

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

29 September 2021 (\*)<sup>(1)</sup>

(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 – Rights of the defence and right to be heard – Inalterability of the measure – Single and continuous infringement – Restriction of competition by object – 2006 Guidelines on the method of setting fines – Value of sales – Obligation to state reasons – Proportionality – Equal treatment – Gravity of the infringement – Mitigating circumstances – Point 37 of the 2006 Guidelines on the method of setting fines – Unlimited jurisdiction)

In Case T-363/18,

**Nippon Chemi-Con Corporation**, established in Tokyo (Japan), represented by H.-J. Niemeyer, M. Röhrig, I.-L. Stoicescu and P. Neideck, lawyers,

applicant,

v

**European Commission**, represented by A. Cleenewerck de Crayencour, B. Ernst, T. Franchoo, C. Sjödin and L. Wildpanner, 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, annulment of the fine imposed on it by that decision or a reduction in the amount of that fine,

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: C. Kristensen, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 October 2020,

gives the following

## Judgment

### I. Background to the dispute

#### A. *The applicant and the sector concerned*

1 The applicant, Nippon Chemi-Con Corporation, is a company established in Japan, which manufactures and sells aluminium electrolytic capacitors. It also manufactured tantalum electrolytic capacitors until

March 2005 and sold them until January 2011, with direct sales invoiced in the European Economic Area (EEA) until February 2005. The applicant owns 100% of the shares in Europe Chemi-Con (Deutschland) GmbH, a company incorporated under German law, and 100% of the shares in United Chemi-Con, a company incorporated under United States law ('Europe Chemi-Con' and 'United Chemi-Con' respectively; together with the applicant, 'the Nippon Chemi-Con group').

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. Electrolytic capacitors are used in almost all 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. 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***

3 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.

4 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.

5 From 3 to 6 March 2015, the Commission conducted inspections pursuant to Article 20(4) of Regulation No 1/2003 at the premises of Europe Chemi-Con.

6 On 4 November 2015, the Commission adopted a statement of objections which was addressed to, inter alia, the applicant.

7 Between 12 November and 17 December 2015, the addressees of the statement of objections were given access to most of the file by means of an 'access-to-file DVD'.

8 Following requests for access made by several addressees of the statement of objections concerning customer names that had been redacted from the statement of objections of 4 November 2015, the Commission made available two new DVDs containing the redacted customer names, of which the applicant became aware on 7 March and 27 April 2016.

9 On 4 May 2016, the Commission sent a letter of facts concerning certain aspects of the statement of objections to the addressees of the statement of objections ('the letter of facts'), which contained, as an annex, a new, non-redacted version of the statement of objections of 4 November 2015 and Annex 1 thereto, and set them a deadline of two weeks to reply, which was later extended to 20 May 2016.

10 On 20 May 2016, the applicant submitted a response to the statement of objections and the letter of facts.

11 The addressees of the statement of objections, including the applicant, were heard by the Commission at the hearing which took place from 12 to 14 September 2016.

### ***C. The contested decision***

12 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***

13 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 EEA Agreement in the electrolytic capacitors sector, in which nine undertakings or groups of undertakings, namely Elna, Hitachi AIC, Holy Stone, Matsuo, NEC Tokin, Nichicon, Rubycon, Sanyo (designating Sanyo and Panasonic) and the applicant (collectively, ‘the cartel participants’) participated (recital 1 and Article 1 of the contested decision).

14 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).

15 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).

16 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).

17 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 contacts’).

18 In the context of the anticompetitive contacts, the cartel participants, in essence, 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).

19 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).

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

## ***2. The applicant’s liability***

21 The Commission held the applicant liable on account of its direct participation in the cartel from 26 June 1998 to 23 April 2012 (recital 959 and Article 1(g) of the contested decision).

## ***3. The fine imposed on the applicant***

22 Article 2(j) of the contested decision imposes a fine of EUR 97 921 000 on the applicant.

## ***4. The calculation of the amount of the fines***

- 23 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).
- 24 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).
- 25 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).
- 26 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).
- 27 As regards the applicant, the Commission first of all considered that it was necessary to take into account, as the reference period, the last full business year of participation in the infringement in respect of the value of sales of aluminium electrolytic capacitors, namely 2011/2012, on the one hand, and the last full business year during which the applicant sold tantalum electrolytic capacitors, namely 2003/2004, given that it had stopped selling them before the end of its participation in the infringement, on the other (recitals 34, 989 to 991 and 1007, Table 1, of the contested decision, as well as footnote 1657 thereto).
- 28 Next, the Commission found that the applicant, through Europe Chemi-Con and United Chemi-Con, had invoiced direct sales of aluminium electrolytic capacitors in the EEA throughout the period of its participation in the infringement (recitals 990 and 998 of the contested decision) and direct sales of tantalum electrolytic capacitors in the EEA until 1 February 2005 (recitals 34 and 1006 of the contested decision).
- 29 Lastly, the Commission applied to the applicant duration multipliers of 13.82 (corresponding to the period from 26 June 1998 to 23 April 2012) in respect of aluminium electrolytic capacitors and 5.26 (corresponding to the period from 29 October 1999 to 1 February 2005) in respect of tantalum electrolytic capacitors (recital 1007, Table 1, of the contested decision).
- 30 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).
- 31 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).
- 32 Accordingly, the Commission set the basic amount of the fine to be imposed on the applicant at EUR 205 649 000 (recital 1010 of the contested decision).
- 33 In the second place, as regards the adjustments to the basic amount of the fines, the Commission did not find that there were any aggravating or mitigating circumstances in the applicant's case (recital 1054 of the contested decision).
- 34 In the third place, the Commission applied the limit of 10% of the applicant's total turnover in the preceding business year, as laid down in Article 23(2) of Regulation No 1/2003 (recitals 1057 and 1058 of the contested decision).

35 Accordingly, the Commission set the total amount of the fine to be imposed on the applicant at EUR 97 921 000 (recital 1139, Table 3, of the contested decision).

### ***5. The operative part of the contested decision***

36 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:

...

(g) [the applicant] from 26 June 1998 to 23 April 2012;

...

#### *Article 2*

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

...

(j) [the applicant]: EUR 97 921 000;

...'

## **II. Procedure and forms of order sought**

37 By application lodged at the Court Registry on 5 June 2018, the applicant brought the present action.

38 On 19 October 2018, the Commission's defence was lodged at the Court Registry.

39 The reply and the rejoinder were lodged at the Court Registry on 27 February and 5 June 2019 respectively.

40 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.

41 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 allocated.

42 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, put written questions to the parties, asking them to provide answers at the hearing.

43 The parties presented oral argument and answered the written and oral questions put by the Court at the hearing on 23 October 2020.

- 44 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.
- 45 The applicant claims that the Court should:
- primarily, annul the contested decision in so far as that decision found that the applicant had infringed Article 101 TFEU;
  - in the alternative, annul the fine imposed on it or, in the further alternative, reduce the amount of that fine;
  - order the Commission to pay the costs.
- 46 The Commission contends that the Court should:
- dismiss the action;
  - order the applicant to pay the costs.

### **III. Law**

#### ***A. The admissibility of the arguments set out in Annexes A.19 and A.43 to the application***

- 47 The Commission contends that, in so far as Annexes A.19 and A.43 to the application contain tables summarising the ECC meetings and the post-2008 meetings, as well as the applicant's arguments concerning those meetings, those annexes cannot constitute a means for the applicant to submit new arguments, as those arguments would be inadmissible.
- 48 The applicant claims that the annexes at issue are admissible. First, Annex A.19 was relied on in the application in order to provide context for the arguments developed in paragraphs 32 to 89 of the application. Secondly, Annex A.43 was mentioned in the application in order to supplement the same arguments as those supported by Annex A.19.
- 49 In that regard, it should be borne in mind that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based. According to settled case-law, the information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case (see judgment of 28 June 2016, *Portugal Telecom v Commission*, T-208/13, EU:T:2016:368, paragraph 68 and the case-law cited; judgment of 7 March 2017, *United Parcel Service v Commission*, T-194/13, EU:T:2017:144, paragraph 191).
- 50 It should also be noted that, in particular, it is necessary, for an action before the Court to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application (see judgment of 7 March 2017, *United Parcel Service v Commission*, T-194/13, EU:T:2017:144, paragraph 192 and the case-law cited).
- 51 Thus, the annexes may be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by applicants in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments

(see judgment of 9 September 2015, *Samsung SDI and Others v Commission*, T-84/13, not published, EU:T:2015:611, paragraph 33 and the case-law cited). Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraph 94 and the case-law cited).

52 In the present case, it should be noted that, as regards Annex A.19, the applicant claims, in the application, that it contains ‘a list of all 20 ECC meetings, summarising its main defence arguments’ intended to show that those meetings ‘made ... no reference to the EEA and related to purely Asian conduct’. In addition, the applicant relies on Annex A.19 in the application to corroborate the assertion that ‘the translation of the minutes of [the] meeting of 20 September 2000 provided by Rubycon is inaccurate and therefore constitutes unreliable evidence’.

53 As regards Annex A.43, the applicant asserts, in the application, that that annex contains an ‘overview table containing the meetings following 2008 and [its] defence arguments’.

54 In the present case, it is apparent from the documents in the file that the applicant set out its arguments in part in the application and in part in Annexes A.19 and A.43 to the application. As regards the arguments and complaints directed against the Commission’s interpretation of the content of some of the anticompetitive contacts, the applicant refers to tables in the annexes, in which it sets out its own interpretation of the anticompetitive contacts, in particular as regards the customers, products and markets concerned by those contacts.

55 In accordance with the case-law referred to in paragraphs 50 and 51 above, in the present case, the Court may take those annexes into consideration only in so far as they support or supplement pleas or arguments expressly set out by the applicant in the body of the application. Accordingly, the arguments and complaints relating to the anticompetitive contacts that are set out in Annexes A.19 and A.43 and have not been reproduced in the body of the application are inadmissible.

## **B. Substance**

56 In support of its action, the applicant raises six 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 annulment of the fine imposed on it or a reduction in the amount of that fine.

57 By the first five pleas, the applicant disputes the Commission’s conclusion that there was a single and continuous infringement of Article 101 TFEU in the electrolytic capacitors sector covering the whole EEA over a period of almost 14 years. The first plea alleges infringement of the right to be heard, Article 41 of the Charter of Fundamental Rights of the European Union (‘the Charter’), the rights of the defence, and the principle of the inalterability of the measure. The second plea alleges a lack of evidence of the infringement, material errors of fact, and expiry of the relevant limitation period. The third plea alleges that there was not a single and continuous infringement. The fourth plea alleges that there was not an infringement by object. The fifth plea alleges that the Commission lacked territorial jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement in the present case.

58 By its sixth plea, the applicant disputes the fine imposed on it, seeking annulment of the fine or a reduction in the amount thereof. This plea alleges errors in the calculation of the amount of the fine and infringement of the 2006 Guidelines, as well as infringement of the principles of equal treatment and proportionality.

59 Furthermore, in the reply, by way of introduction to the second to sixth pleas, the applicant raises a number of general arguments relating, in the first place, to the geographical scope of the anticompetitive contacts, in the second place, to the anticompetitive nature of those contacts, and, in the third place, to the heterogeneous nature of the capacitor industry and to the particularities of the process for the sale of capacitors, which make it impossible to reduce the strategic uncertainties of competitors. Given that these

arguments overlap with those raised by the applicant in connection with the second to sixth pleas, these arguments will be examined in connection with those pleas.

60 In so far as the applicant submits both claims for annulment of the contested decision and for adjustment of the amount of the fine imposed on it, it should be noted that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (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).

61 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***

62 As a preliminary point, it should be noted that, in the present case, the Commission found that there was a single and continuous infringement of Article 101 TFEU covering the whole EEA consisting 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 (see paragraphs 14 and 36 above).

63 In that regard, it must be recalled 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 incompatible with the internal market and are prohibited.

64 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).

65 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).

66 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).

67 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).

68 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 EU judiciary, in law and in fact, in the light of the pleas raised by the applicant 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).

69 It is in the light of those considerations that the applicant’s pleas in law must be examined inasmuch as they seek annulment of the contested decision.

70 The Court considers it appropriate to begin by examining the fifth plea in law.

**(a) *The fifth plea in law, alleging that the Commission lacked territorial jurisdiction***

71 The applicant submits, in essence, that the Commission erred in concluding, in recital 660 of the contested decision, that it had territorial jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement in the present case on the ground that the anticompetitive conduct had been implemented worldwide, including in the EEA, whereas that conduct was Asia-oriented and was not implemented in the EEA; nor did it have a significant effect there.

72 The Commission disputes those arguments.

73 As regards the territorial applicability of Article 101 TFEU and Article 53 of the EEA Agreement, it should be recalled that the EU competition rule set out in Article 101 TFEU prohibits agreements and practices which have as their object or effect the prevention, restriction or distortion of competition ‘within the internal market’.

74 It should also be noted that the conditions for the territorial application of Article 101 TFEU are satisfied in two situations.

75 In the first place, the application of Article 101 TFEU is justified where the practices it covers are implemented in the territory of the internal market, irrespective of the place where they were formed. If the applicability of prohibitions laid down under competition law were made to depend on the place where an agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions (judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others v Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 16).

76 In determining whether the place where the cartel was implemented is in the EEA, it is immaterial whether or not the participants in the cartel had recourse to subsidiaries established in the EEA in order to make their contacts with purchasers established there (judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others v Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 17). 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).

77 In the second place, the application of Article 101 TFEU is also justified under public international law when it is foreseeable that the practices it covers will have an immediate and substantial effect in the internal market (see, to that effect, judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11).

78 In the present case, the Commission concluded in recital 660 of the contested decision that it was the competent authority to apply both Article 101 TFEU and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, in so far as the cartel's conduct had been implemented on a global scale, including in the EEA.

79 In that regard, the Commission considered that, first of all, although the cartel participants were undertakings based in Japan and the anticompetitive contacts took place in Japan, those contacts either had a global reach, so that they included the EEA, or directly concerned the EEA. In particular, the connection with the EEA was demonstrated by the fact that the cartel participants, including the applicant, had sold electrolytic capacitors in the EEA during the infringement period. Next, the cartel participants exchanged information concerning customers with headquarters in the EEA or customers with manufacturing plants in the EEA and coordinated their commercial policy, depending in particular on fluctuations in currency exchange rates, including the euro, and increases in the price of raw materials, without any geographical limitation. Lastly, the information exchanged covered all sales, whether in Japan or overseas, and whether the customers were Japanese or foreign (recitals 665 to 672 of the contested decision).

80 It is true that the applicant, on the one hand, disputes the existence of a link between some of the anticompetitive contacts and the EEA, which will be analysed by the Court in connection with the second and third pleas, and, on the other hand, maintains that there was a limited link between the cartel and the EEA, which will be examined in connection with the second, third and sixth pleas.

81 However, the applicant does not deny that the cartel participants, itself included, directly or indirectly sold electrolytic capacitors worldwide, including in Europe, although the applicant claims that sales in that geographical area were very limited and were made by its subsidiaries.

82 It follows that the criterion of the implementation of the cartel as a factor linking it to EU territory is satisfied in the present case and that the infringement referred to in the contested decision therefore falls within the scope of Article 101(1) TFEU. Accordingly, the Commission was fully entitled to find that it had jurisdiction for the purpose of applying Article 101 TFEU and Article 53 of the EEA Agreement.

83 The fifth plea in law must therefore be rejected.

***(b) The first plea in law, alleging infringement of the right to be heard, Article 41 of the Charter, the rights of the defence, and the principle of inalterability of the measure***

84 In connection with the first plea, the applicant submits, in essence, that the Commission infringed its right to be heard, its rights of defence and Article 41 of the Charter. That plea may be divided into four parts, concerning (i) the lack of timely access to the complete case file, (ii) the lack of access to all potentially exculpatory evidence, (iii) the lack of a supplementary statement of objections, and (iv) the lack of access to the minutes of the contacts between the Commission and other addressees of the statement of objections.

85 The Commission disputes those arguments.

86 As a preliminary point, it should be recalled that, under the heading 'Right to good administration', Article 41(2)(a) of the Charter provides, inter alia, that every person has the right to be heard before any individual measure which would affect him or her adversely is taken.

- 87 According to the settled case-law regarding infringements of competition 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).
- 88 Thus, Article 27(1) of Regulation No 1/2003 provides that, before taking decisions as provided for in, inter alia, Article 23 of that regulation, the Commission is to give the undertakings or associations of undertakings which are the subject of the proceedings conducted by it the opportunity of being heard on the matters to which it has taken objection. The Commission is to base its decisions only on objections on which the parties concerned have been able to comment. According to Article 27(2) of that regulation, the rights of defence of the parties concerned are to be fully respected in the proceedings. They are to be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings concerned in the protection of their business secrets.
- 89 That right of access includes 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).
- 90 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).
- 91 As regards new exculpatory evidence, it should be borne in mind that, if a document in the Commission's possession that may be categorised – since it is capable of exonerating an undertaking which is accused of having participated in a cartel – as exculpatory evidence is not communicated to that undertaking, the latter's rights of defence are infringed if that undertaking shows that the document at issue could have been useful for its defence (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, paragraphs 366 and 367 and the case-law cited).
- 92 Such evidence may be furnished by showing that the non-disclosure of such exculpatory evidence was capable of influencing, to the detriment of the undertaking at issue, the course of the proceedings and the content of the Commission's decision, or that it could have harmed or rendered more difficult the defence of that undertaking's interests during the administrative procedure (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 368).
- 93 It is in the light of those considerations that the arguments put forward by the applicant in connection with the first plea must be examined.

(1) *The first part of the first plea, concerning the lack of timely access to the complete case file*

- 94 The applicant submits that the Commission infringed its right to be heard and Article 41 of the Charter, in so far as it did not grant the applicant timely access to the Commission's complete file. The applicant raises two complaints in that regard. The first complaint relates to unresolved confidentiality claims concerning the names of customers of certain participants in the alleged infringement, in particular Rubycon's customers. The second complaint relates to the lack of access to the document entitled 'Section 0', which contains the full chronology of the anticompetitive contacts.

- 95 As regards the first complaint, it is apparent from the file that the Commission adopted the statement of objections on 4 November 2015. Between 12 November and 17 December 2015, the addressees of the statement of objections were given access to most of the file by means of an ‘access-to-file DVD’. The statement of objections and the access-to-file DVD contained redacted references relating to the names of customers, in particular Rubycon’s customers, which the Commission agreed to treat as ‘provisionally confidential’. Following requests for access made by certain addressees of the statement of objections, including the applicant’s own request for access, the Commission supplemented the first access-to-file DVD with two other DVDs containing the redacted customer names, of which the applicant became aware on 7 March and 27 April 2016 (see paragraphs 6 to 8 above).
- 96 It is also apparent from the file that, on 4 May 2016, the Commission sent the addressees of the statement of objections, including the applicant, the letter of facts, in which it granted the addressees, including the applicant, an extension of the deadline for replying to the statement of objections until 20 May 2016 and set that latter date as the deadline for submitting written observations regarding that letter of facts (see paragraph 9 above).
- 97 It follows from those facts, which, moreover, are not disputed by the applicant, that, when the statement of objections was sent, the Commission treated the names of customers, in particular Rubycon’s customers, as ‘provisionally confidential’ information, which led several addressees of that statement to make requests for access. However, it also follows that the ‘provisionally confidential’ information was made available to the undertakings concerned, including the applicant, on 7 March and 27 April 2016 and that the deadline for replying to the statement of objections was extended until 20 May 2016 (the date also set for submitting observations regarding the letter of facts).
- 98 In addition, as the Commission contends, the applicant errs in citing the Hearing Officer’s final report. That report acknowledges that it would have been ‘preferable’ to ensure that all confidentiality claims had been properly dealt with before the adoption of the statement of objections so as to ‘avoid the considerable time and effort that had to be spent during half a year following the sending of the [statement of objections] on solving this issue’. However, the Hearing Officer also concluded that the applicant’s rights of defence had been safeguarded as a result of the extension of the deadline for replying to the statement of objections.
- 99 Accordingly, the applicant’s complaint alleging infringement of its right to be heard and of Article 41 of the Charter as a result of an alleged lack of timely access to the complete case file, in particular to the initially redacted customer names, must be rejected.
- 100 Moreover, the applicant merely claims, in very general terms, that it ‘spent considerable time and effort after the [statement of objections] on solving the issue [of confidentiality claims], further reducing [its] possibility of formulating its defence’. However, the applicant does not specify how that ‘time’ and ‘effort’ affected its defence.
- 101 In those circumstances, it must be held that the fact that the Commission, first, granted access to the initially redacted customer names and, secondly, extended the deadline for replying to the statement of objections was sufficient to ensure that the applicant could exercise its rights of defence, which it did on 20 May 2016 by its reply to the statement of objections and the letter of facts (see paragraph 10 above).
- 102 As regards the second complaint, relating to the lack of access to the document entitled ‘Section 0’, it must be noted that footnotes 58, 79, 80 and 124 to the contested decision do mention a ‘Section 0’ which, together with Annex I to the contested decision, contains a ‘full chronology’ of the anticompetitive contacts, together with corroborating evidence.
- 103 However, contrary to the applicant’s assertions, the contested decision does not contain any ‘Section 0’ in the form of an annex or a separate document which was not provided to the addressees of the decision. It is apparent from the content of the contested decision that the reference to ‘Section 0’ in certain footnotes constituted a cross-reference to a section of the contested decision containing the ‘full chronology’ of the anticompetitive contacts, together with corroborating evidence.

- 104 Thus, it is clear that the reference to a ‘Section 0’ is the result of a clerical error. It is apparent from reading the contested decision, including its index, that that decision contains a ‘Section 4.3.6’ entitled ‘Chronology of events’. That ‘Section 4.3.6’ is also indicated throughout the contested decision (see, in particular, recitals 74, 681, 726, 733, 738, 753, 762, 828, 859, 904 and 984 of the contested decision) as the section containing the detailed chronology of the anticompetitive contacts, together with corroborating evidence.
- 105 Accordingly, it must be concluded that it is apparent from the contested decision as a whole that the ‘Section 0’ mentioned in some footnotes should in fact read ‘Section 4.3.6’ and that, irrespective of that clerical error, the reference to ‘Section 0’ constitutes a cross-reference intended to refer the reader to the section of the contested decision which contains the ‘full chronology’ of the anticompetitive contacts. As is apparent from the index of the contested decision, such a section of the contested decision corresponds to ‘Section 4.3.6’.
- 106 Thus, the error in the contested decision – consisting of referring to a ‘Section 0’ instead of ‘Section 4.3.6’ of that decision – constitutes an irrelevant typographical error which is not capable of adversely affecting the applicant’s right of access or its rights of defence. It should be added that, despite that error, the applicant was able to identify the chronology of the anticompetitive contacts at issue. In connection with, inter alia, the second plea raised in support of the present action, the applicant identified the 20 ECC meetings and 30 other post-2008 anticompetitive contacts mentioned in that ‘Section 4.3.6’ in order to contest account being taken of them by the Commission.
- 107 Furthermore, even if it were admissible, the line of argument put forward by the applicant for the first time in the reply, alleging infringement of the principle of inalterability or ‘non-existence’ of the contested decision owing to an alleged amendment of its text, must be rejected.
- 108 Contrary to the applicant’s assertions, the Commission did not notify it of two different versions of the contested decision. In that regard, it is apparent from the file that, first of all, as the Commission acknowledged, the courtesy copy of the contested decision provided by the Commission to the applicant by email on the very day of the decision did not contain any reference to ‘Section 0’. Next, as is apparent from paragraph 102 above, the printed version of the contested decision notified to the applicant contained several references to ‘Section 0’ in footnotes. Lastly, it should be noted that the version of the contested decision adopted by the College of Commissioners did not contain any reference to ‘Section 0’. Therefore, that reference is limited to the version of the contested decision notified to the applicant.
- 109 However, it does not follow from the foregoing that the Commission adopted decisions whose content is different. As has been concluded in paragraph 106 above, the incorrect reference to ‘Section 0’ in the version of the contested decision notified to the applicant is merely a typographical error in the numbering of the cross-reference concerning the section of the contested decision containing the chronology of the anticompetitive contacts. That clerical error cannot constitute an infringement of the principle of inalterability or result in an alleged ‘non-existence’ of the contested decision, since it had no effect on the grounds or the operative part of the contested decision and, therefore, is not capable of having an impact on the applicant’s legal situation resulting from that decision.
- 110 It follows from the foregoing that the first part of the first plea must be rejected.
- (2) *The second part of the first plea, concerning the lack of access to all potentially exculpatory evidence*
- 111 The applicant submits that the Commission infringed its rights of defence and its right to be heard by not granting it access to all potentially exculpatory evidence contained in the replies of the other undertakings concerned to the statement of objections. The refusal to grant access concerned Sanyo’s reply, in which Sanyo maintained that the Commission had not established to the requisite legal standard the existence of a single and continuous infringement, and Elna’s reply, in which Elna, first, claimed that the exchanges of information did not constitute an infringement by object and, secondly, disputed the duration of the infringement. Furthermore, the applicant submits that, in its request for access, it indicated the potential

exculpatory evidence, or at least adduced evidence that it existed, with the result that the Hearing Officer provided the applicant with two passages from, and one annex to, a reply to the statement of objections. However, those passages and that annex cannot have been the only exculpatory evidence to which the applicant was entitled to have access.

- 112 As a preliminary point, it must be borne in mind that the statement of objections is a document whose aim is to delimit the scope of the procedure initiated against an undertaking and to ensure that the rights of the defence may be exercised effectively. It is from that aspect that the addressees of the statement of objections benefit from procedural safeguards, pursuant to the principle of respect for the rights of the defence, one of which is the right of access to documents in the Commission's file (see judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraphs 239 and 240 and the case-law cited).
- 113 The replies to the statement of objections are not part of the investigation file proper (see judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 241 and the case-law cited).
- 114 Since they are documents which are not part of the file compiled at the time of notification of the statement of objections, the Commission is required to disclose those replies to other parties involved only if it transpires that they contain new incriminating or exculpatory evidence (judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraph 242).
- 115 Similarly, under paragraph 27 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101 and 102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7), as a general rule, the parties will not be granted access to the replies of the other parties involved in the investigation to the statement of objections. A party will be granted access to such documents only where they may constitute new evidence, whether of an incriminating or of an exculpatory nature, pertaining to the allegations concerning that party in the Commission's statement of objections.
- 116 According to the case-law referred to in paragraphs 91 and 92 above, in so far as the applicant relies on the existence of the alleged exculpatory evidence in replies which have not been disclosed, it is for the applicant to provide prima facie evidence of the relevance of those documents for its defence. An applicant must in particular indicate the potential exculpatory evidence in question or adduce evidence that it exists and therefore of its relevance for the purposes of the case (see, to that effect, judgment of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, EU:T:2011:284, paragraphs 256 and 257 and the case-law cited).
- 117 In the present case, first, it is common ground that, following a request for access from the applicant, the Hearing Officer identified two passages from, and one annex to, the reply of one of the addressees of the statement of objections, which potentially contained new exculpatory evidence in favour of the applicant, and granted the applicant access to the non-confidential versions of those passages and that annex.
- 118 Secondly, the applicant merely states that, in their replies, Sanyo and Elna dispute – as it does – the Commission's conclusions concerning, respectively, first, the existence of a single and continuous infringement and, secondly, the existence of an infringement by object and the duration of that infringement.
- 119 As is apparent from the case-law, the mere fact that other undertakings put forward the same arguments as the undertaking concerned and that they may have used more resources for their defence is not sufficient for those arguments to be regarded as exculpatory evidence (judgment of 12 July 2011, *Mitsubishi Electric v Commission*, T-133/07, EU:T:2011:345, paragraph 44). In the present case, the applicant has adduced no evidence of the existence of evidence in the replies of Sanyo or Elna that might have enabled it to call into question the Commission's findings concerning the existence of a single and continuous infringement, the existence of an infringement by object or the duration of that infringement.

120 It follows from the foregoing that the applicant has not indicated any exculpatory evidence which might stem from the replies given by the other undertakings concerned, in particular by Sanyo and Elna, to the statement of objections and, consequently, has not adduced any evidence of the relevance of such evidence for its defence.

121 Accordingly, the second part of the first plea must be rejected.

(3) *The third part of the first plea, concerning the lack of a supplementary statement of objections*

122 The applicant claims that the Commission infringed its rights of defence inasmuch as it issued a letter of facts rather than a supplementary statement of objections, which would have been the correct procedural measure, as the Hearing Officer confirmed. That letter of facts substantially altered the statement of objections, in so far as it contained the previously redacted customer names, as well as references to the numbers of original Japanese documents and updated references to the numbers of relevant English translations. The Commission thus deprived the applicant of a second hearing and a new round of access to the file, which could have been triggered only by the sending of a supplementary statement of objections. Consequently, the Commission prevented the applicant from convincing it of a different result as to the existence of a single and continuous infringement and as to the duration of that infringement. Furthermore, as was also stated by the Hearing Officer, the Commission erred in allowing the applicant only two weeks to reply to the letter of facts, in so far as that letter amounts in reality to a statement of objections.

123 In that regard, it follows from paragraph 110 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6; ‘the Best Practices’) and from the case-law that communication to the parties concerned of further objections is necessary only if, as a result of the administrative procedure, the Commission is led to take new facts into account against the undertakings or to alter materially the evidence for the contested infringements (see judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 192 and the case-law cited; judgment of 24 May 2012, *MasterCard and Others v Commission*, T-111/08, EU:T:2012:260, paragraph 268), that is to say, if additional objections are issued or if the intrinsic nature of the infringement at issue is modified.

124 By contrast, in accordance with paragraph 111 of the Best Practices, a simple letter (letter of facts) is sufficient where the objections raised against the undertakings concerned in the statement of objections are merely corroborated by the new evidence on which the Commission intends to rely.

125 In the present case, it is apparent from the file that, by the letter of facts referred to in paragraph 9 above, the Commission, first of all, pointed out that it had supplemented the first access-to-file DVD with two other DVDs, made available to the applicant on 7 March and 27 April 2016 and intended to give access to the redacted customer names and to a correspondence table linking the English translations to the original Japanese documents and listing the non-confidential versions of the English translations and the original Japanese documents. Next, the Commission annexed to the letter of facts an updated version of the statement of objections containing that information together with a list of the parts of the statement of objections that had been amended. Lastly, it set 20 May 2016 as the deadline for replying to the letter of facts and extended the deadline for replying to the statement of objections to the same date.

126 In addition, it is apparent from the file that the applicant replied on 20 May 2016 to the letter of facts (see paragraph 10 above).

127 In the present case, it cannot be considered that, by disclosing the previously redacted customer names, by linking the English translations to the original Japanese documents and by listing the non-confidential versions of the English translations and the original Japanese documents, the Commission formulated new objections against the applicant or changed the basis or scope of the imputation of the infringement found against the applicant. The Commission merely disclosed a non-confidential version of certain items of evidence on which it intended to rely.

- 128 The applicant's rights of defence cannot therefore be regarded as having been infringed by the sending of that letter of facts instead of a supplementary statement of objections.
- 129 Moreover, as regards the period which the Commission must grant an undertaking to provide its observations regarding a letter of facts, it should be borne in mind that it is for the Commission to set, on a case-by-case basis, a specific period within which the undertakings concerned may submit written observations regarding the new information contained in the letter of facts (see paragraph 111 of the Best Practices). That period 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). In the present case, the prescribed period of two weeks does not appear unreasonable, especially since, as the Commission points out, the applicant had already been given access to the evidence at issue on 7 March and 27 April 2016 (see paragraph 125 above).
- 130 In any event, in accordance with paragraph 111 of the Best Practices, the applicant had the opportunity to request an extension of the deadline, which it did not do, having submitted its reply within the prescribed period.
- 131 Consequently, the applicant's rights of defence cannot be regarded as having been infringed by reason of the fact that the deadline for submitting observations regarding the letter of facts was set at 20 May 2016.
- 132 It follows from the foregoing that the third part of the first plea must be rejected.

*(4) The fourth part of the first plea, concerning the lack of access to the minutes of the contacts between the Commission and other addressees of the statement of objections*

- 133 The applicant claims that the Commission infringed its rights of defence and its right to be heard and failed to follow the case-law stemming from the judgment of 12 June 2014, *Intel v Commission* (T-286/09, EU:T:2014:547, paragraphs 614, 620 and 621), by not granting it access to the minutes of the meetings and telephone calls which took place, during the investigation, between the Commission and other addressees of the statement of objections. Contrary to its approach in the 'Google Search (Shopping)' case, in the present case, the Commission did not discharge its obligation to provide succinct notes containing the minutes of the meetings and telephone conversations held against the background of the investigation. Following a request from the applicant, the Commission merely provided, by letter of 31 January 2017, a list of contacts referred to but not described in the accessible file, a list of contacts not referred to in that file and a list of contacts excluded from the investigation report.
- 134 In that regard, it is apparent from the file that, by letter of 31 January 2017, the Commission sent the applicant a list of contacts that took place between the Commission and the addressees of the statement of objections before the statement of objections was adopted. That list included both the contacts which were referred to in the Commission's accessible file without description and the contacts not referred to therein. That list indicated the date, the parties, the format (meeting or telephone call) and the purpose (through the presentation of a brief summary) of each contact, from which it was apparent that those contacts concerned, in essence, procedural questions, such as the extension of the deadlines for replies and questions concerning the leniency or settlement procedures.
- 135 As regards, in particular, the contacts mentioned by the applicant, it should be noted that it is apparent from the file that the telephone call of 16 December 2014 took place between the Commission and Nichicon, not with Matsuo, as the applicant claims. Moreover, the purpose of that call, as described in the letter of 31 January 2017, was information, given by the Commission team responsible for the case, concerning its preliminary findings regarding the duration of the infringement and information regarding the settlement procedure. Furthermore, it is apparent from the letter of 31 January 2017 that the purpose of the meeting of 16 January 2015 between the Commission and another competitor which was not an addressee of the contested decision was information, given by the Commission team responsible for the case, concerning its preliminary findings regarding its intention to impute the infringement to that competitor for the actions of one of its subsidiaries.

- 136 Thus, contrary to the applicant's assertions, the contacts referred to in paragraph 135 above did not concern information 'received' by the Commission, but rather information 'given' by the Commission.
- 137 In those circumstances, since the applicant does not dispute that it received the letter of 31 January 2017, which contains a brief summary which is nonetheless sufficient to identify each contact in question (see paragraph 134 above), and since, moreover, it did not request any other information from the Commission following that letter, it must be concluded that the evidence in the file contradicts the applicant's complaint of an alleged lack of access to the contacts which took place between the Commission and other addressees of the statement of objections.
- 138 That conclusion, according to which the letter of 31 January 2017 contains adequate information regarding the essential aspects of the Commission's contacts with other addressees of the statement of objections, is not called into question by the applicant's other arguments.
- 139 As regards the applicant's argument that access to the information contained in the letter of 31 January 2017 was difficult and time-consuming to obtain, it should be noted that such difficulty of access is not sufficient to claim that there has been a breach of the rights of the defence and of the right to be heard, since the applicant has not put forward any evidence to substantiate the fact that that difficulty of access prevented it from exercising those rights or limited its exercise of those rights.
- 140 As regards the applicant's argument based on the Commission's practice in the 'Google Search (Shopping)' case, first, in so far as the similarity between the two cases has not been demonstrated, it is sufficient to recall that decisions in other cases can give only an indication, since the facts of the cases are not the same (see judgment of 16 September 2013, *Roca Sanitario v Commission*, T-408/10, EU:T:2013:440, paragraph 64 and the case-law cited). Secondly, whatever the Commission's previous decision-making practice, the fact is that, by the letter of 31 January 2017, it provided adequate information regarding the essential aspects of its contacts with other addressees of the statement of objections (see paragraph 138 above).
- 141 Furthermore, it should be noted that the judgment of 12 June 2014, *Intel v Commission* (T-286/09, EU:T:2014:547), which was set aside by the judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632), cannot, moreover, be applied to the present case. Paragraphs 614, 620 and 621 of that judgment, relied on by the applicant, concern the interviews, carried out by the Commission, of any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation, in accordance with Article 19(1) of Regulation No 1/2003 and subject to the formalities laid down in Article 3 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18). However, in the present case, as is apparent from paragraphs 134 and 135 above, it is not access to interviews with third parties for the purpose of collecting information that is at issue, but access to contacts which took place between the Commission and other addressees of the statement of objections before it was adopted, which concerned, in essence, procedural questions.
- 142 It follows from the foregoing that the fourth part of the first plea must be rejected and, accordingly, the first plea in law must be rejected in its entirety.

***(c) The second plea in law, alleging a lack of evidence of the infringement, material errors of fact, and expiry of the relevant limitation period***

- 143 In connection with the second plea, the applicant submits, in essence, that the Commission failed to provide precise and consistent evidence of an infringement which had had an impact in the EEA for the entire duration of the alleged infringement. In that regard, the applicant calls into question, first, 20 ECC meetings and, secondly, 30 anticompetitive contacts that took place after November 2008 (that second set of contacts being 'the post-2008 contacts'). The applicant thus disputes 50 contacts (collectively, 'the contested contacts') out of a total of 113 anticompetitive contacts referred to in the contested decision.

- 144 It should be noted, in the first place, that, as is apparent from the application and as was confirmed by the applicant in response to a question at the hearing, the applicant does not dispute, as such, its participation in the contested contacts. Instead, it disputes, for all of those contacts, the anticompetitive nature and/or relevance to the EEA market of the discussions which took place during those contacts. In addition, it disputes the sufficiency or credibility of the evidence on which the Commission relied in order to establish the existence of certain contacts or meetings.
- 145 In the second place, as is apparent from the application and as was confirmed by the applicant in response to a question at the hearing, the applicant also does not dispute the accuracy of the extracts from the contested contacts as set out in the contested decision. Instead, the applicant disputes both the Commission's interpretation of those extracts and the sufficiency of the evidence relied on by the Commission.
- 146 In the third place, although the applicant raises specific arguments seeking to challenge the interpretation of certain specific extracts from each of the contested contacts, some of those arguments overlap to a large extent and may be grouped into four parts. The first part relates to the probative value and credibility of the evidence. The second part relates to the anticompetitive nature of the contested contacts. The third part relates to the link between the contested contacts and the EEA. The fourth part relates to the start and end dates of the infringement and to the limitation period.
- 147 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).
- 148 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).
- 149 The items of evidence on which the Commission relies in the decision in order to prove the existence of an infringement of Article 101(1) TFEU by an undertaking must not be assessed separately, but as a whole (see judgment of 8 September 2016, *Goldfish and Others v Commission*, T-54/14, EU:T:2016:455, paragraph 93 and the case-law cited).
- 150 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).
- 151 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).
- 152 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).

153 It is in the light of those considerations that the arguments put forward by the applicant in connection with the second plea must be examined.

(1) *The first part of the second plea, relating to the probative value and credibility of the evidence*

154 In essence, first, the applicant maintains that the Commission relied on insufficient and unreliable evidence to establish the existence and content of the ECC meetings. The Commission relied solely on Rubycon's corporate statements and/or the minutes of the ECC meetings sent to it by Rubycon, that is to say, evidence from a single source which, more importantly, is a leniency applicant. According to the applicant, it is clear from the case-law that an admission by one undertaking accused of an infringement, the accuracy of which is contested by other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement. It also follows from the case-law, in the applicant's view, that information provided by suspected undertakings is, in principle, less reliable and must in principle be corroborated by additional evidence.

155 Similarly, the applicant maintains that the evidence for a number of the post-2008 contacts is also based, in each instance, on a single source, which is also a leniency applicant. Those contacts are, first of all, the bilateral contact of 13 November 2009, the bilateral contacts of 9 and 11 December 2009, the bilateral contact of 23 February 2010 and the MK meeting of 29 August 2011, for which the single source is Rubycon; next, the MK meeting of November 2009 and the bilateral contact of December 2009, for which the single source is Sanyo; and, lastly, the MK meeting of 24 October 2011, for which the single source is Matsuo. Furthermore, the applicant disputes the sufficiency of the evidence on which the Commission relied in order to establish the existence of the MK meeting of 21 December 2009.

156 Secondly, the applicant calls into question the authenticity, legibility, credibility or sufficiency of certain items of evidence concerning the ECC meeting of 29 August 2002, the MK meetings of 21 December 2009, 17 June 2010, 16 July 2010 and 16 September 2010, the bilateral contacts of 6 October 2010 and 7 April 2010, and the trilateral meeting of 31 May 2010.

157 The Commission disputes those arguments.

158 In that regard, it should be borne in mind that, according to settled case-law, first, 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, judgments of 30 November 2011, *Quinn Barlo and Others v Commission*, T-208/06, EU:T:2011:701, paragraph 52 and the case-law cited, and of 5 June 2012, *Imperial Chemical Industries v Commission*, T-214/06, EU:T:2012:275, paragraph 58 and the case-law cited).

159 Admittedly, 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).

- 160 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).
- 161 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).
- 162 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).
- 163 Secondly, the sole criterion relevant in evaluating the evidence adduced is its reliability. According to the generally applicable rules regarding evidence, the credibility, 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).
- 164 Moreover, the credibility of documentary evidence cannot be called into 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).
- 165 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).
- 166 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).
- 167 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).
- 168 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).

- 169 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).
- 170 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).
- 171 In the present case, as regards the source of the evidence of the ECC meetings, it is apparent from the contested decision that the Commission established their existence on the basis of the minutes of those meetings produced by Rubycon, corroborated in several cases also by Rubycon's corporate statements (see, inter alia, footnotes 124, 125, 200, 210 and 223 to the contested decision). It is true that Rubycon applied to the Commission for a reduction in the amount of the fine under the 2006 Leniency Notice (recital 47 of the contested decision).
- 172 However, contrary to the applicant's assertions, it must be observed, first of all, that the credibility and probative value of the evidence from Rubycon cannot be called into question merely because it is an undertaking involved in the infringement and a leniency applicant.
- 173 It is apparent from the case-law referred to in paragraph 160 above that statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence. In the present case, Rubycon's corporate statements concerning the ECC meetings ran counter to its interests, in so far as Rubycon itself participated in those meetings (recital 79 of the contested decision). Moreover, those statements merely corroborated, in certain cases, the documentary evidence produced by Rubycon, in particular the contemporaneous records of the facts in question.
- 174 Next, the existence of particular circumstances liable to call into question the credibility of that evidence is not apparent from the applicant's arguments, since the mere fact that that evidence originates from the author of the corporate statement is not sufficient to call into question its credibility, in accordance with the case-law referred to in paragraph 164 above.
- 175 Furthermore, the evidence on which the Commission relied was not limited to Rubycon's corporate statements but also included the minutes of the meetings provided by Rubycon. In particular, great importance must be attached to the fact that a document has been drawn up in close connection with the events or by a direct witness of those events (see judgment of 3 March 2011, *Siemens v Commission*, T-110/07, EU:T:2011:68, paragraph 54 and the case-law cited), as is the case here with the minutes of the ECC meetings.
- 176 Lastly, it is true that, in certain cases, the evidence of the ECC meetings is based on a single document, in particular on the minutes provided by Rubycon, and even that there is no corporate statement explaining or confirming the content of that document, as is the case, in particular, with the ECC meetings of 14 November 2001 or 29 August 2002 (see, respectively, recitals 152 and 166 of the contested decision and the footnotes referred to therein). However, in accordance with the case-law cited in paragraphs 164 and 175 above, these were contemporaneous documents to which, for that reason, great importance must be attached, and whose credibility cannot be called into question by the mere fact that they originate from the author of the corporate statement.

- 177 Accordingly, the applicant's line of argument seeking to dispute the probative value and credibility of the evidence concerning the ECC meetings on the ground that that evidence comes from a single source that is also a leniency applicant is unfounded.
- 178 For the same reasons, the Court must reject the applicant's similar arguments relating to the source, in each instance, of the evidence concerning the post-2008 contacts, referred to in paragraph 155 above.
- 179 In that regard, it should be noted that the Commission established the existence of the bilateral contact of 13 November 2009, the bilateral contacts of 9 and 11 December 2009, the bilateral contact of 23 February 2010 and the MK meeting of 29 August 2011 on the basis of Rubycon's corporate statements and other documents, in particular emails and minutes, produced by Rubycon (see, respectively, recitals 547, 548, 555 to 558, 581 and 644 of the contested decision and the footnotes referred to therein). In addition, the Commission established the existence of the MK meeting of November 2009 and the bilateral contact of December 2009 on the basis of Sanyo's corporate statement and the minutes and emails produced by Sanyo (see, respectively, recitals 549 to 554 and 566 of the contested decision and the footnotes referred to therein). Similarly, the Commission established the existence of the MK meeting of 24 October 2011 on the basis of the minutes of the meeting produced by Matsuo (see recital 651 of the contested decision and footnote 1192 thereto).
- 180 As concluded in paragraphs 177 and 178 above, the fact that the evidence for some of the contested contacts consists of one or more documents provided by leniency applicants, namely Rubycon, Sanyo or Matsuo, as the case may be, does not detract from its probative value and credibility.
- 181 Furthermore, as regards the applicant's other arguments seeking to dispute certain items of evidence, it should be noted that, as regards the ECC meeting of 29 August 2002, there is no reason to doubt the authenticity of the respective items of evidence, contrary to the applicant's assertions. In that regard, it is apparent from the documents before the Court that, as the Commission has pointed out, the original Japanese version of the minutes was sent to it by Rubycon as an annex to its reply of 30 May 2014. In addition, Rubycon provided the Commission with the English translation of the document on 25 June 2014 as part of a CD-ROM containing the English translations of the documents which it had provided. Lastly, contrary to the applicant's assertions, there is no doubt that the products in question at that meeting were eco-products in general, although products of the 'LB' type were mentioned only once (see paragraph 3 of the minutes of the meeting).
- 182 As regards the MK meetings of 21 December 2009, 17 June 2010, 16 July 2010 and 16 September 2010, as well as the bilateral contact of 6 October 2010, contrary to the applicant's assertions, their existence was established on the basis of various consistent and credible items of evidence, within the meaning of the case-law referred to in paragraphs 158 to 170 above, namely the minutes of the meetings, the notes and the corporate statements identified in the contested decision in recitals 573 to 580 thereof and footnote 1028 thereto, in recital 606 thereof and footnote 1127 thereto, in recital 615 thereof and footnote 1148 thereto, in recital 619 thereof and footnote 1151 thereto, and in recital 623 thereof and footnote 1155 thereto, respectively.
- 183 As regards the bilateral contact of 7 April 2010, the applicant errs in disputing the sufficiency and credibility of the evidence on the ground that it was limited to a handwritten and allegedly almost illegible note. First, that note was produced by an employee of Rubycon at the time of the contact with the aim of recording the telephone conversation in writing and, therefore, it is appropriate to attach great importance to it, in accordance with the case-law referred to in paragraph 175 above. Secondly, Rubycon's corporate statement confirmed and explained that note. In addition, it is clear from the extract from the note reproduced in recital 587 of the contested decision that it was sufficiently legible for it to be understood that the contact concerned, inter alia, prices for the customer 'P' and capacitors for flat-panel televisions, which, moreover, is not disputed by the applicant.
- 184 Similarly, as regards the trilateral meeting of 31 May 2010, it is apparent from recitals 599 to 605 of the contested decision and footnote 1111 thereto that the Commission established the existence of that

meeting, held between the applicant, Nichicon and Rubycon, on the basis of three items of evidence, namely the handwritten notes of Rubycon's representative, containing extracts from the meeting, Rubycon's corporate statement, explaining those notes, and Nichicon's reply to a request for information from the Commission, confirming that the meeting had taken place. Thus, contrary to the applicant's assertions, that evidence is not incomprehensible or insufficient.

185 It follows from all of the foregoing that the first part of the second plea must be rejected.

(2) *The second part of the second plea, relating to the anticompetitive nature of the contested contacts*

186 The applicant calls into question some of the contested contacts, claiming, in essence, that they did not include an exchange of commercially sensitive information capable of removing the strategic uncertainties of participants and, therefore, were not anticompetitive. In particular, the applicant disputes the meaning and scope of certain extracts from the contested contacts, reproduced in the contested decision, claiming that they were exchanges of past information or public information or even exchanges of future intentions which have not materialised, that is to say, information which is not capable of reducing uncertainty as to competitors' conduct on the market.

187 The Commission disputes those arguments.

188 As a preliminary point, it should be recalled that 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).

189 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).

190 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).

191 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).

192 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).

193 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).

194 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).

195 It is thus apparent from the case-law that the provision of sensitive business information, such as information regarding pricing or information regarding supply and demand, including information in relation to future pricing or 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.

196 In the present case, the Commission concluded, in recital 740 of the contested decision, that numerous extracts from the anticompetitive contacts, in particular from the ECC and ATC meetings, demonstrated that those contacts had been established in order to exchange commercially sensitive information and to find a coordinated response to the issues faced by the undertakings concerned (such as rising raw material prices, currency fluctuations or pressure from other competitors).

197 The Commission also concluded, in recital 741 of the contested decision, that the subject matter of the discussions during the anticompetitive contacts remained the same or largely similar for the entire duration of the cartel. Throughout the infringement period, the discussions were of a global character and typically covered customer price requests or tenders and responses thereto, current and target selling prices, intended price increases or price increases achieved in relation to specific customers or across the industry, the status of price negotiations with customers, production capacity, and sales forecasts.

198 The arguments put forward by the applicant, seeking specifically to challenge the anticompetitive nature of certain specific extracts from the contested contacts, cannot call those findings into question.

(i) *The anticompetitive nature of the exchanges of information at the ECC meetings*

199 The applicant submits, in essence, that, at the ECC meetings, the participants did not exchange sensitive business information, in particular regarding future supply or pricing.

200 As regards the ECC meeting of 26 June 1998, it is apparent from Rubycon's minutes of the meeting and its corporate statement, reproduced, in essence, in recitals 109 to 111 of the contested decision, that the participants in that meeting, including the applicant, agreed to grant a customer, referred to as 'T Company', a 0 to 3% price reduction. In addition, some participants complained about the prices charged by other participants in two European countries, namely Italy and the United Kingdom. That conclusion cannot be called into question by the applicant's assertion that the word 'complained' is too strong and the appropriate expression to describe that behaviour would be 'put on the agenda'. Even if that assertion were

correct, this would mean, in any event, that, at the very least, the participants sought to ‘put on the agenda’ the coordination of their pricing behaviour in those European countries.

201 As regards the ECC meeting of 5 November 1998, it is apparent from the extracts from that meeting, reproduced in recital 114 of the contested decision, that, at the meeting, the applicant stated, with reference to Europe, that it was ‘seeing double digits in price negotiations for [the following year] and falling demand [was] leading to falling prices’. Contrary to the applicant’s assertions, that statement is not limited to a description of a current trend or a general comment on pricing levels, but informs the other participants of its pricing intentions in Europe. Even though no precise figure is indicated, that information nevertheless discloses to the other participants the content of the negotiations which the applicant was in the process of conducting with its customers for the following year and its decisions or intentions concerning its own conduct on the market in terms of pricing.

202 Furthermore, it is apparent from the extracts from that meeting, reproduced in recital 115 of the contested decision, that, at that meeting, 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 Association of South-East Asian Nations (ASEAN), but extended throughout the world, so that it was necessary to take early measures. Contrary to the applicant’s assertions, those statements by Elna are not limited to the announcement of unilateral measures, but demonstrate a coordinated approach as regards the prices charged in the various regions of the world in view of the fear of the reduction in the US dollar price.

203 As regards the ECC meeting of 18 December 1998, the applicant errs in disputing the Commission’s interpretation of the following statement by ‘Company M’:

‘Europe – a visible drop is beginning. With respect to the euro settlement, we will provide support from April of next year.’

204 First, the Commission did not mention that sentence as an example of a price agreement applying to Europe, but as an example of an exchange of information regarding the current and future development of supply and demand in Europe (see recital 118 of the contested decision). The Commission considered that it was apparent from the evidence referred to in footnote 217 to the contested decision that, at that meeting, ‘Company M’ had informed the other participants that a visible drop was beginning in Europe concerning the current and future situation with regard to supply and demand. More specifically, that company gave details of the development of its orders in several regions of the world, including in Europe, and stated that it would start to handle the euro settlement from April 1999 onwards.

205 Secondly, that statement was not limited to informing the other participants of the date on which ‘Company M’ would start using the euro, but, as the Commission points out, it helped the other participants to decide whether and when they themselves would accept payments in euro, removing uncertainty as to the timing of the change envisaged by their competitor. Given that the participants in the meeting were Japanese undertakings, the fact that the euro had been introduced as a non-fiat currency from 1 January 1999 did not oblige them to accept payments in that currency on a certain date.

206 As regards the ECC meeting of 29 October 1999, the applicant errs in disputing the relevance of the statement of ‘Company M’, reproduced as follows in recital 122 of the contested decision:

‘Tantalum chip – There was a 40% price increase for [two European companies], but it will not be sufficient unless the supply is restricted.’

207 It follows that, admittedly, the 40% increase referred to therein concerned the past. However, the disclosure, in particular, of that price increase percentage is also linked to the second part of the statement, which refers to the future intention of its author, namely that of restricting supply, that is to say, the supply of the type of capacitor mentioned, in order to make that price increase sufficient.

- 208 As regards the ECC meeting of 17 December 1999, the applicant errs in disputing the fact that Elna had shared a future pricing intention concerning the EEA when it stated, at that meeting, that it was negotiating increasing prices by several per cent with overseas customers (see recital 126 of the contested decision). It follows from that statement that Elna provided the other participants in the meeting with information relating to its ongoing price negotiations and thus regarding future pricing, irrespective of whether this was an ‘irreversible decision’ on Elna’s part, as the applicant claims.
- 209 As regards the ECC meeting of 28 January 2000, the applicant disputes the fact that the Commission interpreted the statement by ‘Company M’ that, as regards Europe, ‘a return of value of about 15% [was] necessary from April due to the weak euro’ as an intention to increase prices (see recitals 129 and 130 of the contested decision). According to the applicant, that statement is merely an attempt at coordination, or even an unconfirmed intention to increase prices. However, irrespective of the exact scope of the statement in question, it can easily be seen from that statement that the declarant communicated its intentions in respect of future pricing. Furthermore, even if coordination between the participants in that regard were not demonstrated, the fact remains that exchanges concerning future price increases constitute the provision of sensitive business information.
- 210 As regards the ECC meeting of 25 May 2000, the statements called into question by the applicant, which are set out in recital 133 of the contested decision, are the following. In the first place, a participant in the meeting stated, during the part of the meeting concerning ‘the situation of each company’, that ‘for Europe, due to a substantial fall in the Euro, they [were conducting] price increase negotiations of at least 30%’. In the second place, the applicant stated that ‘in Europe they [were] raising prices quite a bit due to the fall in the Euro’. In the third place, Rubycon stated that ‘they [were] negotiating for price increases due [to] the falling European currency’. Contrary to the applicant’s assertions, it is clear from those items, first, that the participants informed each other of ongoing price negotiations and, secondly, that they shared information regarding their intended reaction to the depreciation of the euro, indicating in particular the envisaged price increase percentage .
- 211 As regards the ECC meeting of 28 July 2000, the applicant disputes the Commission’s findings in recital 136 of the contested decision. In the first place, it claims that the Japanese expression ‘ne-modoshi’, translated as ‘price rebound’ in English, was misinterpreted by the Commission as meaning ‘price increases’, whereas it means ‘price recovery’, which indicates that the participants in the meeting had discussed past price fixing rather than future price fixing. In the second place, the phrase ‘and active measures are being taken to [raise] prices in the overseas market as well’ was merely a description of the need to increase prices in order to compensate for the rise in raw material prices, the latter being publicly available information. In the third place, the leniency applicants denied that price agreements having an effect in the EEA had been concluded during the ECC meetings.
- 212 It is apparent from Rubycon’s corporate statement and the minutes of the ECC meeting of 28 July 2000, reproduced in essence in recital 136 of the contested decision, that, at that meeting, the participants noted that price increases in relation to a specific type of aluminium electrolytic capacitor for customers in Taiwan had largely been successfully achieved. Subsequently, the participants stated that ‘prices [had] risen mainly in Taiwan and Europe, but an additional level of price increases [would] expand in the rest of the world’, and that ‘a price increase of 3-5% [had] been accepted in the domestic market, and active measures [were] being taken to [raise] prices in the overseas market as well’.
- 213 It follows that the applicant’s argument alleging an error of translation or interpretation is irrelevant, since it is not disputed by the applicant that the participants in the meeting had discussed raising the prices of their products to compensate for the rise in raw material prices, irrespective of whether they referred to a ‘price recovery’ or to a ‘price increase’.
- 214 Moreover, the Court cannot concur with the applicant when it claims that, at that meeting, the participants merely gave a ‘description of the general necessity that prices had to be increased to compensate for the raw material price surge’, given that they exchanged information capable of reducing uncertainty as to

their respective conduct on the market. The applicant's argument that price agreements were not concluded and that the price of raw materials was public is irrelevant in that regard.

- 215 As regards the ECC meeting of 20 September 2000, the applicant disputes the Commission's conclusion, in recital 139 of the contested decision, that 'Company M' disclosed confidential information in relation to supply and demand. It is true that that competitor had publicly announced that it would reduce production of '11L below 6 Ø and 7L' electrolytic capacitors. However, it is apparent from Rubycon's minutes of the meeting, reproduced in recital 140 of the contested decision, that, at that meeting, that competitor also disclosed information regarding the level of that reduction and stated its intention to increase production of another type of capacitor, informing the other participants of the production volume of that type of capacitor. It follows that some of the information provided by 'Company M' at that meeting had not been disclosed in its press release. Furthermore, the very wording of Rubycon's minutes, which include the words 'Europe – The second round of the return of value is underway', contradicts the applicant's argument that the information exchanged is past information.
- 216 As regards the ECC meeting of 22 November 2000, the applicant submits that the Commission had no evidence that the participants had discussed the pricing of vinyl chloride-free capacitors. In addition, a subsequent meeting scheduled for 20 December 2000 did not take place and no follow-up about a 'consensus view' is evident from the Commission's file.
- 217 In that regard, it is apparent from Rubycon's minutes of the meeting, set out in recitals 145 and 146 of the contested decision, that the participants coordinated the response to a possible price request from 'Company S', indicating their intention to increase prices, and that, as regards the pricing of a certain type of capacitor for eco-products, although no consensus could be reached at that meeting, it was indicated that at the next meeting on 20 December 2000 the increase in the cost of raw materials, in particular, would be reported and that, on that basis, a consensus would be reached.
- 218 It follows that, contrary to the applicant's assertions, the participants in the meeting in question discussed their pricing behaviour concerning a capacitor for eco-products and, accordingly, that they engaged in anticompetitive conduct. The fact that they were unable to reach a unanimous opinion and the fact that the meeting of 20 December 2000 referred to in paragraph 217 above did not take place have no bearing on that conclusion.
- 219 As regards the ECC meeting of 19 September 2001, the applicant errs in claiming that the information exchanged concerning '04 and 60' chip capacitors was limited to past information or that it could be obtained from other sources such as customers. It is apparent from the extracts from the minutes of that meeting, set out in recital 150 of the contested decision, that Nichicon shared sensitive business information, in so far as it set out the downward trend in prices of certain types of capacitor and the percentages associated with that trend. In addition, that undertaking informed the other participants that its customers' requests for price reductions were increasingly frequent and illustrated the reduction percentage requested. The fact that some of that information could have been obtained from Nichicon's customers, which, moreover, the applicant has not shown, has no bearing on that conclusion.
- 220 As regards the ECC meeting of 14 November 2001, the applicant disputes the anticompetitive nature of the exchanges which took place at the 'SM meetings' mentioned at that meeting. Furthermore, it states that it expressed the desire to distance itself from participating in anticompetitive conduct during the 'SM meetings'.
- 221 It is apparent from the documents before the Court, and in particular from Sanyo's corporate statement, that the 'SM meetings', also called 'SM committee', were held regularly every month, at manager level, as opposed to the ECC meetings, which were held at president level. However, the applicant's assertion that it had publicly distanced itself from the 'SM meetings' is not substantiated in any way and, in any event, the mere fact of the applicant distancing itself from those meetings would not support the conclusion that the applicant had distanced itself from the cartel. First, the 'SM meetings' constitute only a small part of the anticompetitive contacts referred to in the contested decision, in which the applicant does not deny having

participated (see paragraph 144 above). Secondly, the applicant has not demonstrated that it indicated to its competitors that it was continuing to participate in the meetings in a spirit that was different from theirs, which is decisive for the purpose of concluding that it had publicly distanced itself from the anticompetitive conduct (see, to that effect, judgment of 25 January 2007, *Sumitomo Metal Industries and Nippon Steel v Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraphs 47 and 48 and the case-law cited).

- 222 Furthermore, it is apparent from the extracts from the minutes of the ECC meeting of 14 November 2001, reproduced in recitals 153 and 154 of the contested decision, the accuracy of which is not disputed by the applicant, that, at that meeting, first, the participants emphasised the importance of exchanging information with each other. Secondly, the applicant stated that the meetings had to be based on mutual trust instead of focusing on prices and that the participants had to discuss what they could promise face to face. Thirdly, one of the participants stated that the problems that should be solved by cooperation related not only to prices, but also to countermeasures against overseas manufacturers. Fourthly, another participant stated that the common enemy of the participants was overseas manufacturers and that the participants had to compete modestly and develop an environment that allowed them to discuss problems after events.
- 223 It follows that the participants in that meeting sought to engage in coordination for the future, in particular at future meetings, and to exchange information, in particular as regards prices.
- 224 As regards the ECC meeting of 19 March 2002, the applicant disputes the Commission's statement, in recital 156 of the contested decision, that the participants in that meeting talked about their willingness to discuss prices at future ECC meetings. According to the applicant, the participants did not agree in that regard and the statement of 'Company M', referred to in recital 157 of the contested decision, according to which that company was 'working in the direction of offering a uniform price for the group', was merely general information. Moreover, the information regarding supply and demand concerned the past or related to general trends.
- 225 That interpretation by the applicant is not supported by the extracts from the minutes of that meeting, reproduced in recitals 157 and 158 of the contested decision. It follows from those extracts that, in addition to that statement by 'Company M', the participants in the meeting, during the discussion of the future objective of the ECC meetings, wished to return to the starting point, which was not possible, given that one of them refused to discuss prices. In addition, certain participants provided information regarding supply and demand, including information in relation to supply and demand for the following April, which included specific data, such as the projected increase in production for tantalum electrolytic capacitors or the percentage decrease in sales.
- 226 As regards the ECC meeting of 17 July 2002, it is apparent from the extracts from the minutes of that meeting, reproduced in recitals 162 and 163 of the contested decision, that, contrary to what the applicant appears to claim, the exchanges which took place were of such a kind as to influence the conduct of competitors on the market. First, it is apparent from Rubycon's statement that Rubycon was concerned by the fact that the products were sold at a very low price and stated that it was necessary to present prices carefully. Secondly, the Nippon Chemi-Con group announced that, once the activities of the group had been resumed, competition that was 'more than [what was] necessary' was to be avoided.
- 227 As regards the ECC meeting of 29 August 2002, the applicant errs in disputing the Commission's assessment in recital 167 of the contested decision that, at that meeting, the participants discussed future price cooperation, in particular the means of restricting price decreases. It is apparent from the extracts from the minutes of the meeting, set out in recital 168 of the contested decision, that the participants considered the possibility of concerted handling of customers' price reduction requests, one of the participants having stated that a report could be drawn up regarding the state of price measures taken by the major manufacturers in the sector. That report is, by its nature, an exchange of sensitive business information which, contrary to the applicant's assertions, is not limited to an 'attempt' to cooperate, but corresponds to a form of coordination on price response.

- 228 Furthermore, as regards the discussions concerning eco-products at the ECC meeting of 29 August 2002, it must be noted that the exchange of information between the participants was not limited to sharing public information or industry trends, as the applicant claims. It is apparent from the extracts from the minutes of that meeting, reproduced in recital 169 of the contested decision, that the participants, in particular in order to compensate for the increase in raw material costs, agreed to set prices differently for eco-products and for non-eco-products of certain customers and to keep the price decrease as small as possible.
- 229 As regards the ECC meeting of 18 September 2002, the extracts from the minutes of that meeting set out in recital 175 of the contested decision and, in particular, the table set out therein show that, contrary to the applicant's assertions, the participants did not discuss mere price proposals, but agreed on the various price increase rates for certain types of capacitor, as is apparent from, inter alia, the following sentence, according to which 'the increase rate shall be 5% with 3% as a minimum as a consensus opinion of the industry'. Moreover, it is apparent from the extracts reproduced in recital 176 of the contested decision that the participants established a 'unification strategy' for the implementation of the price increases. According to that strategy, first, an announcement regarding the price increase would be published in the newspapers, then a subcommittee would be convened to discuss further details and, lastly, a measure would be taken against a certain competitor.
- 230 As regards the ECC meeting of 29 January 2003, the applicant's argument that no discussion of pricing intentions took place cannot succeed. The extracts from the minutes of that meeting, reproduced in recital 182 of the contested decision, show, in particular, that one of the participants expressed its 'wish to cope with the price issue with reference to other companies' intentions' and that another participant mentioned that 'violation of the price agreement will leave a blot in the operation of the ECC meeting', which is sufficient to demonstrate that the participants discussed their pricing intentions.
- 231 As regards the ECC meeting of 19 February 2003, the applicant errs in maintaining that the participants exchanged only past pricing information that had already formed the subject of an agreement with their customers. As is apparent from the extracts from the minutes of that meeting set out in recital 186 of the contested decision, the exchange of information in question concerned, in essence, the result of the implementation of the price increases agreed upon by the same participants at the ECC meeting of 18 September 2002. That exchange is, by its nature, anticompetitive, in so far as it followed a previous coordination of pricing behaviour. Moreover, it does have an impact on future prices, inasmuch as it makes it possible, inter alia, to monitor the outcome of that coordination.
- 232 As regards the ECC meeting of 15 May 2003, it should be noted that, in so far as the infringement referred to in the contested decision included agreements and/or concerted practices with regard to pricing, the applicant's argument that Rubycon's invitation to the other participants, asking them to maintain their prices (see recital 193 of the contested decision), was not accepted by the other competitors is irrelevant. That invitation shows, in any event, that the participants discussed their intention to maintain prices. The disclosure of that intention to other competitors is, irrespective of their express agreement, contrary to the competition rules.
- 233 It follows from all of the foregoing that, contrary to the applicant's assertions, the exchanges of information at the ECC meetings, inter alia those detailed in paragraphs 200 to 232 above, show, in general, the existence of contacts of such a kind as either to influence the conduct of competing undertakings on the market or to disclose to those undertakings a competitor's decision or intention concerning its own conduct on the market, in particular as regards pricing behaviour. Those exchanges are therefore contrary to the requirement of independence that applies to all economic operators and thus to the competition rules, as is apparent from the case-law referred to in paragraphs 189 to 192 above.

*(ii) The anticompetitive nature of the exchanges of information during the post-2008 contacts*

- 234 The applicant submits, in essence, that, during the meetings and contacts that took place after November 2008, the participants did not exchange sensitive business information and/or EEA-relevant information. In

particular, the Commission did not take account of the fact that, following the earthquake which took place in Japan in March 2011, the market conditions and the participants' conduct on the market had changed completely, so as to prevent the alleged collusion between the participants in the meetings and contacts in question.

- 235 As regards the MK meeting of 11 March 2009, the applicant disputes the Commission's interpretation of the sentence contained in an email from 'Company S' set out in part in recital 503 of the contested decision, according to which 'during the meeting, there were voices to increase the price according to the lead time of the orders but [a] price increase for conductive material is not likely'. However, even assuming that the applicant's interpretation, according to which that sentence simply means that 'some participants expressed an interest in price increases', is correct, it must be pointed out that it is apparent from the evidence set out in recital 502 of the contested decision that, at that meeting, the participants exchanged information regarding supply and demand for specific types of electrolytic capacitor and, in particular, demand projection data for March, April and May 2009, that is to say, sensitive business information concerning supply and demand.
- 236 As regards the bilateral contact of 1 and 7 May 2009, the applicant's argument that that contact, which took place between 'Company S' and itself, did not concern future prices is directly contradicted by the extracts from the emails of 1 and 7 May 2009 set out in recitals 510 and 511 of the contested decision. It follows from those extracts that a representative of the applicant sent a representative of Sanyo a table comparing the prices charged by the two companies for 'OS-CON' aluminium electrolytic capacitors, asking for his opinion on prices and emphasising that they would 'both prefer to keep the price down to a minimum'. In response, Sanyo's representative gave the applicant's representative advice on prices and informed him of Sanyo's new prices, which were aligned with those of the applicant.
- 237 As regards the MK meeting of 21 May 2009, contrary to the applicant's assertions, it is apparent from the evidence set out in recitals 514 to 519 of the contested decision that some of the discussions at that meeting were not confined to tantalum electrolytic capacitors or to particular customers, such as the customer 'K'. That was the case, in particular, for the exchange of detailed information regarding supply and demand which followed the same pattern as the previous MK meetings and concerned both aluminium electrolytic capacitors and tantalum electrolytic capacitors.
- 238 As regards the MK meeting of 16 July 2009, the applicant errs in submitting that Rubycon did not express its pricing intentions at that meeting. It is apparent from the information set out in recitals 523 to 528 of the contested decision that Rubycon, inter alia, informed the other participants of its preferred course of action in response to the appreciation of the Japanese yen, namely a rejection of orders with a low price level and a price increase of 20%. As the Commission maintains, that exchange reduces uncertainty for the other participants as to Rubycon's conduct on the market.
- 239 As regards the bilateral contact of July 2009, the applicant's argument that the phrase 'zero response' was mistranslated and misinterpreted as expressing the intention not to grant the customer 'A' any price reductions must be rejected. Any errors in translating or interpreting that phrase have no bearing on the fact that, as is apparent from the emails set out in recitals 534 to 536 of the contested decision, during that contact the applicant and Nichicon exchanged information concerning their respective negotiations with a certain customer established in Hungary.
- 240 As regards the MK meeting of 21 August 2009, it is apparent from the extracts from the minutes of that meeting, reproduced in recitals 538 to 540 of the contested decision, that the participants exchanged detailed information regarding supply and demand, including in relation to future supply and demand, and information regarding price increases, which, moreover, is not disputed by the applicant. In that context, the applicant's argument based solely on an error in the interpretation of Rubycon's statement, cited in recital 540 of the contested decision, is irrelevant, given that, in any event, it is not disputed that an exchange of future pricing intentions took place at that meeting.

- 241 As regards the bilateral contacts of 9 and 11 December 2009, contrary to the applicant's assertions, the two emails which the applicant sent to Rubycon, under the heading 'Negotiations with Company P', the transcript of which is set out in recitals 557 and 558 of the contested decision, show that the applicant disclosed to Rubycon detailed information regarding its negotiations with 'Company P', including information in relation to its strategy with regard to negotiations which had not yet been finalised. The sentence according to which 'Company C [(the applicant)] is trying to recover price in earnest' is an example of this.
- 242 As regards the bilateral contact of 25 January 2010, made by telephone between the applicant and Elna, its anticompetitive nature is clear from Elna's statement, reproduced in recital 572 of the contested decision, which states: 'We do not intend to reduce our price, or just offer a fine tuning of around 1%'. Contrary to the applicant's assertions, the use of the humorous expression 'LOL' at the end of the statement cannot alter that conclusion.
- 243 As regards the bilateral contact of 23 February 2010, contrary to the applicant's assertions, the exchange of pricing information had an impact on the future, since the future conduct of each undertaking participating in the exchange is conditioned by the precise information regarding pricing, even past pricing, which it has received from its competitor. In addition, during that contact, it is apparent from the extract reproduced at the end of recital 582 of the contested decision that the parties mentioned future intentions concerning a price adjustment and the declining of future additional orders from the customer 'P'.
- 244 As regards the MK meeting of 21 April 2010, the applicant errs in claiming that the exchanges which took place at that meeting are insignificant. It is apparent from the evidence set out in recitals 588 to 593 of the contested decision that that meeting followed the same pattern as the previous MK meetings, namely that the participants, including the applicant, exchanged information regarding supply and demand for aluminium electrolytic capacitors and tantalum electrolytic capacitors. In particular, they exchanged demand projection data for April, May and June 2010.
- 245 In addition, contrary to the applicant's assertions, it is clear from the evidence set out by the Commission that the participants in the MK meeting of 21 April 2010 discussed their future intentions concerning pricing and production. Thus, it is apparent from the extract referred to in recital 591 of the contested decision that the applicant complained about the low prices of a specific type of electrolytic capacitor for a certain customer and that the other participants confirmed that price reductions were not appropriate. Similarly, Rubycon's statement, reproduced in recital 593 of the contested decision, discloses its intention to reduce orders for certain items and to shift production to large-sized products of high added value.
- 246 As regards the MK meeting of 21 May 2010, it is apparent from the evidence set out in recitals 594 to 598 of the contested decision that the participants exchanged, in particular, demand projection data for May, June and July 2010. In addition, the applicant's statement, reproduced in recital 598 of the contested decision, declaring its intention not to increase prices for the customer 'S', illustrates the disclosure of the participants' pricing intentions.
- 247 As regards the MK meeting of 17 June 2010, it is apparent from the evidence set out in recitals 607 and 608 of the contested decision that the participants exchanged, in particular, demand projection data for June, July and August 2010. In addition, contrary to the applicant's assertions, the participants did not confine themselves to exchanges regarding unilateral price 'revisions' or the addition to contracts of a clause relating to exchange rates, but shared information regarding their current, and therefore future, strategy for the prices of certain types of capacitor. Thus, it is apparent from the extracts from the minutes of the meeting set out in recitals 609 to 611 of the contested decision that NEC Tokin shared its pricing strategy regarding a specific type of tantalum electrolytic capacitor, that Rubycon disclosed pricing information regarding aluminium electrolytic capacitors for Japanese and foreign customers, and that Elna reported the negative influence that a weak euro had on sales denominated in Japanese yen and indicated its intention to revise prices for two customers.

- 248 As regards the MK meeting of 16 July 2010, as is apparent from the information set out in recitals 616 to 618 of the contested decision, the participants exchanged, in particular, demand projection data for July, August and September 2010. In addition, the applicant informed the other participants in the meeting that the price increase was being negotiated to allow an increase in production of a specific type of aluminium electrolytic capacitor.
- 249 As regards the bilateral meeting of 6 October 2010, contrary to the applicant's assertions, it is apparent from the evidence set out in recitals 623 to 625 of the contested decision that the participants in the meeting exchanged, in essence, information concerning their future pricing intentions regarding aluminium electrolytic capacitors for three of their customers, one of which had its headquarters in Nuremberg (Germany).
- 250 As regards the MK meeting of 15 or 16 November 2010, it is apparent from the evidence set out in recitals 628 and 629 of the contested decision that, first of all, the participants exchanged, in particular, demand projection data for November and December 2010 and January 2011. Next, several participants disclosed information regarding their price increases, some of which concerned future prices, in particular the price increase referred to by NEC Tokin for April 2011. Lastly, it is apparent from the transcripts reproduced in recital 630 of the contested decision that an exchange took place regarding future prices for high pressure aluminium electrolytic capacitors and that there is no doubt as to the identification of those products, which is, moreover, apparent from the applicant's statement reproduced in the same recital of the contested decision. Thus, the applicant errs in maintaining that that meeting concerned only tantalum electrolytic capacitors and was not anticompetitive.
- 251 As regards the MK meeting of 20 December 2010, it is sufficient to note that, at that meeting, the participants exchanged demand projection data for December 2010 and January and February 2011. Contrary to the applicant's assertions, those exchanges were not confined to tantalum electrolytic capacitors and were capable of reducing uncertainty on the market.
- 252 As regards the MK meeting of 19 April 2011, contrary to the applicant's assertions, Elna's statement set out in recital 643 of the contested decision does not merely describe a possibility. The statement in question, according to which 'in addition, there is a concern for the material cost hike, and further price adjustment is fully possible after the 2<sup>nd</sup> Half (July)', constitutes, in itself, a disclosure of future pricing intentions, as is argued by the Commission. In addition, it is apparent from recital 642 of the contested decision that, during that meeting, the participants exchanged demand projection data for April, May and June 2011.
- 253 As regards the MK meeting of 29 August 2011, it should be noted that, first, the participants exchanged demand projection data at that meeting for August, September and October 2011 (see recitals 645 and 646 of the contested decision). Secondly, as is apparent from the evidence set out in recital 647 of the contested decision, Elna disclosed its intention to increase or maintain prices for transactions denominated in Japanese yen and to increase its prices by 12% for transactions denominated in US dollars.
- 254 As regards the MK meeting of 24 October 2011, it is apparent from the minutes of the meeting, in particular the transcripts reproduced in recital 650 of the contested decision, that the applicant informed the other participants, *inter alia*, that it was negotiating annual contracts with overseas customers containing proposals for price increases. It follows from those minutes that the applicant communicated to its competitors, who participated in the meeting, the progress of ongoing negotiations with customers with a view to increasing prices.
- 255 As regards the MK meeting of 23 April 2012, it should be noted that, first, the participants exchanged demand projection data at that meeting for April, May and June 2012 (see recitals 651 to 653 of the contested decision). Secondly, it is apparent from Rubycon's statement referred to in recital 654 of the contested decision that Rubycon informed the other participants in the meeting that several of its customers were in the process of requesting price reductions of about 5 to 7% and that it expected an actual reduction of between 2.5 and 3%, thus sharing concrete information regarding its pricing behaviour.

256 It follows from the foregoing that, contrary to the applicant's assertions, the exchanges of information during the post-2008 contacts, detailed in paragraphs 235 to 255 above, show, in general, the existence of exchanges of information of such a kind as either to influence the conduct of competitors on the market or to disclose to those competitors another competitor's decisions or intentions concerning its own conduct on the market, in particular as regards pricing behaviour. Those exchanges are therefore contrary to the requirement of independence that applies to all economic operators and thus to the competition rules, as is apparent from the case-law referred to in paragraphs 189 to 192 above.

257 Accordingly, the second part of the second plea must be rejected.

(3) *The third part of the second plea, relating to the link between the contested contacts and the EEA*

258 The applicant raises various arguments seeking to call into question the relevance of the contested contacts to the EEA and, thus, to demonstrate that there is no link between the infringement at issue and the EEA. Those arguments relate, in the first place, to the geographical scope of the ECC meetings and some of the post-2008 contacts, in the second place, to the meaning of the expression 'overseas', in the third place, to the minor importance, for the EEA, of certain products discussed during the contested contacts and, in the fourth place, to errors in identifying the companies designated by a single letter during the contested contacts.

259 The Commission disputes those arguments.

260 In that regard, it should be noted at the outset that, as is apparent from the analysis of the fifth plea, the Commission was fully entitled to consider that it had jurisdiction for the purpose of applying Article 101 TFEU and Article 53 of the EEA Agreement, in so far as, in essence, it was concluded that the cartel participants, including the applicant, had directly or indirectly sold electrolytic capacitors on a global scale, including in Europe (see paragraphs 79, 81 and 82 above).

261 However, it is necessary to examine the applicant's arguments concerning the relevance of some of the contested contacts to the EEA, in so far as those arguments seek to demonstrate the existence of a limited link between the cartel and the EEA.

(i) *The geographical scope of the ECC meetings and some of the post-2008 contacts*

262 As regards the geographical scope of the ECC meetings and some of the post-2008 contacts, the applicant claims that, of the 20 ECC meetings, 15 were domestic meetings, the subject matter of which was exchanges of information concerning the supply of aluminium electrolytic capacitors to Japanese customers.

263 In that regard, it should be noted that, in the contested decision, the Commission found that 20 ECC meetings took place between 1998 and 2003. In those meetings, the participants, including the applicant, initially discussed aluminium electrolytic capacitors and, on some occasions, tantalum electrolytic capacitors. The ECC meetings were divided into two subgroups, namely 'Domestic' ECC meetings and 'Foreign Trade' ECC meetings. Of the 20 ECC meetings, nine were 'Foreign Trade' meetings, 8 were 'Domestic' meetings and 3 were Presidents' meetings (footnotes 127 and 128 to the contested decision). The 'Domestic' meetings concerned supplies to customers having their headquarters in Japan and the 'Foreign Trade' meetings concerned supplies to customers having their headquarters outside Japan. However, the Commission found that, in practice, that thematic division was not observed and, consequently, considered that the distinction between 'Domestic' and 'Foreign Trade' ECC meetings was irrelevant (recitals 78 to 80 of the contested decision).

264 In those circumstances, the applicant's argument based on the wording of certain ECC meetings described as 'domestic' meetings cannot call into question the Commission's assessment that, in practice, the alleged thematic division of the ECC meetings was not observed, since the applicant has not put forward any other relevant evidence in that regard.

- 265 In addition, the applicant maintains that some of the ECC meetings and some of the post-2008 contacts had no link with the EEA.
- 266 In that regard, it should be noted that, first of all, for a number of the ECC meetings, the Commission established evidence showing explicit references to European customers or to products sold on the European market (see, in particular, the ECC meetings of 26 June and 5 November 1998, 29 October 1999, 19 September 2001 and 18 September 2002, referred to, respectively, in paragraphs 200, 201 and 206 above, as well as in paragraphs 279 and 280 below).
- 267 As regards the ECC meeting of 15 May 2003, it is apparent from the extract from the minutes of that meeting, reproduced in essence in recital 192 of the contested decision, that the participants in the meeting exchanged, inter alia, information regarding the production and sales of tantalum electrolytic capacitors on ‘overseas’ markets. As is apparent from paragraph 275 below, the Commission was entitled to take the view that the expression ‘overseas’ covered the EEA in this case.
- 268 Next, it should be noted that the Commission established evidence showing explicit references to European customers or to products sold on the European market for a number of the post-2008 contacts. In particular, as regards the MK meeting of 21 April 2010, it is apparent from the minutes of that meeting, provided by Matsuo, that the discussions included the EEA market, which is indicated in particular by the phrases ‘inquiries continue to be strong from automotive electric component manufacturers in Europe’ and ‘it was not at all possible to make deliveries on time in Europe’ and by the fact that the customer ‘T’ had manufacturing plants in Europe (see recital 669 of the contested decision). In addition, as regards the trilateral meeting of 31 May 2010, it is sufficient to note that the relevance of that meeting to supplies in the EEA was established by, inter alia, the fact that the participants discussed a 20% price increase for deliveries of a certain type of capacitor into Hungary, due to the weakening of the euro (see recital 604 of the contested decision), which is not called into question by the applicant’s arguments. Similarly, as regards the MK meeting of 17 June 2010, it is apparent from the minutes of that meeting, provided by Matsuo, that the discussions included ‘price revisions’ for at least one customer having its headquarters or manufacturing plant in Europe (see recital 611 of the contested decision).
- 269 Likewise, as regards the MK meeting of 16 July 2010, it should be noted that it is apparent from the minutes of that meeting produced by Sanyo, referred to in footnotes 1148 and 1150 to the contested decision, that, first, Tokin stated that deliveries to the European market for personal computers were controlled in order to avoid exchange rate losses, and, secondly, Elna reported an increase in sales for European cars. Those findings are sufficient to show that the discussions which took place at the MK meeting of 16 July 2010 did indeed concern the EEA.
- 270 Lastly, and in any event, it should be noted that, contrary to what the applicant appears to maintain, the participants in the meetings mentioned above had not confined their discussions to a particular geographical area. In those circumstances and in so far as the infringement at issue has a global reach (see paragraphs 79 to 82 above), the Commission was entitled to consider, in accordance with the case-law referred to in paragraphs 150 and 151 above, that those meetings included the EEA.
- 271 The applicant’s arguments relating to the geographical scope of the ECC meetings and some of the post-2008 contacts must therefore be rejected.

*(ii) The meaning of the expression ‘overseas’*

- 272 The applicant puts forward arguments challenging the fact that the Commission interpreted the expression ‘overseas’, frequently used by the participants in the contested contacts, as including the EEA. According to the applicant, the Commission assumed, without any evidential basis, that the terms ‘overseas’ and ‘foreign’ included Europe, whereas those terms concern other Asian countries, such as Taiwan and China. In particular, the applicant submits that the Commission has not proved that, at the ECC meetings of 17 December 1999, 14 November 2001, 19 March 2002 and 17 July 2002, and at the MK meetings of November 2009, 18 February 2010, 15 or 16 November 2010 and 20 December 2010, the use of the

expression ‘overseas’ referred to manufacturers, competitors or customers established in the EEA or to the EEA market. The applicant claims that those contested contacts therefore had no link with the EEA.

273 On the one hand, in so far as the applicant’s arguments are based, in essence, on a lack of precise and consistent evidence, it must be pointed out that, in the light of the case-law referred to in paragraph 148 above, the Commission was not required to prove that each of the references to ‘overseas’ was intended to include the EEA. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, allows it to be established that, at least in certain cases, that expression included the EEA.

274 On the other hand, it should be noted that, first, the expression ‘overseas’ does not refer to any specific geographical area. That expression appears to be used generically, with the result that there is no reason to exclude the EEA. Secondly, it is not apparent from the various minutes and internal notes relating to the various anticompetitive contacts 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, including the applicant itself, who used that expression during the various contacts, were for the most part present on the EEA market at the time of those contacts. Fourthly, it is apparent from recitals 671 and 679 of the contested decision that, in a number of the ATC and MK meetings, the expression ‘overseas’ included the EEA. In particular, it is apparent from the extracts from the minutes of the ATC meeting of 28 or 29 August 2003 and the MK meetings of March 2005 and 14 February 2007, reproduced in recital 671 of the contested decision, that express references to Europe were made in connection with the use of the expression ‘overseas’. As the Commission points out, there is nothing to indicate that the meaning of that expression was different when it was used in connection with other anticompetitive contacts, a fortiori in the case of contacts which, according to the Commission, formed part of the same overall plan and brought together the same participants, which is the subject of the third plea.

275 In those circumstances, in accordance with the case-law referred to in paragraphs 150 and 151 above, the Commission was fully entitled to consider that the expression ‘overseas’ covered, in the present case, the EEA or, more specifically, that the cartel either had a global reach, so that it included the EEA, or directly concerned the EEA.

276 The applicant’s arguments relating to the meaning of the expression ‘overseas’ during the contested contacts must therefore be rejected.

*(iii) The minor importance, for the EEA, of certain products discussed during the contested contacts*

277 The applicant maintains that certain exchanges of information during the contested contacts are not relevant to the EEA market, in so far as they concern types of capacitor which are not sold or are sold only to a very limited extent on the EEA market. However, the applicant’s arguments do not demonstrate that there is no link with the EEA, irrespective of the volume of sales in Europe of the products in question.

278 As regards tantalum chip capacitors, which were discussed at the ECC meeting of 29 October 1999, it is apparent from paragraph 206 above that the exchanges in question did indeed concern the supply of that type of capacitor to two European customers, which, moreover, is not disputed by the applicant.

279 As regards ‘04 and 60’ chip capacitors, which were discussed at the ECC meeting of 19 September 2001, the applicant merely claims that customers for those products were established mainly outside Europe and that sales in Europe were limited to 10% of worldwide sales. Accordingly, the applicant itself admits that there were sales of that type of capacitor in Europe, although they were limited.

280 As regards the capacitors referred to at the ECC meeting of 18 September 2002, it is sufficient to note that it is apparent from recitals 176 and 669 of the contested decision that the applicant made sales, through its subsidiary in Europe, to the two customers mentioned at that meeting, who were present on the EEA market – a fact which, moreover, the applicant admitted in its reply to the statement of objections and the letter of facts.

- 281 As regards the capacitors referred to in the bilateral contacts of 1 and 7 May, 9 and 11 December, and December 2009, as well as January and 25 January 2010, it is apparent from, inter alia, the evidence set out in recital 703 of the contested decision that there were European customers for that type of capacitor, even if their main customers were motherboard or computer manufacturers established in Asia.
- 282 As regards the capacitors referred to in the MK meetings of 18 February and 21 May 2010, it should be noted that the discussions at those meetings concerned tantalum electrolytic capacitors as well as aluminium electrolytic capacitors. Moreover, as is apparent from the evidence set out in recitals 578 and 598 of the contested decision, there were exchanges during those meetings concerning the customer ‘S’, who had manufacturing plants in Europe and to whom a number of the cartel participants made sales in Europe (see paragraph 291 below).
- 283 In any event, even if it is accepted that during certain anticompetitive contacts the participants discussed types of electrolytic capacitor for which there were no or very low sales in the EEA market, it must be pointed out that Article 101 TFEU may be applied to practices and agreements that serve the same anticompetitive objective, provided that it is foreseeable that, taken together, those practices and agreements have immediate and substantial effects in the internal market. Undertakings cannot be allowed to avoid the application of the EU competition rules by combining a number of types of conduct that pursue the same objective, each of which, taken on its own, is not capable of producing an immediate and substantial effect in that market, but which, taken together, are capable of producing such an effect (judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg v Commission*, T-441/14, EU:T:2018:453, paragraph 106).
- 284 It follows that the applicant’s entire line of argument relating to the minor importance for the EEA of certain products which were discussed during the contested contacts must be rejected, without there being any need to examine in greater detail the applicant’s other arguments in that regard, namely those relating to the minor importance, or even non-importance, for the EEA of the various types of product discussed at the ECC meetings of 20 September 2000, 17 July 2002, and 29 January, 19 February, 15 May and 7 November 2003, and at the MK meetings of 16 July, November, and 21 December 2009, as well as during the bilateral contact of 7 April 2010.

*(iv) The errors in identifying the companies designated by a single letter during the contested contacts*

- 285 In order to demonstrate that there is no link with the EEA, the applicant disputes the identity of certain companies designated by a single letter in the minutes of the contested contacts.
- 286 As a preliminary point, it should be recalled that the evidence in question concerns clandestine conduct, involving meetings held secretly and a bare minimum of documentation. In view of the difficulty of obtaining direct evidence of such conduct, such as notes or minutes of meetings contemporaneous with the infringement, its probative value cannot be called into question merely because it is handwritten or fragmentary, contains abbreviations and codes and because it may also require further clarification or must be examined in the context of other information in the Commission’s possession (see judgment of 16 June 2015, *FSL and Others v Commission*, T-655/11, EU:T:2015:383, paragraph 203 and the case-law cited).
- 287 First, the applicant submits that ‘T Company’, mentioned at the ECC meeting of 26 June 1998, was not the French company Thomson, but an Asian company, as is shown by the reference to the region covered by the ASEAN.
- 288 However, it follows from the material mentioned in recitals 109 to 111 of the contested decision that the letter ‘T’ used in connection with that meeting designated a French manufacturer of electronic products. On the one hand, the meaning of that letter was confirmed by Rubycon, which, as author of the minutes of the meeting, was well placed to explain the meaning of the letters used, and, on the other hand, the reference to the ASEAN during the meeting was not linked to the expression ‘T Company’ and, therefore, does not contradict that explanation.

- 289 Secondly, the applicant submits that ‘Company M’, which participated in the ECC meeting of 18 December 1998, referred to Matsuo, a manufacturer of tantalum electrolytic capacitors whose sales were insignificant in the EEA. However, as is clear from Rubycon’s corporate statement, the letter refers to a producer of aluminium electrolytic capacitors (see recital 119 of the contested decision, as well as footnote 221 thereto). Moreover, as is apparent from recitals 180 and 1007 of the contested decision, which are not disputed by the applicant, the first meeting in which Matsuo participated took place a few years later, on 29 January 2003.
- 290 Thirdly, the applicant disputes the Commission’s conclusion, in recital 125 of the contested decision, that ‘Company S’, mentioned at the ECC meeting of 17 December 1999, was a Japanese company with manufacturing plants in Europe and not, among a number of possibilities, an American customer. It is apparent from the contested decision that the identification of that company is based on Rubycon’s corporate statement and on Rubycon’s minutes of the ECC meeting of 25 May 2000, reproduced in recitals 125 to 127 of the contested decision.
- 291 Contrary to what the applicant appears to claim, the fact that the explanation relating to the identity of ‘Company S’ was given by the undertaking which was responsible for the minutes of that meeting tends to make it particularly reliable (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). Moreover, the same identification of ‘S Company’ as being that Japanese company is apparent from Rubycon’s minutes of the CUP meeting of 7 October 2008, reproduced in recital 482 of the contested decision. In addition, a number of the cartel participants confirmed, in their corporate statements, that that Japanese company had manufacturing plants in the EEA and that, during the infringement period, they had made sales to it in the EEA (see recital 669 of the contested decision). Furthermore, the applicant confirmed in its reply to the statement of objections that, at the time, its European subsidiary made sales to that company.
- 292 It follows that the applicant’s argument seeking to dispute the identity of ‘Company S’ in connection with the ECC meeting of 22 November 2000 (see recital 145 of the contested decision) must also be rejected.
- 293 Fourthly, the applicant disputes the identification of ‘Company P’, in the context of the bilateral contacts of 13 November 2009, 9 and 11 December 2009, and 23 February 2010, as a company established in Europe. However, it is clear from the corporate statement referred to in recital 548 of the contested decision and in footnotes 1021, 1027 and 1077 thereto that Rubycon identified ‘Company P’ as that company established in Europe. That identification is also confirmed by the fact that the bilateral contact of 13 November 2009 formed part of a group of contacts between the applicant and Rubycon that took place between September 2007 and December 2009, all of which concerned the same customer ‘P’ (see recitals 402, 477, 547 and 555 of the contested decision). In addition, in the emails concerning one of those contacts, that customer was expressly identified by its full name.
- 294 The applicant’s arguments relating to errors in identifying the companies designated by a single letter during the contested contacts must therefore be rejected.
- 295 Consequently, the third part of the second plea must be rejected in its entirety, without there being any need to examine in greater depth the applicant’s arguments concerning, in particular, the MK meetings of 11 March and 17 September 2009. The question whether or not some of the contested contacts, which were not confined to a specific geographical area, included Europe does not affect the conclusion that the anticompetitive contacts, as a whole, had a link with the EEA. In that regard, it should be noted that, first, a number of those contacts contained express references to Europe and, secondly, the participants in those contacts made sales in the EEA market at the time, either directly or through their subsidiaries (see paragraphs 81 and 271 above).
- 296 In any event, the applicant errs in claiming that some of the post-2008 contacts had no link with the EEA. In that regard, concerning the bilateral contact of 13 November 2009, contrary to the applicant’s assertions, it is apparent from the evidence set out in recitals 547 and 548 of the contested decision that that contact formed part of a series of bilateral contacts established between the applicant and Rubycon, all of which

concerned ‘Company P’ (see paragraph 293 above), a company which had manufacturing plants in Europe and to which the applicant’s subsidiaries made sales at the time, as the applicant admitted in the application. Moreover, in so far as that contact was established by a representative of the applicant, the latter’s argument based on the alleged independence of its subsidiaries is irrelevant.

297 Furthermore, the Court must reject the applicant’s arguments concerning the MK meeting of 21 May 2009 and the bilateral contacts of January and 25 January 2010, alleging that it did not make sales to certain specific customers in the EEA, given that, as the Commission contends, the cartel was not limited to particular customers. Moreover, as regards, in particular, the customer ‘K’ mentioned at the MK meeting of 21 May 2009, it is apparent from the applicant’s reply to the statement of objections that its European subsidiary made sales to that customer in the EEA, even if they were limited.

298 It follows from all of the foregoing that the Commission was fully entitled to conclude that there was a link between the anticompetitive contacts, taken as a whole, and the EEA. The applicant’s arguments seeking to demonstrate that there was a limited link between the cartel and the EEA must therefore be rejected.

299 Accordingly, the third part of the second plea must be rejected in its entirety.

*(4) The fourth part of the second plea, relating to the start and end dates of the infringement and to the limitation period*

300 First, the applicant submits that the Commission erred in setting the start of the infringement as the date of the first ECC meeting and the end of the infringement as the date of the MK meeting of 23 April 2012. According to the applicant, that error stems from the fact that the Commission did not submit precise and consistent evidence concerning the anticompetitive nature and/or relevance to the EEA of the ECC meetings and the MK meeting of 23 April 2012.

301 Secondly, the applicant claims that all the alleged anticompetitive conduct imputed to it ending before March 2009 is time-barred, in so far as the first action by the Commission that interrupted the five-year limitation period laid down in Article 25 of Regulation No 1/2003 was the request for information of 28 March 2014, referred to in recital 46 of the contested decision. According to the applicant, the granting of a marker to Panasonic was not an act capable of interrupting the limitation period, as it is not an action which is analogous to those listed in the first sentence of Article 25(3) of Regulation No 1/2003. Furthermore, the case-law stemming from the judgment of 6 October 2015, *Corporación Empresarial de Materiales de Construcción v Commission* (T-250/12, EU:T:2015:749) is not applicable in the present case because it concerns the interruption of the limitation period by a decision to grant conditional immunity and not by the granting of a marker, since a marker does not confer a procedural status on the person applying for it that enables the Commission to conduct an investigation and initiate proceedings regarding the alleged infringement.

302 The Commission disputes those arguments.

303 As regards the start and end dates of the infringement period, in so far as the applicant’s arguments seeking to call into question the contested contacts, including the ECC meetings and the MK meeting of 23 April 2012, have been rejected in their entirety, the applicant’s argument that the Commission erred in setting the start of the infringement as the date of the first ECC meeting and the end of the infringement as the date of the MK meeting of 23 April 2012 must also be rejected.

304 As regards the limitation period, it should be recalled that, according to Article 25(1) and (2) of Regulation No 1/2003, the limitation period in respect of cartels is five years from the day on which the infringement ceases.

305 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.

306 In the light, first, of the conclusion in paragraph 303 above that the Commission did not err in taking the date of the MK meeting of 23 April 2012 as the end date of the infringement, and, secondly, of the Commission's request for information of 28 March 2014, sent to the applicant, which constitutes an action interrupting the limitation period, in accordance with Article 25(3) of Regulation No 1/2003, the applicant errs in relying on the limitation period for the infringement.

307 Consequently, the fourth part of the second plea must be rejected and, accordingly, the second plea in law must be rejected in its entirety.

**(d) *The third plea in law, alleging that there was not a single and continuous infringement***

308 By its third plea, the applicant submits, in essence, that the Commission has not established that there was a single and continuous infringement covering all electrolytic capacitors for the entire duration of the alleged infringement.

309 This plea is divided into three parts. The first part alleges failure to demonstrate an overall plan. The second part alleges that there is no evidence of a link of complementarity between the anticompetitive contacts. The third part alleges that the Commission failed to take account of the heterogeneous nature of the capacitor industry, which makes it impossible to establish the alleged infringement.

310 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).

311 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).

312 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).

313 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).

314 In the present case, the Commission considered that the various anticompetitive contacts 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).

315 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 certain cases, regarding the conclusion, implementation and monitoring of price agreements (recitals 62 and 715 of the contested decision).

316 The Commission found that, although the cartel evolved over time, the aim had not changed, since the 113 anticompetitive contacts described in the contested decision had common characteristics as regards the participants and the nature and material scope of the discussions, which overlapped. Thus, the multilateral meetings, 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) were, at different times, attended by the nine cartel participants and related to both aluminium electrolytic capacitors and tantalum electrolytic capacitors. In parallel, bilateral and trilateral contacts took place as required, covering specific issues. The same individuals, or their successors as the case may be, were involved in the anticompetitive contacts (recitals 70 to 75, 726, 732, 741 and 743 of the contested decision).

317 The Commission concluded that the infringement had 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 76, 729, 742 and 745 of the contested decision).

*(1) The first part of the third plea, alleging that there was not an overall plan*

318 The applicant maintains that the Commission failed to establish that there was an overall plan, since, in essence, in the first place, the Commission failed to prove that each anticompetitive contact had the same single aim, whereas the fact that the CUP meetings used a different ‘mechanism’ from that used in the other meetings demonstrates that the various anticompetitive contacts pursued different aims. In the second place, the description of the overall plan, both in the statement of objections and in the contested decision, is overly vague and imprecise, whereas the concept of an overall plan requires a reference to specific products, to a specific geographical area and to a specific collusive mechanism. In the third place, the evidence relied on by the Commission does not prove that a single anticompetitive aim was pursued throughout the infringement period.

319 The Commission disputes those arguments.

320 In the present case, it should be noted that the evidence set out by the Commission in the contested decision and, in particular, the evidence referred to in paragraphs 314 to 317 above, concerning the common characteristics of the anticompetitive contacts, the ultimate aim of which was the coordination of pricing behaviour, is sufficient, in the light of the requirements stemming from the case-law referred to in paragraphs 150 and 151, as well as paragraphs 310 and 311 above, to demonstrate that they had an identical object and formed part of an overall plan having a single objective.

321 The applicant’s arguments do not call that finding into question.

- 322 In the first place, it was not necessary for the Commission to ascertain whether each of the various anticompetitive contacts was intended to deal with one or more consequences of the normal pattern of competition and, through interaction, contributed to the attainment of the set of anticompetitive effects desired by those responsible, within the framework of an overall plan having a single objective. It is the set of anticompetitive effects desired by the cartel participants which constitutes the overall plan as envisaged by the case-law referred to in paragraph 313 above.
- 323 In addition, the applicant does not put forward any concrete evidence to suggest that certain forms of conduct had characteristics indicating that they did not have an identical anticompetitive object and, therefore, that they did not form part of the same overall plan.
- 324 In that regard, the applicant errs in maintaining that the CUP meetings had a different aim, revealed by the fact that those meetings used a different ‘mechanism’ from that used by the other meetings. It is true that the Commission found that the participants in the CUP meetings had concluded price agreements and had established a system of reporting on the undertakings’ actions for the purpose of monitoring their strategy for price increases (see recital 72 of the contested decision). However, as is apparent from paragraph 315 above, that ‘mechanism’ for monitoring the strategy for price increases was only one of the means of pursuing the ultimate objective of coordinating pricing behaviour. In addition, the Commission also found that that monitoring ‘mechanism’ formed part of an overall strategy according to which the undertakings monitored each other’s behaviour in a general manner and, therefore, also outside the CUP meetings (see recital 716 of the contested decision).
- 325 Thus, although in the CUP meetings the participants pursued price agreements and a system for monitoring pricing strategy, whereas in other meetings they exchanged information regarding pricing or information regarding supply and demand, the CUP meetings cannot be regarded as pursuing a different aim from that pursued by the other anticompetitive contacts.
- 326 It follows from the foregoing that the applicant’s argument, according to which the Commission failed to prove that the anticompetitive contacts described in the contested decision had a single aim, in the light of the allegedly different aim pursued by the CUP meetings, must be rejected.
- 327 In the second place, the applicant claims that the description of the overall plan in the contested decision is ‘overly vague and imprecise’ and is ‘nothing more than a general reference to a distortion of competition in the market’.
- 328 Admittedly, as is apparent from the case-law cited in paragraph 312 above, the concept of a single objective cannot be determined by a general reference to the distortion of competition in the market concerned by the infringement.
- 329 However, in the present case, the applicant’s arguments alleging that the statement of objections contains an inadequate description of the overall plan are ineffective. The measure which is the subject of the present action is the contested decision and not the statement of objections, which, moreover, is a purely provisional measure. Although the statement of objections must set forth all the essential facts upon which the Commission is relying at that stage of the procedure, this may be done summarily and the decision is not necessarily required to be a replica of the statement of objections, since that statement is a preparatory document containing assessments of fact and of law which are purely provisional in nature (see judgment of 5 December 2013, *SNIA v Commission*, C-448/11 P, not published, EU:C:2013:801, paragraphs 41 and 42 and the case-law cited).
- 330 Furthermore, contrary to the applicant’s assertions, the description of the overall plan is not ‘vague’ as regards the products, the collusive mechanisms and the markets concerned. All those aspects are clear from the description provided in the contested decision, as summarised in Article 1 of that decision, according to which the infringement at issue, covering the whole EEA, took place between 26 June 1998 and 23 April 2012 and 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 (see paragraph 14 above).

- 331 Lastly, it should be noted that the applicant's arguments in support of a 'vague' description of the overall plan are based to a large extent on recitals 767, 769 and 770 of the contested decision, which contain the Commission's response to the applicant's arguments set out in its reply to the statement of objections and the letter of facts (see paragraph 10 above). As the Commission contends, the applicant ignores recitals 730 to 743 of the contested decision, which contain the reasons why the Commission concluded that there was an overall plan with a common objective.
- 332 It is apparent from recitals 730 to 743 of the contested decision, among other recitals referred to in paragraphs 314 to 316 above, that, first, the Commission defined the overall plan as consisting of avoiding price competition and coordinating the future conduct of participants in relation to the sale of aluminium electrolytic capacitors and tantalum electrolytic capacitors, thereby reducing uncertainty on the market. Secondly, the Commission explained how that common objective was pursued and why the anticompetitive contacts described in the contested decision constituted continuous conduct in the pursuit of a single economic aim, within the meaning of the case-law referred to in paragraph 310 above.
- 333 In the third place, the applicant claims that the evidence relied on by the Commission does not prove that a single anticompetitive aim was pursued throughout the infringement period.
- 334 In that regard, the applicant's argument that the Commission relies solely on evidence concerning the ECC and ATC meetings without specifying the underlying aim of the other meetings is directly contradicted by the very wording of the contested decision. The applicant's argument is essentially based on recital 733 of the contested decision, which does not contain an exhaustive list of the items demonstrating the participants' aim, but merely refers, by way of 'example', to certain items taken from Section 4.3.6 of the contested decision.
- 335 Section 4.3.6 of the contested decision presents a full chronology of the anticompetitive contacts, with details relating to each multilateral meeting and each bilateral or trilateral contact, as well as an indication, in footnotes, of the evidence relied on by the Commission. In addition, recitals 77 to 105 of the contested decision contain a brief overview of the anticompetitive contacts as regards the dates, places, participants and topics dealt with at the various groups of meetings and contacts. The evidence on which the Commission relied is also set out in the footnotes relating to those recitals.
- 336 In the light of the foregoing, the applicant's arguments challenging the accuracy of the statements made by the parties at some of the ATC meetings and relied on by the Commission in recital 733 of the contested decision, inasmuch as those statements do not appear in the minutes of those meetings and do not reflect a broader aim, must also be rejected. The applicant's reasoning is based on the incorrect assumption that the Commission determined the common objective of the cartel solely on the basis of those statements, whereas they are given by way of example and the Commission's conclusion regarding that common objective was based on several other factors. Thus, even if the applicant's line of argument concerning the accuracy of the statements made by the parties at some of the ATC meetings were well founded, it could not call into question the Commission's conclusion that there was an objective common to all the anticompetitive contacts.
- 337 As is apparent from the case-law referred to in paragraphs 148 and 149 above, 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. Thus, the items of evidence on which the Commission relies in the contested decision in order to prove the existence of an infringement of Article 101(1) TFEU by an undertaking must not be assessed separately, but as a whole.
- 338 Furthermore, the applicant claims, in essence, that the multilateral meetings referred to in recital 732 of the contested decision and in footnotes 1323 to 1326 thereto do not demonstrate that the single

anticompetitive aim was pursued by means of exchanging information regarding pricing, information regarding supply and demand, and information regarding the implementation and monitoring of price agreements. The applicant also submits that the exchanges of information regarding pricing or information regarding supply and demand at some of those meetings were irrelevant to the EEA.

339 As regards the argument that certain meetings were irrelevant to the EEA, it should be noted, as a preliminary point, that the arguments put forward by the applicant in connection with that complaint are no different from those put forward in connection with the third part of the second plea and must therefore be rejected on the same grounds.

340 As regards the argument based on the statements made by the leniency applicants, it should be noted that none of the six leniency applicants had introduced any geographical limitation in their statements (see recital 797 of the contested decision), which, moreover, is not disputed by the applicant.

341 In addition, the applicant does not substantiate in any way its claim that the meetings identified in recital 732 of the contested decision and in footnotes 1323 to 1326 thereto are irrelevant for the purpose of establishing that the single anticompetitive aim was pursued by means of exchanging information regarding pricing, information regarding supply and demand, and information regarding the implementation and monitoring of price agreements.

342 Although, in its written pleadings, the applicant sets out a list of meetings which it seeks to dispute, it confines itself, in essence, to denying that some of the ECC, ATC and MK meetings, referred to in recital 732 of the contested decision and in footnotes 1323 to 1326 thereto, concerned exchanges of commercially sensitive information regarding pricing, and to denying that the exchanges of information regarding supply and demand were relevant to the achievement of the aim of avoiding price competition. That very general line of argument is not sufficient to contradict the Commission's conclusion that those meetings formed part of an overall plan with a single anticompetitive aim.

343 As regards the ECC and MK meetings, the applicant's arguments must also be rejected for the reasons already set out, in particular, in connection with the first part of the second plea, concerning the credibility of the evidence on which the Commission relied in the contested decision.

344 As regards the CUP meetings, the applicant merely reiterates its argument that those meetings had a different aim from that pursued by the other multilateral meetings. For the reasons set out in paragraphs 324 and 325 above, that argument is unfounded.

345 In any event, the absence of an express reference to the EEA during certain meetings does not mean that none of the anticompetitive contacts referred to by the Commission in the contested decision establishes a link with the EEA. In the present case, first, as is apparent from paragraph 271 above, it must be held that there is a body of consistent evidence which is sufficient to infer a link between the contested contacts, taken as a whole, and the EEA. Secondly, the Commission was fully entitled to find that the cartel participants, including the applicant, made direct sales of electrolytic capacitors in the EEA. In that context, in order to demonstrate a link with the EEA, the Commission was not required to show that the applicant made sales in the EEA to all the customers referred to in the anticompetitive contacts.

346 It follows from all of the foregoing that the Commission was fully entitled to conclude that there was an overall plan.

347 The first part of the third plea must therefore be rejected.

*(2) The second part of the third plea, alleging that there was no link of complementarity between the anticompetitive contacts*

348 By the second part of the third plea, the applicant claims that the Commission failed to prove that there was a link of complementarity between the anticompetitive contacts. In that regard, it puts forward three

complaints, the first based on the collapse of Lehman Brothers in September 2008, the second based on the lack of evidence that the duration of the infringement was continuous, and the third based on the different nature of the anticompetitive contacts.

349 The Commission disputes those arguments.

350 As a preliminary point, it should be borne in mind that, in accordance with the case-law referred to in paragraphs 311 and 313 above, the decisive criterion for the existence of a single and continuous infringement is that the various instances of conduct constituting the infringement form part of an ‘overall plan’ having a single objective. Moreover, it is not necessary to ascertain whether those instances of conduct present a link of complementarity in order to classify them as a single and continuous infringement, 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.

351 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).

352 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).

353 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).

354 It is in the light of that case-law that the applicant’s complaints must be examined.

(i) *The first complaint in the second part of the third plea, based on the collapse of Lehman Brothers*

355 The applicant maintains that it is apparent from the evidence concerning the MK meetings that, following the collapse of Lehman Brothers in September 2008, the cartel participants ‘ceased following a common understanding of avoiding price competition’, inasmuch as they no longer shared the same interests, since that collapse strongly affected the capacitor industry.

356 It should be noted that such an interruption of the cartel is contradicted at the outset by the material in the file. The chronology of the anticompetitive contacts shows that those contacts continued after September 2008. Thus, as is apparent from the analysis of the second plea, during September, October and November 2008, CUP meetings, MK meetings and bilateral contacts took place. Likewise, during 2009 and until 23 April 2012, several MK meetings took place, as did several bilateral and trilateral contacts. Moreover, as is apparent from paragraph 16 above, the MK meetings took place between 2005 and 2012; that is to say, they began to be held before the collapse of Lehman Brothers in September 2008 and came to an end following that collapse.

357 Furthermore, the applicant's arguments that that collapse disrupted the capacitor industry, that the topic of the discussions changed or that the cartel participants obtained poor financial results have no bearing on the fact that the contacts between the cartel participants, with the characteristics referred to in paragraphs 314 to 316 above, revealing the anticompetitive nature of the cartel, were carried out both before and after the collapse of Lehman Brothers.

358 The first complaint in the second part of the third plea must therefore be rejected.

*(ii) The second complaint in the second part of the third plea, based on the lack of evidence that the duration of the infringement was continuous*

359 The applicant maintains that the Commission has not proved that the duration of the infringement linked to the EEA was continuous. In particular, the applicant claims that contracts with customers in the EEA were on an annual basis and that, consequently, the functioning of the cartel would have required the participants to exchange information on at least a yearly basis. There were two periods of interruption during which the alleged anticompetitive contacts were in no way linked to the EEA, namely the periods between 22 November 2000 and 29 August 2002 (21 months) and between 4 August 2005 and 18 October 2006 (14 months). According to the applicant, the Commission failed to prove to the requisite legal standard that the infringement continued or was repeated after those periods of interruption with regard to the EEA.

360 In so far as the applicant's line of argument seeks to maintain that the Commission failed to demonstrate the continuity of the cartel on the ground that some of the anticompetitive contacts had no link with the EEA, it should be borne in mind, first, that the cartel had a global reach and that its connection with the EEA was based, primarily, on the fact that the cartel participants had sales of electrolytic capacitors in the EEA (see paragraphs 79, 81 and 82 above). The Commission was therefore not required to demonstrate that each item of evidence included a specific reference to Europe (see paragraph 345 above).

361 Secondly, and in any event, the applicant errs in claiming that the anticompetitive contacts which took place during the period from 4 August 2005 to 18 October 2006 were in no way linked to the EEA. In general, and as has been concluded in connection with the second plea, it is apparent from the evidence set out in the contested decision, in particular the minutes of the meetings in question, that in some cases the discussions contained references to Asia, in other cases they referred to Europe, and in several cases the discussions between the cartel participants had no geographical limitation.

362 In particular, as regards the ECC meetings of 22 November 2000, of 19 September and 14 November 2001, and of 19 March and 17 July 2002, it should be noted at the outset that, as the applicant admits in its written pleadings, its arguments are confined to a summary of the complaints which it put forward in respect of the same meetings in connection with the second plea. For the same reasons as those set out in connection with the second plea, it cannot be concluded that those ECC meetings had no relevance to the EEA.

363 As regards the contacts which took place during the period from 4 August 2005 to 18 October 2006, first, it should be noted that the applicant does not dispute the relevance to the EEA of all the anticompetitive meetings and contacts that took place during that period, in particular the MK meeting of 16 December 2005 and the bilateral contact of 26 January 2006 (see recitals 276 to 325 of the contested decision). Thus, the applicant's line of argument is, in any event, insufficient to call into question the continuity of the infringement during that period.

364 Secondly, and in any event, it should be noted that the meetings and contacts relied on by the applicant were not unconnected with the EEA.

365 Thus, as regards the MK meeting of 10 November 2005, it is apparent from the file that the participants, including the applicant, discussed at that meeting, inter alia, their intentions to maintain or increase prices. In addition, reference was made, at least, to a European customer and to Germany in the course of that

discussion (see the minutes of the meeting mentioned in recitals 278 and 280 of the contested decision and in footnote 545 thereto).

- 366 As regards the trilateral contact of January 2006, it should be noted that the applicant, Sanyo and another competitor discussed prices for the customers Intel and Dell, who had manufacturing plants in Europe (see the evidence mentioned in recitals 288 to 291 and 669 of the contested decision).
- 367 As regards the MK meeting of 12 April 2006, although the discussion tended to focus on games consoles that were not manufactured in the EEA, there were nevertheless references to orders for European cars and to the contribution of the European market, together with the American market, to the increase in prices (see the minutes mentioned in recitals 296 to 298 of the contested decision and in footnote 564 thereto).
- 368 As regards the CUP meeting of 4 July 2006, the applicant's line of argument must be rejected for the reasons already set out in paragraphs 172 to 176 above, in particular as regards the credibility of the evidence concerning that meeting, namely the minutes of the meeting and the oral statement produced by Rubycon, on the ground that that evidence comes from a single source. In addition, it should be noted that the CUP meetings generally had a global reach, covering sales of electrolytic capacitors to customers worldwide (see footnote 1214 to the contested decision) and that, in particular, the discussions at the CUP meeting of 4 July 2006 were not confined to a specific geographical area, as is apparent from the minutes of that meeting, mentioned in footnote 575 to the contested decision.
- 369 As regards the MK meeting of 12 July 2006 and the meaning of the expression 'overseas', the applicant's arguments must be rejected for the reasons already set out in paragraphs 273 to 275 above. In addition, it should be noted that it is apparent from the evidence concerning that meeting (identified in recital 307 of the contested decision) that the participants exchanged, inter alia, information regarding supply and demand for aluminium electrolytic capacitors and tantalum electrolytic capacitors, including projection data, without any geographical limitation. In addition, the applicant's argument that its contracts with European customers were negotiated on an annual basis with negotiation at the end of each year has no bearing on the fact that, as has been demonstrated by, inter alia, the evidence concerning that meeting, the applicant engaged in discussions regarding pricing with other cartel participants during the year in question.
- 370 Lastly, as regards the MK meeting of 13 September 2006, while it is true that the exchange of information concerned, inter alia, customers having their headquarters in Japan, such as 'S', 'P' or 'J', the fact remains that, at that time, those undertakings had customers or manufacturing plants in Europe, as is apparent from the evidence cited in recitals 316 and 669 of the contested decision. Furthermore, the applicant confirmed in its reply to the statement of objections that, at the time, its European subsidiary made sales to 'S' and 'P' in the EEA. In addition, the fact that part of the evidence relating to that meeting refers to China does not deprive the meeting of any relevance to the EEA.
- 371 Furthermore, the applicant's line of argument alleging a gap in time between certain meetings must be rejected. First, the Commission stated, in recital 60 of the contested decision, that the cartel participants had coordinated their behaviour for almost 14 years, during the period from 26 June 1998 to 23 April 2012. In addition, the Commission stated, in recital 959 of the contested decision, that the applicant had participated in the cartel throughout that period. Secondly, as is apparent from the analysis of the second and third pleas above, the applicant participated, throughout the infringement period, in more than 100 anticompetitive contacts which, taken as a whole, had a link with the EEA (see paragraphs 298 and 345 above). Thirdly, there is no evidence that, during the period in question, the applicant distanced itself from the cartel or withdrew from it or even interrupted its participation.
- 372 In those circumstances, a possible gap in time between certain meetings has no bearing on the assessment of whether the continuous nature of the infringement and of the applicant's participation therein is well founded. Since the cartel extended over almost 14 years and the applicant participated in it throughout that period, the existence of certain periods of time separating those meetings cannot be regarded as constituting an interruption of the infringement. It would be artificial to subdivide into a number of distinct

actions an anticompetitive agreement which is characterised by a series of efforts pursuing a single economic end (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, paragraphs 180, 223 and 224 and the case-law cited).

373 It follows from all of the foregoing that the interruption of the infringement owing to an alleged lack of a link with the EEA during certain periods has not been demonstrated in the present case.

374 The second complaint in the second part of the third plea must therefore be rejected.

*(iii) The third complaint in the second part of the third plea, based on the different nature of the anticompetitive contacts*

375 The applicant claims that the anticompetitive contacts were not capable of forming part of an overall plan, given that there was no overlap between the topics discussed and that there was no continuity between the various groups of meetings and bilateral and trilateral contacts.

376 As regards the topics discussed during the anticompetitive contacts, the arguments put forward by the applicant in connection with the present plea do not call into question the Commission's assessments referred to in paragraphs 196 and 197 above.

377 First of all, the Court cannot concur with the applicant in so far as it maintains, once again, that some of the meetings and contacts, and in particular the ECC meetings mentioned in recital 740 of the contested decision, did not concern the EEA. In that regard, the applicant's arguments must be rejected for the reasons already set out in paragraphs 266, 267 and 270 above.

378 Next, in so far as those meetings and contacts, which formed part of a single and continuous infringement with a global reach and whose participants made direct or indirect sales in the EEA market, had a common anticompetitive objective, the Commission was not required to demonstrate that each anticompetitive contact included a specific reference to Europe (see paragraph 360 above).

379 Lastly, even if, as the applicant maintains, the priority of each meeting or group of meetings was different, such a finding would have no bearing on the fact that the common objective pursued by the parties, which resulted from the contacts set out in the contested decision, 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 (see paragraphs 314 to 317 and 346 above).

380 As regards the lack of continuity between the various groups of meetings and bilateral and trilateral contacts, the applicant claims, more specifically, that there was no continuity, first, between the ECC meetings and the ATC meetings, next, between the ATC meetings and the MK meetings, then between the CUP meetings and the other multilateral meetings and, lastly, between the bilateral and trilateral contacts and the multilateral meetings. In that regard, it claims, in essence, that the products, topics and methods discussed at those meetings were different and that the bilateral and trilateral contacts were independent with regard to the meetings.

381 The applicant's line of argument in support of its claim that there was no continuity between the anticompetitive actions must be rejected in its entirety. In the first place, the variations or developments relied on by the applicant concerning the topics, methods or plans discussed at the meetings and contacts are in no way valid indications of an alleged lack of continuity between the actions, but merely reflect changes or variations inherent in the long duration of the actions (almost 14 years), and the global reach of the discussions.

382 In the second place, as regards the alleged difference between the types of product discussed at the meetings and contacts, it is sufficient to recall that the infringement found in the contested decision concerned the electrolytic capacitors sector and, in particular, the supply of aluminium electrolytic

capacitors and tantalum electrolytic capacitors (see paragraphs 13 and 14 above). Thus, the fact that certain meetings focused on one of those two subgroups of electrolytic capacitors and other meetings either focused on the other or concerned both of those subgroups does not mean that those meetings formed part of a separate infringement. On the contrary, that circumstance supports the Commission's finding that the undertakings concerned coordinated their anticompetitive practices for each of the two product subgroups (see, to that effect and by analogy, judgment of 16 September 2013, *Masco and Others v Commission*, T-378/10, EU:T:2013:469, paragraph 73).

- 383 In the third place, as regards the topics discussed at the meetings, none of the topics put forward by the applicant, in particular the discussions regarding raw materials or market statistics, can be regarded as unrelated to the common objective of the infringement as defined by the Commission, since those data are not, by their nature, irrelevant to the pursuit of a strategy aimed at avoiding price competition and the coordination of future conduct with regard to the sale of electrolytic capacitors. Similarly, the fact that the various groups of meetings may have had different priorities, or even included topics not having an anticompetitive aim, does not alter the fact that the evidence, described in, inter alia, Section 4.3.6 of the contested decision, shows that those contacts included anticompetitive practices all pursuing the same objective of avoiding price competition and coordinating behaviour with regard to the sale of capacitors (see paragraph 379 above).
- 384 In the fourth place, as regards, in particular, the CUP meetings, it is sufficient to recall that those meetings did not pursue a different aim from that pursued by the other multilateral meetings, but formed part of the same common anticompetitive objective (see paragraphs 324 and 325 above).
- 385 In the fifth place, as regards the bilateral and trilateral contacts, the applicant does not take account of the fact that those contacts took place between the same undertakings as those which participated in the multilateral meetings (sometimes involving the same employees, including some of the applicant's employees) and concerned the same products. Moreover, the topics discussed in connection with those contacts were relevant to the multilateral meetings. Thus, those contacts, which were not scheduled regularly, but took place as required, covered specific issues and were complementary to the multilateral meetings, not independent as the applicant claims (see paragraphs 17, 18, 316 and 383 above).
- 386 It follows that the applicant's arguments in support of an alleged lack of continuity between the various groups of meetings and contacts described in the contested decision in no way call into question the Commission's conclusion that all the anticompetitive contacts constituted a regular network of multilateral meetings, supplemented by bilateral and trilateral contacts, in pursuit of a single economic aim (recital 730 of the contested decision).
- 387 The third complaint must therefore be rejected and, accordingly, the second part of the third plea must be rejected in its entirety.

(3) *The third part of the third plea, based on the heterogeneous nature of the capacitor industry*

- 388 The applicant submits that the heterogeneous nature of the capacitor industry renders collusion across all electrolytic capacitors impossible. The applicant submits, in essence, that the Commission failed to establish to the requisite legal standard the existence of a single and continuous infringement covering all aluminium electrolytic capacitors and tantalum electrolytic capacitors in general. Capacitors are highly diversified products, which are distinguished by a multitude of characteristics and for which, in view of their prevalent supply model, there is no uniform market price. Consequently, the infringement at issue could not cover all sales of electrolytic capacitors to the EEA. The two distinct categories of aluminium electrolytic capacitors and tantalum electrolytic capacitors cover a wide variety of product types, in particular as regards their price and the geographical area concerned. The exchanges of general information which took place during the anticompetitive contacts were insufficient to reduce uncertainty on the market and to facilitate price coordination between competitors, especially since not all types of aluminium electrolytic capacitors and tantalum electrolytic capacitors were the subject of such exchanges.

- 389 The Commission disputes those arguments.
- 390 As a preliminary point, it should be noted that the applicant misinterprets the contested decision when it submits that the Commission considered that there was a single and continuous infringement which, taken as a whole, covered all types of aluminium electrolytic capacitors and tantalum electrolytic capacitors.
- 391 What is apparent from the contested decision, and in particular from recital 736 thereof, is that the Commission found, after examining all the meetings and evidence relating thereto, that all the anticompetitive contacts concerned aluminium electrolytic capacitors or tantalum electrolytic capacitors, or even both, in general.
- 392 In that regard, it should be borne in mind that 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).
- 393 In addition, 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).
- 394 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).
- 395 However, in the present case, first, the Commission stated in the contested decision that it was apparent from the anticompetitive contacts as a whole and, in particular, from the meetings of 29 August 2002, 22 December 2006, 25 June 2008 and 20 December 2010, cited by way of example, that the information exchanged was not limited to certain subtypes of aluminium electrolytic capacitors and tantalum electrolytic capacitors, but covered aluminium electrolytic capacitors and tantalum electrolytic capacitors in general (see recital 796 of the contested decision).
- 396 Secondly, the information exchanged also related to specific considerations that were nonetheless relevant for the purpose of determining the selling price of the products, such as the increase in raw material costs and the fluctuation of exchange rates, which were not limited to certain subtypes of aluminium electrolytic capacitors and tantalum electrolytic capacitors (see, inter alia, recital 796 of the contested decision, as well as footnotes 1417 and 1418 thereto).
- 397 Thirdly, the cartel participants had not introduced any limitation in their corporate statements as to the definition of the products covered by the cartel (see recital 797 of the contested decision).
- 398 Fourthly, most of the representatives of the cartel participants were responsible for the manufacture and/or sale of aluminium electrolytic capacitors and tantalum electrolytic capacitors in general and not for a specific range of capacitors (see recital 798 of the contested decision).
- 399 In those circumstances, and in the light of the case-law referred to in paragraphs 151 and 392 to 394 above, the Commission cannot be criticised for having considered that, taken as a whole, the information exchanged during the anticompetitive contacts covered all aluminium electrolytic capacitors and tantalum electrolytic capacitors and, therefore, that the single and continuous infringement covered all those products.
- 400 It follows that the third part of the third plea must be rejected and, accordingly, the third plea in law must be rejected in its entirety.

**(e) *The fourth plea in law, alleging that there was not an infringement by object***

- 401 The applicant submits that the Commission erred in considering, in recital 845 of the contested decision, that the entirety of the alleged conduct constitutes a restriction of competition by object. First, the exchanges of information referred to in the contested decision were incapable of reducing uncertainty on the market, in so far as there was no regular pattern making it possible to determine a strategy, and participants only very rarely exchanged clear and individualised pricing intentions. Secondly, those exchanges of information were incapable of influencing the competitive structure of the entire capacitor industry, given the heterogeneous nature of that industry. Thirdly, the applicant only very rarely disclosed its own future pricing intentions to the other participants in the alleged infringement. Fourthly, the Commission failed to take sufficient account of the relevant economic and legal context. Fifthly, extensive evidence shows that the cartel participants, and in particular the applicant, engaged in active competition during the alleged infringement period.
- 402 The Commission disputes those arguments.
- 403 As a preliminary point, it should be borne in mind that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement between undertakings, a decision by an association of undertakings or a concerted practice must have ‘as [its] object or effect’ the prevention, restriction or distortion of competition in the internal market.
- 404 With regard to the classification of a practice as a restriction by object, it is apparent from the case-law of the Court of Justice that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects. That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraphs 113 and 114 and the case-law cited).
- 405 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purpose of applying Article 101(1) TFEU, to prove that it has actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers. Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for the purpose of determining whether such conduct is covered by that defined in Article 101(1) TFEU, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraphs 115 and 116 and the case-law cited).
- 406 In order to determine whether a type of coordination between undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition ‘by object’ within the meaning of Article 101(1) TFEU, regard must be had, inter alia, to its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 117 and the case-law cited).
- 407 In cases where the anticompetitive object is readily apparent, the analysis of the economic and legal context in which the practice occurs may naturally be limited to what is strictly necessary. Just such a readily apparent anticompetitive object is present where competitors enter into price-fixing agreements with each other or where they exchange sensitive information which is relevant to their respective pricing models (see judgment of 7 November 2019, *Campine and Campine Recycling v Commission*, T-240/17, not published, EU:T:2019:778, paragraph 295 and the case-law cited).

- 408 In addition, although the parties' intention is not a necessary factor in determining whether a type of coordination between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 118 and the case-law cited).
- 409 In the present case, the Commission found that there was a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement, consisting in the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors through the exchange of various items of information (see paragraphs 14, 18 and 19 above).
- 410 In particular, the Commission considered that the undertakings met at the meetings and contacts described in the contested decision with a view to coordinating their future prices or other pricing-related aspects of their conduct on the market through exchanges of information regarding future prices or other pricing-related aspects and information regarding supply and demand and, in some cases, through the implementation and monitoring of price agreements (see paragraph 14 above and recitals 841 and 844 of the contested decision).
- 411 With regard to the exchanges of information, they concerned, inter alia, future supply and demand, such as production volumes or increases or decreases in shipments, and future prices or pricing intentions, such as maintaining prices, future price reductions or the ranges for those price reductions, price increases due to an increase in prices of raw materials or so as to cover currency fluctuations, coordination of the answers to be given to specific customers in case of a quotation request or exchanges of information regarding target prices for negotiations with specific customers (recital 843 of the contested decision).
- 412 Through those exchanges of information, the cartel participants informed each other of their intended conduct on the market with regard to factors that were decisive for their pricing behaviour. Those exchanges were aimed not only at eliminating or reducing uncertainties as to the conceivable behaviour of those undertakings, but also at enabling those undertakings to agree on prices and at limiting the bargaining power of their customers. They therefore reveal a sufficient degree of harm to competition and may be regarded, by their very nature, as being harmful to the proper functioning of normal competition, within the meaning of the case-law referred to in paragraph 404 above.
- 413 Furthermore, the Commission found that the cartel participants had, in some cases, concluded agreements that related to price increases and included a common strategy for implementing increases and a mechanism for reporting on the status of negotiations with certain customers (recitals 843 and 844 of the contested decision).
- 414 It follows from the foregoing that the Commission was fully entitled to classify the infringement at issue as a restriction of competition by object and to find that it was not necessary to examine its actual effects, in accordance with the case-law referred to in paragraphs 404 and 405 above.
- 415 The various arguments put forward by the applicant do not invalidate that finding.
- 416 In the first place, the applicant's argument that there was no regular pattern making it possible to establish a competitive strategy and no exchange of information that was harmful to competition must be rejected. As is apparent from the analysis of the second and third pleas above, the anticompetitive contacts in which the applicant repeatedly participated related to the coordination of pricing behaviour as regards the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors through the exchange of sensitive business information and, in certain cases, through the implementation and monitoring of price agreements.
- 417 More specifically, first, it is clear that the anticompetitive contacts described in the contested decision constituted a regular and continuous network of multilateral meetings, supplemented by bilateral and trilateral contacts, in pursuit of a single economic aim. Secondly, the ultimate aim of the collusive contacts,

namely the coordination of pricing behaviour, was pursued by means of, inter alia, exchanges of information regarding pricing, including future pricing, exchanges of information regarding supply and demand, including future supply and demand (in particular in relation to production volumes or increases or decreases in shipments) and, in some instances, the conclusion, implementation and monitoring of price agreements.

- 418 In addition, it is apparent from the analysis of the second, third and fifth pleas that the infringement at issue had a global reach and an impact on the EEA market.
- 419 It must therefore be held that the cartel participants exchanged individualised, sensitive and confidential information that was capable of directly influencing their commercial strategy and reducing the degree of uncertainty as to the operation of the market in question.
- 420 It follows that, contrary to the applicant's assertions, the information exchanged revealed, on account of its nature and geographical scope, a sufficient degree of harm to competition that it may be considered to result in a restriction of competition by object covering the EEA, within the meaning of the case-law referred to in paragraph 404 above.
- 421 In the second place, for the reasons set out above in connection with the analysis of the third part of the third plea, the applicant's arguments based on the heterogeneous nature of capacitors and the fact that certain exchanges of information concerned only one type of capacitor must be rejected.
- 422 In the third place, the applicant's claim that it rarely shared its pricing intentions must be rejected.
- 423 First, that claim is irrelevant, since it cannot be ruled out that an isolated exchange of information may be sufficient to establish concerted action that is in breach of the competition rules laid down in the FEU Treaty (see, to that effect, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 59).
- 424 Furthermore, it must be borne in mind that, in order to prove that there has been a concerted practice, it is not necessary to show that the competitor which disclosed its intentions or future conduct on the market formally undertook, in respect of one or several other competitors, to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market. It is sufficient that, by its statement of intention, the competitor eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect from it on the market (see judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 67 and the case-law cited). In the present case, the applicant participated in almost all the multilateral meetings referred to in the contested decision, in connection with which the participants exchanged information concerning their future pricing intentions (see recital 847 of the contested decision).
- 425 Secondly, the applicant's claim is factually inaccurate. As is apparent from the analysis of the second plea, the cartel participants, including the applicant, disclosed their future pricing intentions (in particular their intention to prevent price reductions) at several meetings which took place during the infringement period.
- 426 In the fourth place, the applicant's complaint that the Commission did not attach sufficient importance to the relevant economic and legal context is to no avail. As has already been stated in paragraph 407 above, in cases where, as in the present case, the anticompetitive object is readily apparent, the analysis of the economic and legal context in which the practice occurs may naturally be limited to what is strictly necessary. In any event, elements of such an analysis may be found in recital 856 of the contested decision, in which the Commission states, inter alia, that the cartel participants were the main Japanese producers of electrolytic capacitors, with considerable market power, and that they coordinated over a long period of time in order to create a united front against other competitors and customers. Moreover, the conduct examined was not aimed exclusively at specific customers or specific products and many of the issues addressed were industry-wide. The contacts concerning specific customers represented only one of the manifestations of collusive behaviour.

427 In the fifth place, the applicant's claim that there was active competition between the undertakings concerned throughout the infringement period is irrelevant. The fact that an undertaking does not act on the outcome of a meeting that has an anticompetitive object is not such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see judgment of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 85 and the case-law cited).

428 In addition, 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. As is apparent from the case-law referred to in paragraph 194 above, such a concerted practice is caught by Article 101(1) TFEU even in the absence of anticompetitive effects on the market. In the present case, no such proof to the contrary has been adduced by the applicant.

429 In the light of the foregoing, the fourth plea in law must be rejected.

***(f) The sixth plea in law, alleging errors in the calculation of the amount of the fine and infringement of the 2006 Guidelines, as well as infringement of the principles of equal treatment and proportionality***

430 By its sixth plea, the applicant requests that the Court annul the fine that was imposed on it. This plea may be divided into two parts. The first part alleges errors in the calculation of the value of sales. The second part alleges failure to reduce the amount of the fine on the basis of the limited links between the alleged infringement and the EEA.

431 In the first place, as regards the calculation of the amount of the fine, 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.

432 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 Article 23 of 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; see, also, by analogy, judgment of 5 December 2013, *Solvay Solexis v Commission*, C-449/11 P, not published, EU:C:2013:802, paragraph 100 and the case-law cited).

433 In accordance with settled case-law, in adopting rules of conduct such as the 2006 Guidelines 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; see also, by analogy, judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211).

434 In the second place, as regards the calculation of the value of sales, point 13 of the 2006 Guidelines provides as follows:

‘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. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement’.

435 Thus, point 13 of the 2006 Guidelines pursues the objective of adopting as the starting point for the calculation of the amount 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 (judgment of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76; see also, to that effect, judgment of 20 January 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 85 and the case-law cited).

- 436 According to settled case-law, 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 (judgment of 7 June 1983, *Musique Diffusion française and Others v Commission*, 100/80 to 103/80, EU:C:1983:158, paragraph 121; see also judgment of 28 June 2016, *Portugal Telecom v Commission*, T-208/13, EU:T:2016:368, paragraph 236 and the case-law cited).
- 437 It can be seen both from the wording of point 13 of the 2006 Guidelines, by the use of the adverb 'normally' in the second sentence of that point, and from point 37 of those guidelines that, in imposing a limit on its margin of discretion as regards the calculation of fines, the Commission envisaged the eventuality where the particular circumstances of a case would justify derogation from the rule concerning the taking into account, in the calculation of the amount of the fine, of the sales made by the undertaking concerned during the last full business year of its participation in the infringement (see judgment of 17 December 2014, *Pilkington Group and Others v Commission*, T-72/09, not published, EU:T:2014:1094, paragraph 212 and the case-law cited).
- 438 That margin of discretion is, however, limited. The 2006 Guidelines lay down a rule of conduct indicating the approach to be adopted from which the Commission cannot depart, in an individual case, without giving reasons which are compatible with, inter alia, the principle of equal treatment (see judgment of 10 July 2019, *Commission v Icap and Others*, C-39/18 P, EU:C:2019:584, paragraph 29 and the case-law cited).
- 439 In the third place, with regard to the principle of proportionality, that principle 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 judgments of 16 November 2011, *Sachsa Verpackung v Commission*, T-79/06, not published, EU:T:2011:674, paragraph 258 and the case-law cited, and of 15 July 2015, *Fapricela v Commission*, T-398/10, EU:T:2015:498, paragraph 257 and the case-law cited).
- 440 In the present case, when determining the basic amount of the fines imposed by the contested decision, first of all, the Commission took into account, as the reference period, the last full business year of participation in the infringement, in accordance with the rule in point 13 of the 2006 Guidelines. Next, it determined the value of sales using sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced to customers in the EEA as a basis. Lastly, it calculated the value of sales separately for those two categories of products, applying separate duration multipliers to each (see paragraphs 24 to 26 above).
- 441 As regards the applicant, the Commission considered that it was necessary to take into account, as the reference period, the last full business year of participation in the infringement in respect of the value of sales of aluminium electrolytic capacitors, namely 2011/2012, on the one hand, and the last full business year during which the applicant sold tantalum electrolytic capacitors, namely 2003/2004, given that it had stopped selling them before the end of its participation in the infringement, on the other (see paragraph 27 above).

442 As regards the applicant again, the Commission found that, through its subsidiaries Europe Chemi-Con and United Chemi-Con, it had invoiced direct sales of aluminium electrolytic capacitors in the EEA throughout its participation in the infringement and direct sales of tantalum electrolytic capacitors in the EEA until 1 February 2005. Consequently, the Commission applied to the applicant a multiplier of 13.82 (corresponding to the period from 26 June 1998 to 23 April 2012) in respect of aluminium electrolytic capacitors, and of 5.26 (corresponding to the period from 29 October 1999 to 1 February 2005) in respect of tantalum electrolytic capacitors (see paragraphs 28 and 29 above).

443 It is in the light of those considerations that the complaints raised by the applicant in connection with the sixth plea in law should be examined.

*(1) The first part of the sixth plea, alleging errors in the calculation of the value of sales*

444 In connection with the first part of the sixth plea, the applicant submits, in essence, that the Commission incorrectly determined the value of sales relevant to the calculation of the basic amount of the fine. This part is divided into three complaints. The first complaint alleges an error inasmuch as the value of sales includes all types of aluminium electrolytic capacitors and tantalum electrolytic capacitors. The second complaint alleges an error inasmuch as the value of sales includes sales made by the applicant's subsidiaries. The third complaint alleges an error inasmuch as the Commission used the business year 2011/2012 as the reference period.

*(i) The first complaint in the first part of the sixth plea, alleging an error inasmuch as the value of sales includes all types of aluminium electrolytic capacitors and tantalum electrolytic capacitors*

445 The applicant disputes, in essence, the fact that, in order to determine the value of sales relevant to the calculation of the basic amount of the fine, the Commission took into consideration the Nippon Chemi-Con group's sales relating to all types of aluminium electrolytic capacitors and tantalum electrolytic capacitors.

446 In the first place, the applicant submits that the Commission failed to fulfil its obligation to state reasons, in so far as the explanations set out in recitals 988 and 995 of the contested decision are insufficient to prove that all electrolytic capacitors were covered by the infringement. Moreover, the Commission is required to produce a statement of reasons justifying its choice to apply the 2006 Guidelines when the addressees of the contested decision challenge the application of those rules.

447 In the second place, according to the applicant, the Commission erred in concluding in recital 4 of the contested decision that electrolytic capacitors are homogeneous products, whereas they are highly differentiated products and the Commission should therefore have determined precisely which types of capacitor were directly or indirectly related to the infringement. In failing to do so, the contested decision infringes, inter alia, the case-law stemming from the judgments of 11 July 2013, *Team Relocations and Others v Commission* (C-444/11 P, not published, EU:C:2013:464), and of 28 June 2016, *Telefónica v Commission* (T-216/13, EU:T:2016:369). In particular, the Commission should have made further distinctions within the two groups of aluminium electrolytic capacitors and tantalum electrolytic capacitors.

448 In the third place, the applicant maintains that the Commission has not established that the sales made by the Nippon Chemi-Con group in the EEA during the reference period 2011/2012 were directly or indirectly related to the alleged infringement and, consequently, has infringed the 2006 Guidelines. The group's sales in the EEA during that period concerned only aluminium electrolytic capacitors for the industrial and automotive sector and the Commission has not established that the sale of that type of capacitor in the EEA was directly or indirectly related to the alleged infringement, or that their prices were dependent on those charged in Asia. Nor has the Commission shown that the alleged infringement had actual effects in the EEA.

449 According to the applicant, first, the basic amount of the fine calculated by the Commission was disproportionate, inasmuch as sales of that type of capacitor in the EEA had only little connection, or even

no connection, with the alleged infringement. Secondly, the Commission's failure to undertake a detailed factual and legal analysis in relation to the value of sales is so severe that the imposition of a fine cannot stand and, therefore, Article 2(j) of the contested decision should be annulled in its entirety.

450 The Commission disputes those arguments.

451 As regards the obligation to state reasons, it should be recalled that, according to settled case-law, the statement of reasons required under Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 1 February 2018, *Schenker v Commission*, C-263/16 P, not published, EU:C:2018:58, paragraph 51 and the case-law cited).

452 In particular, when the Commission decides to depart from the general methodology set out in the 2006 Guidelines, by which it limited the discretion it may itself exercise in setting the amount of fines, and relies on point 37 of those guidelines, those requirements relating to the obligation to state reasons must be complied with all the more rigorously (see judgment of 12 July 2019, *Hitachi-LG Data Storage and Hitachi-LG Data Storage Korea v Commission*, T-1/16, EU:T:2019:514, paragraph 80 and the case-law cited). In that regard, it should be noted that it is apparent from the case-law referred to in paragraph 433 above that the 2006 Guidelines lay down a rule of conduct indicating the approach to be adopted from which the Commission cannot depart, in an individual case, without giving reasons which are compatible with, inter alia, the principle of equal treatment.

453 It follows, *a contrario*, that the Commission is not under an obligation to give a specific statement of reasons when it decides to comply with the indicative rules which it has imposed on itself, such as those laid down in the 2006 Guidelines (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). The Commission is required only to state the reasons, in the contested decision, relating to the methodology applied to calculate the amount of the fine and not the factors that it did not take into account in that calculation and, in particular, the reasons for which it did not have recourse to the exception provided for in point 37 of the 2006 Guidelines (see, to that effect, judgment of 12 July 2019, *Hitachi-LG Data Storage and Hitachi-LG Data Storage Korea v Commission*, T-1/16, EU:T:2019:514, paragraph 81 and the case-law cited).

454 That is precisely the situation in the present case, in which the Commission decided to apply the methodology set out in the 2006 Guidelines to calculate the fines imposed on the cartel participants (see paragraph 23 above). Thus, since the Commission explained, in the contested decision, the various aspects of the application of that methodology, including the fact that it took separate account of the value of sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced to customers in the EEA (see paragraphs 441 and 442 above), it cannot be said to have failed in any way to fulfil the obligation to state reasons, in the light of the case-law cited in paragraphs 451 to 453 above.

455 As regards the value of sales relevant to the calculation of the basic amount of the fine, it is apparent from the case-law that, having regard to 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 (see judgment of 1 February 2018, *Deutsche Bahn and Others v*

*Commission*, C-264/16 P, not published, EU:C:2018:60, paragraph 50 and the case-law cited). 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).

456 In the present case, the single and continuous infringement referred to in the contested decision concerns the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors in general, that is to say, without excluding any particular type of those products (see paragraphs 14 and 395 to 398 above). First, the anticompetitive contacts were not limited to certain subtypes of aluminium electrolytic capacitor or tantalum electrolytic capacitor. Secondly, the Commission was not required to define the relevant market on the basis of economic criteria, as the applicant attempts to do. Thirdly, the cartel participants had not introduced any limitation in their corporate statements as to the definition of the products covered by the cartel. Fourthly, most 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 for a specific range of products.

457 It follows that, contrary to the applicant's assertions, the Commission has demonstrated that aluminium electrolytic capacitors and tantalum electrolytic capacitors in general were directly or indirectly related to the infringement. Accordingly, the Commission was fully entitled to calculate the value of sales by taking into account sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors invoiced to customers in the EEA, including those intended for industrial and automotive applications.

458 Furthermore, the Court cannot accept the applicant's argument alleging infringement of the principle of proportionality, which, in any event, is not substantiated specifically. The relevant sales of the Nippon Chemi-Con group in the EEA correspond to the turnover deriving from the products in respect of which the infringement was committed. Accordingly, those sales constitute an objective criterion giving a proper measure of the harm caused by the infringement, as well as a proper indication of its scale on the relevant market and the size of the applicant's contribution to it, in accordance with the case-law referred to in paragraphs 435 and 436 above.

459 Accordingly, the first complaint in the first part of the sixth plea must be rejected in its entirety.

*(ii) The second complaint in the first part of the sixth plea, alleging an error inasmuch as the value of sales includes sales made by the applicant's subsidiaries*

460 The applicant contests, in essence, the fact that the Commission included the sales of the Nippon Chemi-Con group and, in particular, of Europe Chemi-Con, invoiced to all customers established in the EEA, in its calculation of the value of sales. In the first place, the Commission failed to take account of the fact that the applicant did not itself make any sales in the EEA and that the conduct described in the contested decision relates only to very few customers of the Nippon Chemi-Con group. Of the 60 customers mentioned in the contested decision, only 2 are global customers of United Chemi-Con and only 4 are global customers of Europe Chemi-Con. In the second place, the Commission did not take into account that Europe Chemi-Con and United Chemi-Con enjoyed independent pricing authority in relation to their local customers and to global customers headquartered in Europe, that authority being sufficient to rebut the presumption that those subsidiaries, wholly owned by the applicant, were part of the same undertaking. In the third place, the Commission did not establish that the Nippon Chemi-Con group's sales to its local

and global customers were directly or indirectly related to the infringement, or that the infringement had any specific effects in the EEA.

461 The Commission disputes those arguments.

462 It is settled case-law that EU competition law, in particular Article 101 TFEU, refers to the activities of undertakings and the concept of ‘undertaking’ covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see judgments of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 54 and the case-law cited, and of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 140 and the case-law cited).

463 On that point, the Court of Justice has stated, first, that the concept of an undertaking, in that context, must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons, and, second, that when such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer 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, paragraph 82 and the case-law cited).

464 As regards, again, the concept of an undertaking, this time in the context of calculating the fine, it must be borne in mind that it is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the products in respect of which the infringement was committed, which gives an indication of the scale of the infringement (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 145 and the case-law cited). The proportion of the overall turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of the infringement (see judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 149 and the case-law cited).

465 Furthermore, in the specific case where a parent company holds all or almost all of the capital in a subsidiary which has infringed the EU competition rules, there is a rebuttable presumption that that parent company actually exercises a decisive influence over its subsidiary (see judgment of 27 April 2017, *Akzo Nobel and Others v Commission*, C-516/15 P, EU:C:2017:314, paragraph 54 and the case-law cited; see also, to that effect, judgment of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 63). Such a presumption implies, unless it is rebutted, that the actual exercise of decisive influence by the parent company over its subsidiary is established and gives grounds for the Commission to hold the former responsible for the conduct of the latter, without having to produce any further evidence (see judgment of 27 April 2017, *Akzo Nobel and Others v Commission*, C-516/15 P, EU:C:2017:314, paragraph 55 and the case-law cited).

466 Admittedly, the presumption that subsidiaries are not autonomous has been developed by the case-law in order to allow the conduct of one legal entity (the subsidiary) to be imputed to another (the parent company). However, that presumption that subsidiaries are not autonomous also applies where, as in the present case, it is a matter of determining the relevant value of sales for the purpose of calculating the basic amount of the fine to be imposed on a parent company which participated directly in the infringement and which, during the infringement period, sold the products covered by that infringement in the EEA through its subsidiaries.

467 In the present case, it is common ground that the applicant owned 100% of the shares in Europe Chemi-Con and 100% of the shares in United Chemi-Con for the entire duration of the infringement (see paragraph 1 above). It follows that the applicant and its subsidiaries constitute a single economic unit and thus form a single undertaking for the purposes of Article 101 TFEU, in accordance with the case-law

referred to in paragraph 463 above. It also follows that there is a rebuttable presumption that the subsidiaries concerned were not autonomous.

468 The applicant has not put forward any specific evidence to rebut that presumption of a lack of autonomy and to substantiate the alleged independent pricing authority of its subsidiaries. On the other hand, it follows from the analysis of the second plea that certain customers of Europe Chemi-Con and United Chemi-Con which had their headquarters or manufacturing plants in Europe were discussed during some of the anticompetitive contacts (see paragraphs 249, 280 and 296 above), which, moreover, the applicant itself acknowledges in the application.

469 It must therefore be held that the presumption that the applicant's subsidiaries were not autonomous has not been rebutted in the present case.

470 In addition, it should be noted that the value of sales relevant to the calculation of the basic amount of the fine must correspond to the value of the 'undertaking's' sales of goods or services to which the infringement directly or indirectly relates in the EEA (see paragraph 434 above). This means that, in the present case, the value of sales must include the sales of aluminium electrolytic capacitors and tantalum electrolytic capacitors made in the EEA by the economic unit formed by the applicant and its wholly owned subsidiaries.

471 Accordingly, the Commission cannot be criticised for having taken into account, when determining the value of the undertaking's sales to which the infringement directly or indirectly relates, in accordance with point 13 of the 2006 Guidelines, the amount of sales of electrolytic capacitors which the applicant's subsidiaries invoiced to customers established in Europe (see, to that effect, judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 150).

472 As to the remainder, it should be noted that the applicant merely repeats the arguments made in connection with the previous pleas, which have already been rejected.

473 As regards the argument that the Commission did not establish the existence of an infringement having specific effects in the EEA, as has been concluded in connection with the analysis of the fourth plea (see paragraph 414 above), the Commission was fully entitled to classify the infringement at issue as a restriction of competition by object and, therefore, to find that it was not necessary to examine its actual effects. In addition, as has been noted in paragraphs 82 and 266 above, first, the anticompetitive contacts, taken as a whole, showed a link with the EEA and, secondly and in any event, the criterion of the implementation of the cartel as a factor linking it to EU territory was satisfied by mere sale within the European Union of the product that was the subject of the cartel. It follows that the applicant's argument that the Commission did not establish that the Nippon Chemi-Con group's sales to its local and global customers were directly or indirectly related to the infringement must also be rejected.

474 The second complaint in the first part of the sixth plea must therefore be rejected.

*(iii) The third complaint in the first part of the sixth plea, alleging an error inasmuch as the Commission used the business year 2011/2012 as the reference period*

475 The applicant claims that the Commission erred in using the business year 2011/2012 as the reference period to calculate the value of sales. The earthquake which took place in Japan on 11 March 2011 caused a surge in sales of electrolytic capacitors and, consequently, the business year 2011/2012 was exceptional. In order to determine the value of sales, the Commission should therefore have relied on an average of the revenues achieved during the period of the applicant's participation in the alleged infringement.

476 The Commission disputes those arguments.

477 In the present case, first of all, it is apparent from recital 989 of the contested decision that, in determining the basic amount of the fines to be imposed, the Commission, relying on the rule in point 13 of the 2006

Guidelines, used the last full year (more precisely, the last full business year) of participation in the infringement as the reference period for calculating the value of sales of all the cartel participants, with the exception of Elna and the applicant.

478 As regards the applicant and Elna, the Commission found that, as they had stopped selling tantalum electrolytic capacitors prior to the end of their participation in the infringement, it was appropriate, in respect of those capacitors, to take account of the value of sales in the last full business year in which those undertakings had sold them in order to ensure that the value of sales did not underestimate the economic significance of the infringement.

479 As regards the applicant in particular, the Commission considered that it was necessary to take into account, as the reference year, on the one hand, the last full business year of participation in the infringement in respect of the value of sales of aluminium electrolytic capacitors, namely 2011/2012, and, on the other hand, the last full business year during which the applicant sold tantalum electrolytic capacitors, in respect of the value of sales of the latter, namely 2003/2004 (see paragraph 27 above).

480 The applicant challenges only the choice, as the reference period, of the last full business year of participation in the infringement in respect of the value of sales of aluminium electrolytic capacitors, namely 2011/2012.

481 In that regard, it should be noted that, first, 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).

482 Secondly, 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 which are compatible with the principle of equal treatment (see paragraph 433 above).

483 In the present case, it has not been demonstrated that there are any special circumstances that would justify the Commission being compelled to derogate 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, as regards the calculation of the value of sales of aluminium electrolytic capacitors by the applicant and its subsidiaries.

484 The arguments put forward by the applicant cannot cast doubt on that finding.

485 In that regard, it must be observed that the applicant does 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 aluminium electrolytic capacitors 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.

486 Admittedly, the applicant claims that the value of Europe Chemi-Con's sales in 2011/2012 was significantly higher than the average of that value between 1998 and 2014. However, the applicant does not put forward any concrete evidence to show that the increase in invoicing for 2011/2012 is not the result of normal fluctuations, especially since, as the applicant acknowledges, the value of sales for 2000/2001 was close to that for 2011/2012. In particular, the applicant does not adduce any concrete evidence to support the conclusion that the earthquake which took place in Japan in 2011 was a cause, or indeed the decisive cause, of the increase in Europe Chemi-Con's turnover during the last year of the applicant's participation in the infringement.

487 Moreover, an increase in the value of sales may be the result of the cartel, one of the main objectives of which is to increase the prices of the products concerned. In the present case, the infringement in question lasted almost 14 years and had specifically as its object the coordination of pricing behaviour, the applicant having participated in it for its entire duration.

488 In that context, the mere increase in the turnover of the applicant's European subsidiary is not sufficient to show that the value of sales during the last full business year of participation in the infringement was not representative of its true size and its economic power on the market or of the extent of its infringement.

489 The third complaint in the first part of the sixth plea must therefore be rejected, as must, consequently, the first part of that plea in its entirety.

*(2) The second part of the sixth plea, alleging failure to reduce the amount of the fine on the basis of the limited links between the alleged infringement and the EEA*

490 The applicant maintains that the Commission infringed the 2006 Guidelines as well as the principles of proportionality and equal treatment, in so far as, when calculating the amount of the fine imposed on it, the Commission failed to take account of the limited links between the alleged infringement and the EEA. First, those limited links are demonstrated by the fact that all the addressees of the contested decision and all the persons who participated in the anticompetitive contacts are Asian and that all the meetings in question took place in Asia. Secondly, the market shares of the addressees of the contested decision in the EEA were low. Thirdly, the applicant's subsidiaries had independent pricing authority. Fourthly, the main products sold by the applicant's subsidiaries in the EEA were only marginally affected by the allegedly anticompetitive conduct in Asia. Fifthly, the customers concerned by the alleged infringement are mostly based or at least headquartered in Asia. Sixthly, the leniency applicants explicitly denied that the conduct disclosed in their respective submissions had any relevance to the EEA.

491 According to the applicant, the limited links between the alleged infringement and the EEA should have led the Commission to apply a lower gravity factor, a reduction factor on account of mitigating circumstances, or point 37 of the 2006 Guidelines, so as to reduce the amount of the fine imposed on it.

492 The Commission disputes those arguments.

493 In the first place, as regards the arguments put forward by the applicant in support of the alleged existence of limited links between the infringement and the EEA, it should be noted that that line of argument consists, in essence, in a repetition of the arguments put forward in connection with the previous pleas, which have already been rejected.

494 As regards the argument based on the Asian origin of the cartel, it is sufficient to recall that, as has been pointed out in paragraphs 79, 81 and 82 above, the Commission was fully entitled to conclude that the cartel, although formed in Asia, had a global reach and had been implemented in the EEA.

495 Consequently, the applicant's argument that the market shares of the addressees of the contested decision in the EEA were low is also irrelevant, since those addressees, including the applicant, had direct or indirect sales of electrolytic capacitors in the EEA.

496 As regards the argument based on the alleged independent pricing authority of the applicant's subsidiaries, it must be rejected for the reasons set out in connection with the analysis of the second complaint in the first part of the present plea (see paragraphs 469 and 471 above).

497 As regards the arguments based on the alleged heterogeneous nature of the capacitor industry and the differences between demand in the Asian market and demand in the EEA, they must be rejected for the reasons set out in connection with the analysis of the third part of the third plea (see paragraphs 395 to 399 above).

- 498 As regards the argument that the Commission failed to demonstrate that certain discussions during the anticompetitive contacts concerned the EEA, that argument has already been rejected in the analysis of the second plea.
- 499 As regards the argument that the leniency applicants denied that the conduct disclosed in their respective submissions had any relevance to the EEA, the analysis of the second and fifth pleas shows that it was, *inter alia*, on the basis of the evidence produced by those leniency applicants that the implementation of the cartel in the EEA was established. That argument cannot therefore succeed.
- 500 In the second place, as regards the applicant's line of argument that the Commission should have taken account of the limited links between the cartel and the EEA so as to reduce the gravity factor of the infringement, it should be borne in mind that, in accordance with points 19 to 22 of the 2006 Guidelines, one of the two factors on which the basic amount of the fine is based is the proportion of the value of the sales concerned, which is determined depending on the degree of gravity of the infringement. The assessment of the gravity of the infringement is to be made on a case-by-case basis for all types of infringement, taking account of all the circumstances of the case. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to decide on the proportion of the value of sales to be considered in a given case, the Commission is to have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographical scope of the infringement and whether or not the infringement has been implemented.
- 501 In the present case, the Commission found that there was a single and continuous infringement covering the whole EEA consisting 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 (see paragraph 14 above). The Commission set, for all the cartel participants, the proportion of the value of their sales to be taken into account in order to reflect the gravity of the infringement at 16%, taking account of the fact 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 (see paragraph 30 above).
- 502 It follows that the Commission set a gravity factor slightly above the middle of that scale which, in accordance with point 21 of the 2006 Guidelines, may be up to 30% of the value of sales.
- 503 In those circumstances, since the infringement was by its very nature among the most serious infringements and covered the whole EEA, it cannot be considered that the Commission should have found that the gravity factor of 16% was not appropriate or was too high in respect of the applicant's infringement or that its application to all the addressees of the contested decision infringes the principle of equal treatment.
- 504 In the third place, as regards the applicant's argument that the Commission should have taken account of the limited links between the alleged infringement and the EEA as a mitigating circumstance, it should be noted that, first, it has already been established that the infringement referred to in the contested decision had a connection with the EEA throughout the infringement period. Secondly, even if the links between the infringement and the EEA were limited, it would not be possible to link that circumstance to one of the mitigating circumstances expressly mentioned in point 29 of the 2006 Guidelines. In addition, even though the list laid down in point 29 of the 2006 Guidelines is not exhaustive, the fact that the infringement is not limited to the EEA, and that it does not originate in the EEA, is not capable of mitigating the relative gravity of the applicant's participation in that infringement and, therefore, of justifying a reduction, on account of mitigating circumstances, in the basic amount of the fine imposed on it.
- 505 In the fourth place, as regards the applicant's argument that point 37 of the 2006 Guidelines should be applied in the present case in order to reduce the amount of the fine imposed on it, it should be recalled that that point provides as follows:

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

506 Point 37 of the 2006 Guidelines thus permits the Commission to depart from the general methodology laid down by those guidelines, in order to take account of the particularities of a given case or to achieve an adequate level of deterrence.

507 It should be recalled in that regard that, while the Commission enjoys a broad discretion as regards the method for calculating fines in relation to infringement of the EU competition rules (see paragraph 432 above), it has nevertheless adopted, in the interests of transparency, the 2006 Guidelines, in which it indicates the basis on which it will take account of one or other aspect of the infringement and what this will imply as regards the amount of the fine (see judgment of 10 July 2019, *Commission v Icap and Others*, C-39/18 P, EU:C:2019:584, paragraph 25 and the case-law cited).

508 As is apparent from the case-law referred to in paragraph 433 above, in adopting rules of conduct such as the 2006 Guidelines, 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.

509 In the present case, it must be held that no particularity, within the meaning of point 37 of the 2006 Guidelines, has been demonstrated that would justify, in the light, in particular, of the principles of equal treatment and the protection of legitimate expectations, the Commission departing from the rules laid down in the 2006 Guidelines in order to grant the applicant a reduction in the amount of the fine.

510 The second part of the sixth plea must therefore be rejected, as must, consequently, the sixth plea in law in so far as it seeks annulment of the fine imposed on the applicant.

511 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 imposed on the applicant***

512 In connection with the sixth plea, the applicant requests that the Court reduce the amount of the fine imposed on it, in the light, in essence, of the principles of equal treatment and proportionality. According to the applicant, that amount must be reduced by the application of a lower gravity factor, by a reduction on account of mitigating circumstances, or by a reduction pursuant to point 37 of the 2006 Guidelines.

513 The Commission disputes those arguments.

514 As a preliminary point, it should be noted that unlimited jurisdiction empowers the EU judicature, 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).

515 In order to satisfy the requirements of Article 47 of the Charter 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).

- 516 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*. Thus, 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).
- 517 In addition, it should be borne in mind that, when exercising its unlimited jurisdiction, the General Court is not bound by the 2006 Guidelines, which do not preclude the assessment of the fine by the EU judiciary. 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).
- 518 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).
- 519 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).
- 520 It is in the light of those considerations that it is necessary to examine, in the present case, 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 the Court reducing the amount of the fine imposed on the applicant by the contested decision.
- 521 In the first place, as regards the request that the gravity factor for the infringement be reduced, it should be borne in mind that, as stated in paragraph 502 above, the gravity factor of 16% applied by the Commission is slightly above the middle of the scale provided for in point 21 of the 2006 Guidelines, which may be up to 30% of the value of sales. In those circumstances, that factor of 16% does not appear disproportionate in the light of the nature and geographical scope of the infringement at issue.
- 522 Thus, in the light of all the circumstances of the case, the Court, in the exercise of its unlimited jurisdiction, considers that the gravity factor of the infringement of 16% is appropriate.
- 523 In the second place, as regards the request for a reduction in the amount of the fine on account of mitigating circumstances, it should be noted that, first, the existence of limited links between the alleged infringement and the EEA has not been demonstrated in the present case (see paragraphs 82, 298, 345 and 493 above). Secondly and in any event, the alleged existence of such limited links is not capable of mitigating the relative gravity of the applicant's participation in the infringement at issue and, therefore, does not constitute a circumstance justifying a variation in the basic amount of the fine.
- 524 In the third place, as regards the request that point 37 of the 2006 Guidelines be applied, although the Court, in the exercise of its unlimited jurisdiction, is not bound by the 2006 Guidelines in the same way as

the Commission (see paragraph 517 above), the fact remains that, in the present case, all the matters of fact and of law do not justify, particularly in the light of the principles of proportionality and equal treatment, the adoption of a specific method of calculating the amount of the fine in order to grant the applicant a reduction in the amount of that fine. There is nothing to support the conclusion that the fine imposed on it by the Commission in the contested decision is not commensurate with the gravity or the duration of the infringement.

525 Consequently, the Court considers, in the exercise of its unlimited jurisdiction, that none of the evidence relied on by the applicant in any respect in the present case and no ground of public policy justifies it making use of that power to reduce the amount of the fine imposed by the Commission on the applicant. Furthermore, the Court considers, taking account of all the evidence put forward before it, that the fine applied by the Commission constitutes, in the light of the duration and gravity of the infringement in which the applicant participated directly and throughout the infringement period, a penalty which makes it possible to penalise the applicant's anticompetitive conduct in a manner which is both proportionate and dissuasive.

526 The head of claim seeking a reduction in the amount of the fine must therefore be rejected and, consequently, the action must be dismissed in its entirety.

#### IV. Costs

527 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.

528 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 Nippon Chemi-Con Corporation to bear its own costs and to pay the costs 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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2. The head of claim seeking a reduction in the amount of the fine imposed on the applicant

#### IV. Costs

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\* Language of the case: English.

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1 This judgment is published in extract form.