has been concluded, in connection with the second complaint in the first part of the present plea, that the Commission had not erred in finding that the single and continuous infringement covered the EEA.
- 421 It follows from the foregoing that, contrary to the applicant's assertions, there is no evidence, characterising the various forms of conduct forming part of the infringement, capable of indicating that the

CUP meetings did not share the same object and did not form part of the same overall plan as the other meetings.

422 That conclusion cannot be called into question by the applicant's other arguments.

423 First, it is necessary to reject the argument that the description of the 'overall plan' is too vague and it is necessary, in order to establish an identical objective, to give a more precise definition, which takes account, in particular, of the mechanism by which the participants intended to restrict competition.

424 In that regard, first, as the Commission remarks, the cooperation mechanism may indeed be a factor in determining whether different meetings form part of the same overall plan, but this does not mean that the Commission is required to define the mechanism by which the parties attempted to achieve the common objective.

425 Second, as has been pointed out in paragraph 85 above, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, in so far as 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. It would be excessive 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 were able to base its argument on the vagueness of the information produced with regard to the operation of an illegal agreement in circumstances in which the existence and anticompetitive purpose of the agreement had nonetheless been sufficiently established.

426 Secondly, it is necessary to reject the argument that it is not apparent from Annex II to the contested decision that the participants in the CUP meetings and the ATC meetings were represented by the same individuals.

427 In that regard, it is sufficient to note that, in recital 791 of the contested decision, the Commission did not state that all the participants in the CUP meetings and the ATC meetings were represented by the same individuals. The Commission merely stated in that recital that the same representatives had participated in numerous anticompetitive meetings. As regards the ATC meetings and the CUP meetings, the Commission found that at least three participants were represented by the same individuals at those meetings.

428 In any event, the fact that not all the participants in the CUP meetings and the ATC meetings were represented by the same individuals at those meetings is not capable of calling into question the Commission's conclusion that the same representatives participated in numerous anticompetitive meetings.

429 In the light of those considerations, the present complaint must be rejected.

430 On the basis of all the foregoing considerations, the fifth part of the present plea must be rejected.

431 The second plea in law must therefore be rejected.

(d) The third plea in law, alleging that the Commission lacked jurisdiction

432 The applicant submits, in essence, that, in accordance with the case-law, the Commission was required to show that, first, the discussions covered the EEA and, second, the products concerned had been purchased by customers established in the EEA. Consequently, at the very least as regards the exchanges for which there is no relevant link to the EEA, the Commission did not, in any event, have jurisdiction.

433 The Commission disputes the applicant's arguments.

434 In that regard, it follows from the case-law that, when undertakings which are established outside the EEA, but which produce goods that are sold within the EEA to third parties, collude on the prices they charge to their customers in the EEA and put that collusion into effect by selling at prices which are

actually coordinated, they are taking part in collusion which has the object and effect of restricting competition within the internal market within the meaning of Article 101 TFEU and which the Commission has territorial jurisdiction to proceed against (see judgment of 9 July 2015, *InnoLux v Commission*, C-231/14 P, EU:C:2015:451, paragraph 72 and the case-law cited).

- 435 An infringement of Article 101 TFEU consists of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. 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. What counts is therefore the place where it is implemented. Moreover, in determining whether that place is in the EEA, it is immaterial whether or not the participants in the cartel had recourse to subsidiaries, agents, sub-agents, or branches within the EEA in order to make their contacts with purchasers established there (see judgment of 9 September 2015, *LG Electronics v Commission*, T-91/13, not published, EU:T:2015:609, paragraph 147 and the case-law cited).
- 436 Where the condition relating to implementation is satisfied, the Commission's jurisdiction to apply the EU competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law (see judgment of 9 September 2015, *LG Electronics v Commission*, T-91/13, not published, EU:T:2015:609, paragraph 148 and the case-law cited).
- 437 Moreover, that criterion of the implementation of a cartel as a factor linking the latter to EU territory is satisfied by mere sale within the European Union of the product that is the subject of the cartel, irrespective of the location of the sources of supply and the production plants (see judgment of 9 September 2015, *LG Electronics v Commission*, T-91/13, not published, EU:T:2015:609, paragraph 149 and the case-law cited).
- 438 In the present case, it has been concluded in connection with the examination of the first plea in law that the Commission had been fully entitled to consider that, although the anticompetitive exchanges took place in Japan, the latter either had a global reach, so that they included the EEA, or directly concerned the EEA.
- 439 It has also been concluded in connection with the second plea in law that the Commission had been fully entitled to find that the anticompetitive exchanges constituted a single and continuous infringement covering all sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors in the EEA.
- 440 It follows from all of the foregoing that the Commission was fully entitled to find that it had jurisdiction in the present case, for the purpose of applying Article 101 TFEU and Article 53 of the EEA Agreement.
- 441 The third plea in law must therefore be rejected.

(e) *The fourth plea in law, alleging manifest errors of assessment in the determination of the fine*

- 442 By the present plea, the applicant submits that, by imposing a fine of EUR 72 901 000 on it, the Commission infringed the principles of proportionality, *ne bis in idem* and equal treatment and failed to fulfil its obligation to state reasons.
- 443 This plea is divided into two parts.
- 444 In connection with the first part, the applicant submits, in essence, that the Commission infringed the principle of proportionality by taking as a basis, for the calculation of the fine, the total value of sales of electrolytic capacitors in the EEA during the last business year in which the applicant was found to have participated in the infringement.
- 445 In connection with the second part, the applicant submits, in essence, that the Commission failed to take proper account of the mitigating circumstances surrounding the infringement for the purpose of determining the reduction of the fine granted to it.

(1) *The first part, relating to the incorrect calculation of the amount of the fine*

446 This part may be divided into three complaints. The first complaint relates to the incorrect use of the total value of sales invoiced in the EEA for the purpose of calculating the amount of the fine. The second complaint relates to the determination of the multiplier to be taken into account for the purpose of assessing the gravity of the infringement. The third complaint relates to the determination of the additional amount to be taken into account.

(i) *The first complaint, relating to the incorrect use of the total value of sales invoiced in the EEA*

447 The applicant submits, in essence, that the Commission infringed the principle of proportionality by taking as the basis for the calculation of the amount of the fine the total value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced during the last business year of its participation in the cartel.

448 The Commission disputes the applicant's arguments.

449 In that regard, it must first of all be borne in mind that, pursuant to Article 23(2)(a) of Regulation No 1/2003, the Commission may, by decision, impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 TFEU.

450 Article 23(3) of Regulation No 1/2003 provides that, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.

451 Point 13 of the 2006 Guidelines provides that, 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly ... relates in the relevant geographic area within the EEA' and that, to that end, it 'will normally take the sales made by the undertaking during the last full business year of its participation in the infringement'.

452 Next, it should be borne in mind that the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the 2006 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Regulation No 1/2003 (see judgment of 9 September 2015, *LG Electronics v Commission*, T-91/13, not published, EU:T:2015:609, paragraph 158 and the case-law cited).

453 That discretion is, however, limited. In adopting such rules of conduct and announcing, by publishing them, that it will henceforth apply them to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules at the risk of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see judgment of 12 December 2012, *Ecka Granulate and non ferrum Metallpulver v Commission*, T-400/09, not published, EU:T:2012:675, paragraph 40 and the case-law cited).

454 In particular, it should be borne in mind that, according to the case-law, the principle of equal treatment means that, when the amount of the fine is determined, the Commission cannot, by the application of different methods of calculation, discriminate between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see judgment of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraph 79 and the case-law cited).

455 Thus, although they do not constitute the legal basis of the decision by which the Commission establishes an infringement and imposes a fine, the Guidelines on the method of setting fines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by that decision and, consequently, ensure legal certainty on the part of the undertakings (see judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 108 and the case-law cited).

- 456 Lastly, it should be borne in mind that the principle of proportionality requires that the measures adopted by the institutions must not exceed what is appropriate and necessary for attaining the objective pursued. In the context of calculating fines, the gravity of infringements has to be determined by reference to numerous factors and it is important not to confer on one or other of those factors an importance which is disproportionate in relation to other factors. In that context, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (see judgment of 15 July 2015, *Fapricela v Commission*, T-398/10, EU:T:2015:498, paragraph 257 and the case-law cited).
- 457 It is not disputed in the present case that, in recitals 987 to 991 of the contested decision, the Commission used as a basis for setting the fines the total value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced in the EEA during the last full business year of participation in the infringement. In so doing, the Commission complied with point 13 of the 2006 Guidelines, the content of which is set out in paragraph 451 above.
- 458 As the Court of Justice has already held, point 13 of the 2006 Guidelines pursues the objective of adopting, as the starting point for the setting of the fine imposed on an undertaking, an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it. Consequently, while the concept of the value of sales referred to in point 13 of those guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not fall within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel. Such a limitation would, in addition, have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking, since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel in question. Such a reward for secrecy would also adversely affect the objective of effective investigation and sanctioning of infringements of Article 101 TFEU and, therefore, cannot be permitted (see judgment of 23 April 2015, *LG Display and LG Display Taiwan v Commission*, C-227/14 P, EU:C:2015:258, paragraphs 53 and 54 and the case-law cited).
- 459 Thus, the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market, while the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (see judgment of 28 June 2016, *Portugal Telecom v Commission*, T-208/13, EU:T:2016:368, paragraph 236 and the case-law cited).
- 460 In addition, the Commission's margin of discretion when calculating the amount of the fine allows it, under normal circumstances, to take into account the last year of participation in the infringement as the reference period. Such a general approach is justified, since that margin of discretion allows the Commission to disregard any fluctuation in the value of sales during the years of the infringement, and since an increase in the value of sales may be the result of the cartel itself (see, to that effect, judgment of 11 July 2014, *Esso and Others v Commission*, T-540/08, EU:T:2014:630, paragraph 111).
- 461 Moreover, as has been pointed out in paragraph 453 above, in so far as the 2006 Guidelines constitute a self-imposed limitation on its margin of discretion, the Commission may not depart from them in an individual case without giving reasons.
- 462 In the present case, there are no special circumstances that would justify the Commission derogating from the rule of the last full business year of participation in the infringement, which the Commission itself laid down in point 13 of the 2006 Guidelines.

- 463 Consequently, contrary to the applicant's assertions, the Commission did not infringe the principle of proportionality by taking as the basis for the calculation of the fine the total value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors in the EEA during the last year of its participation in the cartel.
- 464 That finding cannot be called into question by the applicant's arguments.
- 465 First, it is necessary to reject the argument that any calculation based on the total value of sales satisfies the principle of proportionality only for the periods in respect of which the evidence shows that the cartel covered all product lines and customers.
- 466 Indeed, it has been pointed out in paragraph 458 above that, while the concept of the 'value of sales' cannot extend to encompassing sales which do not fall within the scope of the infringement, it cannot be restricted only to the value of sales in respect of which it is established that they were actually affected by that infringement. In the light of the objective pursued by point 13 of the 2006 Guidelines, which consists in adopting as the starting point for the calculation of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it, the concept of the 'value of sales' must be understood as referring to sales on the market concerned by the infringement.
- 467 In those circumstances, pursuant to point 13 of the 2006 Guidelines, the Commission was fully entitled to use as a basis for calculating fines the sales made on the market affected by the cartel, given that those sales came within the scope of the infringement, and not only the sales in respect of which the Commission had documentary evidence (see, to that effect, judgment of 23 April 2015, *LG Display and LG Display Taiwan v Commission*, C-227/14 P, EU:C:2015:258, paragraph 57 and the case-law cited).
- 468 Moreover, such a limitation would have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking.
- 469 Secondly, it is necessary to reject the argument that the Commission erred in its assessment of the evidence in finding that it related to aluminium electrolytic capacitors and tantalum electrolytic capacitors in general. According to that argument, it follows that if the total value of sales were taken into account as a basis for calculating the amount of the fine, a disproportionate fine would be imposed.
- 470 It is sufficient to recall that it has been concluded, in connection with the first part of the second plea in law, that the Commission, first, was not required to demonstrate that each anticompetitive exchange covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors and, second, had been fully entitled to consider that the single and continuous infringement covered all sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors in the EEA.
- 471 Thirdly, it is necessary to reject the argument that if the total value of sales were taken into account as a basis for calculating the amount of the fine, a disproportionate fine would be imposed, having regard to the specific characteristics of the sector relating to the heterogeneous nature of capacitors and markets.
- 472 It should be noted that that argument is no different from that put forward in connection with the first part of the second plea in law. In those circumstances and in so far as it has been concluded in respect of that part of that plea that the Commission had proved to the requisite legal standard that the applicant had participated in a single and continuous infringement which was not limited to a specific type of aluminium electrolytic capacitor or tantalum electrolytic capacitor, but covered a wide range of such capacitors, that argument must be rejected.
- 473 In any event, it should be noted that the applicant has not demonstrated in sufficient detail how the approach adopted by the Commission fails to reflect the economic significance of the infringement and the size of the applicant's contribution thereto.

- 474 Fourthly, it is necessary to reject the argument that the Commission failed to state sufficient reasons for not taking the specific nature of the sector into account.
- 475 Indeed, it has been pointed out in paragraph 453 above that the 2006 Guidelines adopted by the Commission for setting fines ensure that undertakings have legal certainty, given that they determine the methodology which the Commission has laid down for itself for the purpose of setting fines. The administration cannot depart from those guidelines, in an individual case, without giving reasons which are compatible with equal treatment. It is only in that single scenario that a specific statement of reasons is necessary (see, to that effect, order of 2 February 2012, *Elf Aquitaine v Commission*, C-404/11 P, not published, EU:C:2012:56, paragraph 60). Since the Commission did not depart from the 2006 Guidelines in the present case, as is apparent from paragraph 457 above, it was not required to provide a specific statement of reasons.
- 476 Fifthly, it is necessary to reject the argument that if the total value of sales were taken into account as a basis for calculating the amount of the fine, a disproportionate fine would be imposed, in the light of the specific nature of the applicant's sales structure.
- 477 In that regard, it should be noted that that line of argument, namely that, first, the conduct was focused on Asia, secondly, the organisation of sales in the EEA was autonomous and, thirdly, the areas of overlap between the European and Japanese product portfolios were limited, is no different from that put forward in connection with the first plea in law and the first part of the second plea in law, relating to the lack of implementation of the cartel in the EEA.
- 478 In those circumstances and in so far as that line of argument was rejected during the examination of the first plea in law and the first part of the second plea in law, it must also be rejected in connection with the present plea.
- 479 Moreover, according to the case-law, the taking into account of the turnover of each of the undertakings during the reference year, namely the last full year of the infringement found, makes it possible to assess the size and economic power of each undertaking and the scale of the infringement committed by each of them, those factors being relevant to an assessment of the gravity of the infringement committed by each undertaking (see judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 134 and the case-law cited).
- 480 When the amount of the fine is determined, the principle of equal treatment means that the Commission cannot, by the application of different methods of calculation, discriminate between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see judgment of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraph 79 and the case-law cited).
- 481 In the present case, by using the sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors in the EEA to calculate the amount of the fines, the Commission, first, complied with the rules it laid down for itself in the 2006 Guidelines and, accordingly, did not exceed the limits of its discretion and, second, observed the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraph 78 and the case-law cited).
- 482 In the latter regard, it must be held that the specific internal circumstances relied on by the applicant concerning its sales structure, which fall solely within its commercial strategy, do not in themselves constitute particular circumstances justifying the application of a different calculation method and, therefore, discrimination between the participants.
- 483 Sixthly, it is necessary to reject the argument that the Commission misapplied the 2006 Guidelines by taking as the basis for calculating the amount of the fine the total value of sales invoiced in the EEA

instead of the total value of sales consigned to the EEA.

484 First, it should be noted, as the Commission does, that point 13 of the 2006 Guidelines refers neither to ‘sales delivered’ nor to ‘sales invoiced’. It refers only to ‘sales’ in the EEA. It follows that those guidelines, just as they do not require account to be taken of sales delivered in the EEA, do not preclude the Commission from using the sales invoiced in the EEA to calculate the value of each undertaking’s sales within the EEA (judgment of 17 May 2013, *Parker ITR and Parker-Hannifin v Commission*, T-146/09, EU:T:2013:258, paragraph 210).

485 Moreover, it is admittedly apparent from the case-law that, to be able to use the sales invoiced in the EEA, it is necessary for that criterion to reflect the reality of the market, that is to say for it to be the best criterion for ascertaining the effects of the cartel on competition in the EEA (judgment of 17 May 2013, *Parker ITR and Parker-Hannifin v Commission*, T-146/09, EU:T:2013:258, paragraph 211). However, the applicant does not explain how the fact that the Commission took into account, when calculating the amount of the fine, certain sales invoiced to customers in the EEA but subsequently delivered to sites outside that geographic area does not reflect the impact of the infringement on competition in the EEA.

486 It follows from the foregoing considerations that the applicant has not put forward any evidence to establish that the turnover achieved during the last full business year of participation in the infringement, in respect of all sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors in the EEA, did not constitute, at the time when the Commission adopted the contested decision, an indication of its true size, its economic power on the market and the extent of the infringement in question.

487 It follows that the present complaint must be rejected.

(ii) The second complaint, relating to the determination of the multiplier to be taken into account in order to assess the gravity of the infringement

488 The applicant submits, in essence, that, first, the Commission has not given any explanations, beyond stereotypes, as to the approach taken with regard to the determination of the multiplier reflecting the gravity of the infringement. Such stereotypical reasoning does not fulfil its obligation to state reasons inasmuch as the Commission did not take account of the specific circumstances of the case. It is also incompatible with the Commission’s own guidelines, which state that only ‘horizontal price-fixing, market-sharing and output-limitation agreements ... are ... among the most harmful restrictions of competition’. Secondly, in view of the particular circumstances of the case and the fines imposed in other cases, the multiplier should have been set at a percentage substantially lower than the 16% multiplier adopted by the Commission.

489 The Commission disputes the applicant’s arguments.

490 In the first place, the applicant submits that the Commission’s statement of reasons is inadequate – because it is based on stereotypes – and incompatible with its own guidelines.

491 As a preliminary point, it should be borne in mind that the statement of reasons required by Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure in order to defend their rights and to enable the EU judicature to exercise its power of review. Although pursuant to Article 296 TFEU, the Commission is bound to state the reasons on which its decisions are based, mentioning the facts, law and considerations which have led it to adopt them, it is not required to discuss all the issues of fact and law which have been raised during the administrative procedure. 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 (see judgment of 19 January 2016, *Mitsubishi Electric v Commission*, T-409/12, EU:T:2016:17, paragraph 53 and the case-law cited).

- 492 The essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity and duration of the infringement (see 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, paragraph 394 and the case-law cited).
- 493 That requirement does not, however, oblige the Commission to indicate in its decision the figures relating to the method of calculating the fines, it being pointed out, in any event, that the Commission cannot, by mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment (see 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, paragraph 395 and the case-law cited).
- 494 As regards, first, the claim that the statement of reasons is inadequate, it should be borne in mind, in that regard, that, in recital 1001 of the contested decision, the Commission stated that, for the purpose of assessing the gravity of the infringement, it would take account of 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/or whether or not the infringement had been implemented. In recital 1002 of that decision, the Commission stated that, in its assessment, it had taken account of the fact that horizontal price coordination ‘arrangements’ were, by their very nature, among the most harmful restrictions of competition. Consequently, pursuant to point 23 of the 2006 Guidelines, the proportion of sales to be taken into account for the infringement had to be set at the higher end of the scale of the value of sales. It also stated that the infringement covered the whole EEA. In recital 1003 of the contested decision, the Commission thus considered that, in view of the particular circumstances of the present case, in particular the nature and geographic scope of the infringement, the proportion of the value of sales to be taken into consideration was set at 16% for all the addressees of that decision.
- 495 It follows that the Commission set out, in the contested decision, in a clear and unequivocal fashion, the reasons why the multiplier was set at 16%, in such a way as to enable the applicant to defend its rights and to enable the EU judicature to exercise its power of review. Moreover, the applicant does not give details as to the specific circumstances not taken into account by the Commission in its reasoning.
- 496 Accordingly, the applicant’s claim must be rejected.
- 497 As regards, second, the claim that the statement of reasons is incompatible with the Commission’s own guidelines, it should be borne in mind, in that regard, that point 23 of the 2006 Guidelines states the following:
- ‘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.’
- 498 It should also be noted, as the Commission does, that the list of infringements set out in point 23 of the 2006 Guidelines is not limited to those infringements. The preposition ‘among’ in that point suggests that that list is not exhaustive, but merely indicative.
- 499 Moreover, according to the case-law, horizontal price coordination is, owing to its very nature, one of the most harmful restrictions of competition (see, to that effect, judgment of 26 January 2017, *Villeroy & Boch v Commission*, C-644/13 P, EU:C:2017:59, paragraph 77).
- 500 Accordingly, the applicant’s claim must be rejected.
- 501 In the second place, the applicant submits that the multiplier chosen is disproportionate in the light of the particular circumstances of the case and the Commission’s previous practice.

502 Regarding, first, the claim that the multiplier used is disproportionate in the light of the particular circumstances of the case, in so far as, first of all, horizontal price coordination is, owing to its very nature, one of the most harmful restrictions of competition, next, point 21 of the 2006 Guidelines specifies that, 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, and, lastly, point 23 of the 2006 Guidelines indicates that the proportion to be taken into account for horizontal price-fixing agreements and concerted practices will generally be set ‘at the higher end of the scale’, the Commission did not apply a rate that was disproportionate by adopting an amount of 16% of the value of sales in the present case (see, to that effect, judgment of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 81 and the case-law cited). The Commission thus complied with its own guidelines on the method of setting fines.

503 Moreover, the applicant does not give details as to the specific circumstances which the Commission should have taken into account for the purposes of that determination.

504 Accordingly, the applicant’s claim must be rejected.

505 Regarding, secondly, the claim that the multiplier used is disproportionate in the light of the Commission’s previous practice, it should be borne in mind that the Commission’s practice in previous decisions does not serve as a legal framework for fines imposed in competition matters, since the Commission enjoys a wide discretion in the area of setting fines and is not bound by assessments which it has made in the past (see judgment of 28 June 2016, *Telefónica v Commission*, T-216/13, EU:T:2016:369, paragraph 264 and the case-law cited).

506 It should also be added that undertakings involved in an administrative procedure in which fines may be imposed for infringement of the EU competition rules cannot acquire a legitimate expectation that the Commission will not exceed the level of fines previously imposed or of a particular method of calculating the fines. The Court of Justice has stated in particular that the undertakings in question must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past (see judgment of 7 June 2007, *Britannia Alloys & Chemicals v Commission*, C-76/06 P, EU:C:2007:326, paragraph 61 and the case-law cited).

507 Accordingly, the applicant’s claim must be rejected.

508 It follows from all of the foregoing that the present complaint must be rejected.

(iii) The third complaint, relating to the determination of the additional amount to be taken into account

509 The applicant submits, in essence, that, in view of the fact that the cartel participants had already been given substantial fines in non-member countries, which took into account the global aspects of the infringement and a deterrent effect, the Commission has infringed the principle *ne bis in idem* and the principle of proportionality by also imposing an amount in addition to the basic amount in order to deter the cartel participants from engaging in any unlawful cartels in the future.

510 The Commission disputes the applicant’s arguments.

511 As a preliminary point, it is apparent from recital 1009 of the contested decision that the Commission stated that, in the light of the specific circumstances of the present case and the criteria discussed in Section 8.3.3.1 of that decision, the percentage to be applied to the additional amount for deterrence should be 16%.

512 It should be borne in mind that the principle *ne bis in idem*, also enshrined in Article 4 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, constitutes a fundamental principle of EU law the observance of which is guaranteed by the judicature (see judgment of 29 June 2006, *SGL Carbon v Commission*, C-308/04 P, EU:C:2006:433, paragraph 26 and the case-law cited).

- 513 Under the principle *ne bis in idem*, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal interest. The application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (see judgment of 27 September 2006, *Roquette Frères v Commission*, T-322/01, EU:T:2006:267, paragraph 278 and the case-law cited).
- 514 First, in so far as the applicant claims that, by imposing a fine on it for participation in a cartel already penalised by the authorities of non-member States, the Commission infringed the principle *ne bis in idem*, it should be noted that the principle *ne bis in idem* cannot apply in circumstances such as those of this case, where the proceedings conducted and penalties imposed by the Commission, on the one hand, and by the authorities of non-member States, on the other, clearly do not pursue the same objectives (see, by analogy, judgment of 27 September 2006, *Roquette Frères v Commission*, T-322/01, EU:T:2006:267, paragraphs 280 and 281 and the case-law cited).
- 515 Whereas, in the former scenario, it is a question of preserving undistorted competition in the EEA, the protection sought, in the latter scenario, concerns the market of the non-member country. The condition of unity of the legal interest protected, which is necessary for the application of the principle *ne bis in idem*, is therefore lacking.
- 516 Moreover, the applicant neither invokes nor demonstrates the existence of a principle of law or a rule or convention of public international law prohibiting authorities or courts of different States from prosecuting or convicting a person on the basis of identical facts producing effects on their territory or within their jurisdiction. In the absence of proof of the existence of such a rule or convention binding the European Union or non-member States and providing for such a prohibition, the Commission cannot be bound by it (see, to that effect, judgment of 29 June 2006, *SGL Carbon v Commission*, C-308/04 P, EU:C:2006:433, paragraph 34).
- 517 Consequently, the applicant's claim alleging that the Commission infringed the principle *ne bis in idem* must be rejected.
- 518 Secondly, in so far as the applicant claims that the Commission infringed the principle of proportionality by failing to take account, in determining the additional percentage to be applied, of the fact that the fines imposed on it by other States already included a deterrent effect, it must be borne in mind that point 25 of the 2006 Guidelines states that, 'irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements'.
- 519 Moreover, it should be observed that any consideration concerning the existence of fines imposed by the authorities of a non-member State can be taken into account only under the Commission's discretion in setting fines for infringements of EU competition law. Accordingly, although it cannot be ruled out that the Commission may take into account fines imposed previously by the authorities of non-member States, it cannot be required to do so. The objective of deterrence which the Commission is entitled to pursue when setting the amount of a fine is to ensure compliance by undertakings with the competition rules laid down by the FEU Treaty for the conduct of their activities within the internal market. Consequently, when assessing the deterrent nature of a fine to be imposed for infringement of those rules, the Commission is not required to take into account any penalties imposed on an undertaking for infringement of the competition rules of non-member States (see judgment of 29 June 2006, *SGL Carbon v Commission*, C-308/04 P, EU:C:2006:433, paragraphs 36 and 37 and the case-law cited).
- 520 Consequently, the applicant's claim alleging infringement of the principle of proportionality must be rejected.
- 521 On the basis of all the foregoing considerations, the first part of the present plea must be rejected.

(2) *The second part, relating to the failure to take account of the mitigating circumstances surrounding the applicant*

522 This part may be divided into three complaints. The first complaint relates to the fact that the amount of the fine does not sufficiently reflect the applicant's absence from the MK meetings. The second complaint relates to the fact that the Commission rejected negligence as a mitigating circumstance. The third complaint relates to the fact that the amount of the fine does not reflect the competitive conduct adopted by the applicant on the market during the infringement period.

(i) *The first complaint, relating to the fact that the amount of the fine does not sufficiently reflect the applicant's absence from the MK meetings*

523 The applicant submits, in essence, that the amount of the reduction granted to it on account of its non-participation in the MK meetings is not consistent with the principles of proportionality and equal treatment.

524 The Commission disputes the applicant's arguments.

525 As a preliminary point, it is apparent from recital 1023 of the contested decision that the Commission granted the applicant, on account of mitigating circumstances, a 3% reduction in the basic amount of the fine imposed, on the ground that its participation in the MK meetings had not been established and that there was no evidence that it had been aware of those meetings.

526 In the first place, the applicant submits that the reduction granted to it on account of its non-participation in the MK meetings was insufficient, given the importance of those meetings in the characterisation of the infringement.

527 According to the case-law, the grant of a reduction in the basic amount of the fine in respect of mitigating circumstances is necessarily linked to the circumstances of the particular case, which may lead the Commission not to grant that reduction to an undertaking which is party to an unlawful agreement. Recognition of a mitigating circumstance, in situations where an undertaking is party to a manifestly unlawful agreement which it knew or could not be unaware constituted an infringement, cannot result in the fine imposed being deprived of deterrent effect and the effectiveness of Article 101(1) TFEU being undermined (see judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 237 and the case-law cited).

528 Although the circumstances in the list in point 29 of the 2006 Guidelines are certainly among those which may be taken into account by the Commission in a specific case, it is not required to grant a further reduction as a matter of course once an undertaking has put forward evidence of the existence of one of those circumstances; the appropriateness of any reduction of the fine in respect of mitigating circumstances must be examined comprehensively on the basis of all the relevant circumstances (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 240 and the case-law cited).

529 It has been observed that, first, the applicant had participated in the infringement for almost the whole infringement period, that is to say for almost 12 years of the cartel's 14-year duration. Secondly, notwithstanding its non-participation in the MK meetings, the applicant had taken part in 52 multilateral meetings, including the ECC, ATC and CUP meetings, and in 6 bilateral or trilateral contacts. Thirdly, the applicant had not disputed that the CUP meetings complemented the MK meetings and that they were considered by the cartel participants to be 'shadow meetings' held in parallel with the MK meetings, in so far as they were generally held one week after those meetings and brought together most of their participants. Fourthly, all the anticompetitive exchanges formed part of the same overall plan, pursuing a single economic aim. Moreover, it is not apparent from the contested decision that the MK meetings were particularly important in comparison with the other meetings.

- 530 Furthermore, as regards the reductions granted in other cases, it has been pointed out, in paragraphs 505 and 506 above, that the Commission's practice in previous decisions cannot serve as a legal framework for fines imposed in competition matters.
- 531 In the light of those considerations, it must be held that, notwithstanding its non-participation in the MK meetings, the applicant is not justified in claiming that its participation in the cartel was limited and that it revealed a degree of harm which would have justified a greater reduction in the amount of the fine. It follows that the Commission has not infringed the principle of proportionality. The applicant's claim must therefore be rejected.
- 532 In the second place, the applicant criticises the Commission for having granted it the same reduction as that granted to the cartel participants which did not take part in the CUP meetings, even though they were not in comparable situations, having regard to the importance of the MK meetings in comparison with the CUP meetings in the characterisation of the infringement.
- 533 In that regard, it should be borne in mind that the principle of equal treatment, which is a general principle of EU law enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraphs 77 and 78 and the case-law cited).
- 534 When the amount of the fine is determined, that principle means that the Commission cannot, by the application of different methods of calculation, discriminate between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see judgment of 27 February 2014, *InnoLux v Commission*, T-91/11, EU:T:2014:92, paragraph 79 and the case-law cited).
- 535 First, it has been observed, in paragraph 529 above, that the MK meetings were not particularly important in comparison with the other meetings. Second, it is apparent from recital 1022 of the contested decision that the Commission considered that Sanyo, NEC Tokin and Matsuo were liable for the entirety of the single and continuous infringement, with the exception of the CUP meetings, given that their participation in those meetings had not been established and there was no proof that they had been aware of those meetings.
- 536 It follows that the Commission considered that those undertakings, like the applicant, were liable for the entirety of the single and continuous infringement, with the exception of a group of meetings, in respect of which their participation had not been established.
- 537 In those circumstances, by granting the same reduction to all those undertakings, the Commission observed the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.
- 538 It follows that the Commission has not infringed the principle of equal treatment. The applicant's claim must therefore be rejected.
- 539 It follows from all of the foregoing that the present complaint must be rejected.

(ii) The second complaint, relating to the exclusion of negligence as a mitigating circumstance

- 540 The applicant submits, in essence, that, by rejecting negligence as a mitigating circumstance, the Commission infringed the principle of proportionality since the applicant's low degree of culpability is not reflected in the amount of the fine. It argues that the fine imposed does not take into account, first, the efforts it made to ensure that the ECC and ATC meetings remained in line with competition law, secondly, the internal compliance measures which it implemented and, thirdly, the fact that its representative participated in the CUP meetings without its consent and in breach of its internal policy.

541 The Commission disputes the applicant's arguments.

542 As a preliminary point, it should be borne in mind that, in recital 1029 of the contested decision, in response to the applicant's claim that it could be held liable only for a negligent infringement and not for an intentional infringement, the Commission concluded that it could not be granted any mitigating circumstance on that basis. In recital 1028 of that decision, the Commission stated that the parties were aware of the collusive nature of their contacts and therefore could not have been unaware of the potential repercussions they were facing, particularly since the cartel participants were not local undertakings but undertakings with a global presence. Those undertakings should have ensured that their employees were sufficiently familiar with the competition rules and that they complied with those rules.

543 By its argument, the applicant submits, in essence, that the fine imposed on it is disproportionate in the light of the unintentional nature of its infringement.

544 According to settled case-law, it is not necessary for an undertaking to have been aware that it was infringing the competition rules for an infringement to be regarded as having been committed intentionally and not negligently. It is sufficient that it could not have been unaware that its conduct had as its object the restriction of competition in the internal market (see judgment of 13 July 2018, *Stührk Delikatessen Import v Commission*, T-58/14, not published, EU:T:2018:474, paragraph 226 and the case-law cited).

545 First, it has been pointed out in the second complaint in the first part of this plea that the infringement in which the applicant participated consisted, by means of agreements and concerted practices, in horizontal price coordination, which is, by its very nature, one of the most harmful restrictions of competition. Secondly, it has been pointed out, on several occasions, that the cartel participants were frequently referred to in the minutes of meetings and in emails using acronyms. Thirdly, it is apparent from the contested decision and the evidence that it was regularly reiterated in the emails that they were confidential and that it was necessary to delete them, and not to forward or otherwise disseminate them. Fourthly, it must be borne in mind, as the Commission observed in recital 1028 of the contested decision, that the participants in the cartel were not local undertakings but undertakings with a global presence.

546 It must therefore be held that the applicant could not have been unaware that its conduct had as its object the restriction of competition in the internal market, with the result that the applicant cannot maintain that it could at most be held liable only for a negligent infringement.

547 In those circumstances, the Commission was fully entitled to reject the applicant's claim that it committed the infringement negligently and, consequently, to consider that it could not be granted any mitigating circumstance on that ground.

548 That finding cannot be called into question by the applicant's arguments.

549 First, it is necessary to reject the argument that, because of its concerns as to the compliance of the meetings with EU law, the applicant refused to hold the ECC meetings from June 2003 onwards and stopped attending the ATC meetings with effect from 16 February 2005, while implementing, in parallel, internal policies for compliance with EU competition law.

550 It is apparent from the examination of the first and second pleas in law that, notwithstanding its alleged concerns, the applicant continued to participate regularly in anticompetitive meetings and bilateral and trilateral contacts and to exchange sensitive business information. In addition, the applicant's concerns regarding the legality of the meetings suggest, on the contrary, that it was aware that it was infringing the competition rules. In any event, the implementation of a compliance programme is an aspect internal to the undertaking which does not alter the fact that it participated in the anticompetitive exchanges.

551 Accordingly, by continuing to participate in the anticompetitive meetings, notwithstanding its alleged concerns as to their compliance with EU law, the applicant demonstrated that it was fully aware that it was participating in an infringement.

552 Secondly, it is necessary to reject the argument that H participated in the CUP meetings in a personal capacity and not as a representative of the applicant and, therefore, did so in breach of the applicant's internal policies.

553 First of all, it has been noted, in connection with the examination of the first complaint in the fifth part of the second plea in law, that the applicant, after its alleged withdrawal from the ATC meetings on 16 February 2005, in no way distanced itself from the cartel and its members. Next, it is apparent from the contested decision that H represented the applicant in the anticompetitive exchanges until May 2010. Lastly, according to the case-law, for Article 101 TFEU to apply, there must be action by a person who is authorised to act on behalf of an undertaking, regardless of whether there is action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned (see judgment of 16 February 2017, *Tudapetrol Mineralölwerke Nils Hansen v Commission*, C-94/15 P, not published, EU:C:2017:124, paragraph 28 and the case-law cited).

554 It follows from all of the foregoing that the present complaint must be rejected.

(iii) The third complaint, relating to the applicant's competitive conduct on the market

555 The applicant submits, in essence, that, in the amount of the fine, the Commission did not take due account of the fact that, during the infringement period, it had adopted competitive conduct on the market and that its role in the cartel was limited as it did not participate in the MK meetings.

556 The Commission disputes the applicant's arguments.

557 As a preliminary point, in recital 1043 of the contested decision, after recalling the applicable case-law, the Commission considered that it was clear from the evidence that the applicant had indeed attempted to exploit the cartel for its own benefit.

558 In recital 1044 of that decision, the Commission also observed that the competitive conduct which the applicant claimed to have adopted on the market did not exclude its intentional contribution to the infringement.

559 In the first place, the applicant complains that the Commission failed to take account, in the amount of the reduction of the fine granted to it, of the fact that, during the infringement period, it had adopted competitive conduct on the market.

560 According to settled 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 is not necessarily something which has to be taken into account, as a mitigating circumstance, when the amount of the fine to be imposed is determined (see judgment of 14 May 2014, *Reagens v Commission*, T-30/10, not published, EU:T:2014:253, paragraph 266 and the case-law cited).

561 An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit and an undertaking which does not distance itself from the results of a meeting in which it was present in principle retains full responsibility for the fact of its participation in the cartel. Therefore, the Commission is not required to recognise the existence of a mitigating circumstance consisting of non-implementation of a cartel unless the undertaking relying on that circumstance is able to show that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel in question. It would be too easy for undertakings to reduce the risk of being required to pay a heavy fine if they were able to take advantage of an unlawful agreement and then benefit from a reduction of the fine on the ground that they had played only a limited role in implementing the infringement, when their attitude encouraged other undertakings to act in a way that was more harmful to competition (see judgment of

14 May 2014, *Reagens v Commission*, T-30/10, not published, EU:T:2014:253, paragraph 267 and the case-law cited).

562 In the present case, it should be noted at the outset that the evidence relied on by the applicant in support of its claim is inconsistent with the arguments developed in connection with the first complaint in the fifth part of the second plea in law. In order to demonstrate that it could not be held liable beyond 16 February 2005, the date on which it withdrew from the ATC meetings, the applicant maintained that it had publicly distanced itself from the cartel, emphasising that it was apparent from the minutes of the MK meetings that the participants regarded it as an external competitor. However, the applicant maintains, for the purposes of this complaint, that it adopted competitive conduct on the market not from the date of its withdrawal from the ATC meetings, but throughout the infringement period found against it.

563 Furthermore, first, it has been concluded in connection with the examination of the first complaint in the fifth part of the second plea in law that the applicant had not demonstrated that it had clearly and publicly distanced itself from the cartel. Secondly, there is nothing in the file to establish that the applicant clearly and firmly opposed the implementation of the cartel to the point of disrupting its operation. Thirdly, the alleged competitive conduct cannot be corroborated by the analysis carried out by an independent firm of the applicant's prices in the EEA. That analysis is limited to a comparison of the prices charged by the applicant on an annual basis, but is not a comparison of the prices charged by the applicant with market prices or with the prices charged by its competitors, which could have shown that the applicant had acted differently and thus undermined the functioning of the cartel.

564 It must therefore be held that the applicant is not justified in relying on the existence of a mitigating circumstance relating to its competitive conduct on the market.

565 In the second place, the applicant complains that the Commission failed to take account, in the amount of the reduction of the fine, of the fact that its role in the cartel was limited because it did not participate in the MK meetings.

566 It should be noted that that line of argument is no different from that put forward in connection with the first complaint in this part, which has been rejected.

567 In those circumstances and in so far as the applicant seeks once again to show that its non-participation in the MK meetings should have led to it being granted a greater reduction of the fine, that argument must be rejected.

568 In the light of those considerations, the present complaint must be rejected.

569 On the basis of all the foregoing considerations, the second part of the present plea must be rejected and, consequently, the fourth plea in law must be rejected in its entirety.

570 In the light of all the foregoing considerations, the applicant's head of claim seeking annulment of the contested decision must be rejected.

2. The head of claim seeking a reduction in the amount of the fine

571 By its second head of claim, the applicant requests the Court, in any event, to exercise its unlimited jurisdiction in order to substitute its own assessment for that of the Commission concerning the amount of the fine, and, consequently, to reduce the amount of the fine imposed on it.

572 As a preliminary point, it should be noted that, in support of the present head of claim, the applicant relies on the arguments put forward in support of the fourth plea in law, alleging manifest errors in the determination of the amount of the fine.

- 573 It should be borne in mind that the unlimited jurisdiction conferred on the EU judicature by Article 31 of Regulation No 1/2003 pursuant to Article 261 TFEU empowers it, in addition to merely reviewing the legality of the penalty, to substitute its own assessment in relation to the determination of the amount of that penalty for that of the Commission, the author of the act in which that amount was initially fixed. Consequently, the EU judicature may vary the contested act, even without annulling it, in order to cancel, reduce or increase the amount of the fine imposed, that jurisdiction being exercised by taking into account all the factual circumstances (see judgment of 25 July 2018, *Orange Polska v Commission*, C-123/16 P, EU:C:2018:590, paragraph 106 and the case-law cited).
- 574 In order to satisfy the requirements of Article 47 of the Charter of Fundamental Rights of the European Union when conducting a review in the exercise of its unlimited jurisdiction with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see judgment of 26 January 2017, *Villeroy & Boch v Commission*, C-625/13 P, EU:C:2017:52, paragraph 180 and the case-law cited).
- 575 It must however be noted that the exercise of powers of unlimited jurisdiction does not amount to a review of the Court's own motion and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy, which the Courts are required to raise of their own motion, such as a lack of reasoning in the contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (see judgment of 9 June 2016, *Repsol Lubricantes y Especialidades and Others v Commission*, C-617/13 P, EU:C:2016:416, paragraph 85 and the case-law cited).
- 576 In addition, when exercising its unlimited jurisdiction, the General Court is not bound by the 2006 Guidelines, which do not prejudge the assessment of the fine by the EU judicature. Indeed, although the Commission must observe the principle of the protection of legitimate expectations when it applies its self-imposed rules, such as the 2006 Guidelines, that principle cannot bind the Courts of the European Union in the same way, in so far as they do not propose to apply a specific method of setting fines in the exercise of their unlimited jurisdiction, but consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations (see judgment of 14 May 2014, *Donau Chemie v Commission*, T-406/09, EU:T:2014:254, paragraph 59 and the case-law cited).
- 577 Nevertheless, the case-law of the Court of Justice also makes clear that the exercise of unlimited jurisdiction with regard to the determination of fines cannot result in discrimination between undertakings which have participated in an agreement contrary to the competition rules of EU law. If the General Court intends, in the case of one of those undertakings, to depart specifically from the method of calculation followed by the Commission, which it has not called into question, it must give reasons for doing so in its judgment (see judgment of 14 May 2014, *Donau Chemie v Commission*, T-406/09, EU:T:2014:254, paragraph 60 and the case-law cited).
- 578 The General Court may therefore reduce a fine to a level below that which results from the application of the 2006 Guidelines where the circumstances of the case before it justify such action. Nevertheless, the applicant must cite grounds which are relevant and capable of justifying such a reduction and substantiate those grounds with evidence (see judgment of 14 May 2014, *Donau Chemie v Commission*, T-406/09, EU:T:2014:254, paragraph 310 and the case-law cited).
- 579 It is in the light of those considerations that it is necessary to examine whether the circumstances relied on by the applicant may, even in the absence of an error of law or an error of assessment on the part of the Commission, justify a reduction in the amount of the fine imposed on the applicant by the contested decision.
- 580 In the first place, as regards the calculation of the value of sales, first of all, it has been found, in connection with the examination of the first complaint in the first part of the fourth plea in law, that the

taking into account of the total value of sales of the products concerned during the last year of participation in the cartel as a basis for calculating the fine was such as to give a proper indication of the scale of the infringement on the relevant market and its economic significance for the cartel participants' activities.

581 Furthermore, it should be noted that the arguments put forward by the applicant in that regard are not sufficiently precise to enable the Court to understand how the applicant determines the basis of assessment and the alternative calculation methods on which it relies. The applicant considers, on the basis of the information contained in the study carried out by an independent firm, that the amount of the fine should be reduced in order to be set at a level varying between EUR 25 million and EUR 40 million. In addition, the proposed basis of assessment and calculation methods do not offer any indication that they would reflect the scale of the infringement on the relevant market or its economic significance for the applicant's activities and, moreover, that they would ensure observance of the principle of equal treatment as between the cartel participants.

582 Next, it has been pointed out, in the examination of the first complaint in the first part of the second plea in law, that the applicant had participated in a single and continuous infringement which was not limited to a specific type of aluminium electrolytic capacitor or tantalum electrolytic capacitor, but covered a wide range of aluminium electrolytic capacitors and tantalum electrolytic capacitors; nor was it limited to certain customers.

583 Lastly, it has been pointed out in paragraph 482 above that the specific internal circumstances relied on by the applicant, relating to its sales structure, formed part of its single commercial strategy and did not in themselves constitute particular circumstances justifying the application of a different calculation method for the determination of the value of sales.

584 In the second place, as regards the reduction of the gravity multiplier applied by the Commission, relied on by the applicant in connection with the second complaint in the first part of the fourth plea in law, first, it should be noted at the outset that the applicant has not indicated either the specific circumstances which justify a reduction in the percentage chosen by the Commission or the percentage at which that multiplier should be set. Secondly, it has been pointed out in paragraph 502 above that the infringement at issue was, by its very nature, one of the most harmful restrictions of competition. Thirdly, it has been pointed out in paragraph 367 above that the applicant had participated in the infringement for almost the whole infringement period, that is to say for almost 12 years of the cartel's 14-year duration. Fourthly, it is apparent from the examination of the second complaint in the first part of the second plea in law that the infringement extended to the whole of the EEA. Fifthly, although, by the references made to the multiplier used by the Commission in other decisions, the applicant sought to demonstrate, in the present case, potential discrimination, it should be borne in mind, in that regard, that the Court is not bound by the Commission's previous practice in taking decisions (see, by analogy, judgment of 26 October 2017, *Marine Harvest v Commission*, T-704/14, EU:T:2017:753, paragraph 78).

585 In the third place, as regards the reduction in the additional amount applied by the Commission, which is the subject of the third complaint in the first part of the fourth plea in law, first, it has been noted in paragraph 519 above that the deterrent nature of a fine to be imposed for infringement of the EU competition rules cannot be determined by reference to any penalties imposed on an undertaking for infringement of the competition rules of non-member States. Secondly, the Commission applied an additional amount of 16% of the value of sales in the present case, that is to say, an amount within one percentage point of the lowest percentage which it could have selected, in accordance with point 25 of the 2006 Guidelines.

586 In the fourth place, as regards the greater reduction of its fine on account of mitigating circumstances, it has been observed, in paragraph 531 above, that, notwithstanding its non-participation in the MK meetings, the applicant was not justified in claiming that its participation in the cartel was limited and that it revealed a lesser degree of harm justifying such a reduction. It has also been observed, in paragraph 536 above, that the Commission had granted a similar reduction to all the undertakings which had been held liable for the

entirety of the infringement, with the exception of a group of meetings in respect of which their participation had not been established.

587 In the fifth place, it has been found in paragraph 546 above that the applicant could not have been unaware of the reprehensible nature of its conduct and, therefore, maintain that it could at most be held liable only for a negligent infringement.

588 In the sixth place, it has been found in paragraph 564 above that the applicant was not justified in relying on the existence of a mitigating circumstance relating to its competitive conduct on the market. In particular, there is nothing in the file to show that the applicant acted differently from the other cartel participants and disrupted the functioning of the cartel.

589 It follows from all of the foregoing that none of the factual and legal circumstances relied on by the applicant in support of a reduction of the fine imposed on it justifies, in particular in the light of the principles of proportionality and equal treatment, the adoption of a calculation method different from that adopted by the Commission, such as to lead to such a reduction. Consequently, there is no need for the Court to exercise its unlimited jurisdiction in the present case.

590 It follows that the applicant's head of claim seeking a reduction in the amount of the fine must be rejected and, consequently, the action must be dismissed in its entirety.

IV. Costs

591 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.

592 Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**
- 2. Orders Nichicon Corporation to bear its own costs and to pay those incurred by the European Commission.**

Costeira

Gratsias

Kancheva

Delivered in open court in Luxembourg on 29 September 2021.

E. Coulon

S. Papasavvas

Registrar

President

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IV. Costs

* Language of the case: English.

1 This judgment is published in extract form.