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

29 September 2021 (*)(1)

(Competition – Agreements, decisions and concerted practices – Market for aluminium electrolytic capacitors and tantalum electrolytic capacitors – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Fines – Partial immunity from fines – Point 26 of the 2006 Leniency Notice – Reduction in the amount of the fine – Point 37 of the 2006 Guidelines on the method of setting fines – Ceiling of 10% of turnover – Unlimited jurisdiction)

In Case T−344/18,

Rubycon Corp., established in Ina (Japan),

Rubycon Holdings Co. Ltd, established in Ina,

represented by J. Rivas Andrés and A. Federle, lawyers,

applicants,

v

European Commission, represented by B. Ernst, L. Wildpanner and F. van Schaik, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for, first, 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 applicants, and, second, a reduction in the amount of the fines imposed on them,

THE GENERAL COURT (Ninth Chamber, Extended Composition),

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

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 21 October 2020,

gives the following

Judgment

I. Background to the dispute

A. The applicants and the sector concerned

1 The applicants, Rubycon Corp. (‘the first applicant’) and Rubycon Holdings Co. Ltd (‘the second applicant’), are companies established in Japan. The first applicant manufactures and sells aluminium

electrolytic capacitors. Since 1 February 2007, the second applicant has held 100% of the capital of the first applicant.

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 applicants.

5 On 26 May 2014, the applicants applied to the Commission for a reduction in the amount of the fine under the 2006 Leniency Notice.

6 On 4 November 2015, the Commission adopted a statement of objections which was addressed to, inter alia, the applicants. The applicants did not reply to the statement of objections.

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

C. The contested decision

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

1. The infringement

9 By the contested decision, the Commission found that there had been a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA) in the electrolytic capacitors sector, in which nine undertakings or groups of undertakings, namely Elna, Hitachi AIC, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, Sanyo (designating Sanyo and Panasonic) and the applicants (collectively, 'the cartel participants') participated (recital 1 of the contested decision, as well as Article 1 thereof).

10 The Commission stated, in essence, that the infringement at issue, covering the whole EEA, had taken place between 26 June 1998 and 23 April 2012 and had consisted of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in relation to the supply of aluminium electrolytic capacitors and tantalum electrolytic capacitors (recital 1 of the contested decision).

11 The cartel was, in essence, organised through multilateral meetings, generally held in Japan every one or two months at senior sales manager level, and every six months at higher management level, including the presidents (recitals 63, 68 and 738 of the contested decision).

12 Initially, between 1998 and 2003, the multilateral meetings were held under the name ‘Electrolytic Capacitor(s) Circle’ or ‘Electrolytic Capacitor Conference’ (‘the ECC meetings’). Subsequently, between 2003 and 2005, they were held under the name ‘Aluminium Tantalum Conference’, ‘Aluminium Tantalum Capacitors group’ or ‘ATC meetings’. Lastly, between 2005 and 2012, they were held under the name ‘Market Study Group’ or ‘Marketing Group’ (‘the MK meetings’). In parallel with the MK meetings, and complementing those meetings, ‘Cost Up’ or ‘Condenser Up’ meetings (‘the CUP meetings’) were held between 2006 and 2008 (recital 69 of the contested decision).

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

14 In the context of the anticompetitive exchanges, the cartel participants, 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).

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

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

2. The applicants’ liability

17 The Commission held the first applicant liable on account of its direct participation in the cartel from 26 June 1998 to 23 April 2012 (recital 961 of the contested decision, as well as Article 1(h) thereof).

18 In addition, the Commission held the second applicant liable in its capacity as a parent company, holding the entirety of the capital of the first applicant, for the period from 1 February 2007 to 23 April 2012 (recitals 962 and 963 of the contested decision, as well as Article 1(h) thereof).

3. The fines imposed on the applicants

19 Article 2(k) and (l) of the contested decision imposes, first, a fine of EUR 27 718 000 on the first applicant ‘jointly and severally’ with the second applicant and, second, a fine of EUR 706 000 on the first applicant.

4. The calculation of the amount of the fines

20 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).

21 In the first place, in order to determine the basic amount of the fines imposed on the applicants, 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).

22 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).

23 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).

24 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).

25 Furthermore, 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).

26 As regards the multiplier relating to the duration of the infringement, under the third paragraph of point 26 of the 2006 Leniency Notice, the Commission granted the first applicant partial immunity from fines in respect of the duration of the infringement, corresponding to the infringement period from 26 June 1998 to 28 August 2003, on the ground that it had submitted compelling evidence which established additional facts increasing the duration of the infringement for that period (see recital 1087 of the contested decision).

27 Thus, the Commission applied, as regards the first applicant, a multiplier of 8.65, corresponding to the period from 29 August 2003 to 23 April 2012 and disregarding the period from 26 June 1998 to 28 August 2003 (see paragraph 26 above). As regards the second applicant, the Commission applied a multiplier of 5.22, corresponding to the period from 1 February 2007 to 23 April 2012 (recital 1007, Table 1, of the contested decision, as well as footnote 1658 thereto).

28 Accordingly, the Commission set the basic amount of the fine for the first applicant at EUR 61 434 000 and the basic amount of the fine for the second applicant at EUR 39 598 000 (recital 1010 of the contested decision).

29 In the second place, as regards the adjustments to the basic amount of the fines, first of all, the Commission refused to grant the applicants an additional reduction in the amount of the fine on the basis of point 37 of the 2006 Guidelines (recitals 1052 and 1053 of the contested decision).

30 In addition, the Commission did not find that there were any aggravating or mitigating circumstances in the applicants' case (recital 1054 of the contested decision).

31 Next, the Commission applied the ceiling of 10% of the applicants' 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).

32 Lastly, following the application of that 10% ceiling, the Commission, pursuant to the second indent of the first paragraph of point 26 of the 2006 Leniency Notice, granted the applicants a 30% reduction in the amount of the fine that would otherwise have been imposed on them, in so far as it considered that they had been the second undertaking to submit evidence representing significant added value (recitals 1082 and 1083 of the contested decision).

33 In addition, the Commission refused to grant the applicants partial immunity from fines in respect of the gravity of the infringement, under the third paragraph of point 26 of that notice, on the ground that the evidence submitted by them had not enabled it to establish additional facts increasing the gravity of the infringement (recitals 1093 to 1096 of the contested decision).

34 Accordingly, the Commission set the total amount of the fines to be imposed on the applicants at EUR 28 424 000 (recital 1139 of the contested decision).

5. The operative part of the contested decision

35 The contested decision provides as follows with regard to the applicants:

‘*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:

…

(h) [the first applicant] from 26 June 1998 to 23 April 2012, [the second applicant] from 1 February 2007 to 23 April 2012;

…

Article 2

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

…

(k) [the first applicant] and [the second applicant], jointly and severally: EUR 27 718 000;

(l) [the first applicant]: EUR 706 000;

…

Article 4

This Decision is addressed to:

…

– [the first applicant], Japan;

– [the second applicant], Japan;

…’

II. Procedure and forms of order sought

36 By application lodged at the Court Registry on 4 June 2018, the applicants brought the present action.

37 On 27 September 2018, the Commission’s defence was lodged at the Court Registry.

38 The reply and the rejoinder were lodged at the Court Registry on 21 November 2018 and 29 January 2019 respectively.

39 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.

40 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.

41 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 to those questions at the hearing.

42 The parties presented oral argument and answered the written and oral questions put by the Court at the hearing on 21 October 2020.

43 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.

44 The applicants claim that the Court should:

– annul the contested decision in so far as it concerns them and, in particular, annul Article 1(h), Article 2(k) and (l) and Article 4 of the contested decision;

– reduce the amount of the fines which have been imposed on them;

– order the Commission to pay the costs.

45 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

A. The admissibility of the application for annulment of Article 1(h) and Article 4 of the contested decision

46 The Commission contends, in essence, that the applicants' heads of claim seeking, first, annulment of 'all' of the contested decision and, second, annulment of Article 1(h) and Article 4 of the contested decision are inadmissible, in so far as the applicants have not raised any pleas in support of those heads of claim.

47 The applicants object that those heads of claim are admissible.

48 In that regard and in the first place, it should be noted that, contrary to the Commission's contentions, it is unequivocally clear from the application that, by the present action, the applicants do not seek annulment of 'all' of the contested decision, but only annulment of that decision in so far as it concerns them, which, moreover, was confirmed by the applicants in response to a question put to them at the hearing.

49 In the second place, it should be recalled that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, which is applicable to proceedings before the General Court by virtue of the first paragraph of Article 53 of that statute, and under Article 76(d) and (e) of the Rules of Procedure, the application must contain the subject matter of the dispute, the pleas in law and arguments relied on, a brief statement of the pleas in law, and the form of order sought by the applicant.

50 In the present case, it is apparent from the application that the pleas in law raised by the applicants seek only the annulment of the fines imposed on them by the Commission in Article 2(k) and (l) of the contested decision or a reduction in the amount of those fines.

51 It must therefore be held that the applicants do not raise any pleas in law in support of the application for annulment of Article 1(h) and Article 4 of the contested decision. Accordingly, the action must be

dismissed as in part inadmissible, in so far as it seeks the annulment of those provisions of the contested decision.

52 Accordingly, the examination of the substance of the present action must be confined, first, to the head of claim seeking annulment of the fines imposed on the applicants by Article 2(k) and (l) of the contested decision and, second, to the head of claim seeking a reduction in the amount of those fines.

B. Substance

53 The applicants put forward two pleas in law in support of both their head of claim seeking annulment of the fines imposed on them and their head of claim seeking a reduction in the amount of those fines. The first plea relates to the Commission's refusal to grant the applicants partial immunity from fines in return for the evidence submitted by them and relating to additional facts increasing the gravity of the infringement. The second plea relates to the Commission's refusal to depart from the general method laid down by the 2006 Guidelines and to grant a reduction in the amount of the fine under point 37 of those guidelines.

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

54 As a preliminary point, it should be borne in mind that the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (see judgment of 26 September 2018, *Philips and Philips France* v *Commission*, C−98/17 P, not published, EU:C:2018:774, paragraph 49 and the case-law cited).

55 As regards the judicial review provided for in Article 263 TFEU, it must be recalled that such review 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 judicature, in law and in fact, in the light of the pleas raised by the applicant at first instance and taking into account all the relevant elements submitted by the latter. However, in the context of that review, the Courts of the European Union may in no circumstances substitute their own reasoning for that of the author of the contested act (see judgment of 25 July 2018, *Orange Polska* v *Commission*, C−123/16 P, EU:C:2018:590, paragraph 105 and the case-law cited).

56 As regards the calculation of the amount of the fines, it should be borne in mind that 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.

57 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 judgments 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, and of 9 September 2015, *LG Electronics* v *Commission*, T−91/13, not published, EU:T:2015:609, paragraph 158 and the case-law cited).

58 According to 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 judgments of 21 September 2006, *JCB Service* v *Commission*, C−167/04 P, EU:C:2006:594, paragraph 208 and the case-law cited, and 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).

(a) The first plea in law, relating to the Commission's refusal to grant the applicants partial immunity from fines in return for the evidencesubmitted by them and relating to additional facts increasing the gravity of the infringement

59 In connection with the first plea, the applicants submit, in essence, that the Commission erred in refusing to grant them partial immunity from fines under the third paragraph of point 26 of the 2006 Leniency Notice, in so far as the evidence submitted by them concerning the ECC and CUP meetings enabled the Commission to increase the gravity of the infringement.

60 The first plea is comprised, in essence, of three parts. The first alleges failure to fulfil the obligation to state reasons, the second alleges an error of law in the application of the third paragraph of point 26 of the 2006 Leniency Notice, and the third alleges infringement of the principle of equal treatment.

(1) The first part of the first plea, alleging failure to fulfil the obligation to state reasons

61 The applicants submit that the statement of reasons for the contested decision is inadequate in so far as it does not make it possible to understand why the Commission did not grant them partial immunity from fines. In addition, that statement of reasons is inconsistent inasmuch as it concludes that the evidence submitted by the applicants concerning the CUP meetings had no impact on the gravity of the infringement, on the one hand, and that the non-participation of certain undertakings in those meetings justified a reduction in the basic amount of the fine 'to reflect the absence of a higher gravity', on the other.

62 The Commission contends that the statement of reasons for the contested decision is sufficient.

63 In that regard, 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).

64 It is also settled case-law that the statement of the reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C−521/09 P, EU:C:2011:620, paragraph 151 and the case-law cited).

65 In the present case, it is apparent from the contested decision that the Commission refused to grant the applicants partial immunity from fines under the third paragraph of point 26 of the 2006 Leniency Notice, concerning evidence submitted by them in relation to the ECC and CUP meetings, on the ground that that evidence had not enabled it to establish additional facts increasing the gravity of the infringement (see recitals 1093 to 1096 of the contested decision and paragraph 33 above).

66 In addition, in recitals 1093 to 1096 of the contested decision, the Commission set out the reasons why it considered that the ECC and CUP meetings did not have a direct impact on the gravity of the infringement. It is apparent from those recitals that the Commission considered, in essence, that neither the ECC meetings nor the CUP meetings were different in nature from the other manifestations of collusive conduct in the present case, which all constituted concerted practices and/or price agreements which formed part of the same serious infringement of Article 101(1) TFEU. In particular, as regards the CUP meetings, the Commission concluded that, even without those meetings, the infringement would have been just as long

and would have constituted just as serious an infringement of the competition rules and that the monitoring mechanism implemented through those meetings was not a feature peculiar to the cartel (see paragraphs 99 and 100 below).

67 It follows that the Commission set out clearly and unequivocally the reasons which led it to refuse to grant the applicants partial immunity from fines, since the evidence submitted by the applicants did not make it possible to establish additional facts increasing the gravity of the infringement. The contested decision thus enables the applicants to ascertain the reasons for that refusal and enables the Court to exercise its power of review in respect of the validity of that refusal. Accordingly, the applicants' argument based on an inadequate statement of reasons must be rejected.

68 Similarly, the applicants err in maintaining that the statement of reasons for the contested decision is inconsistent inasmuch as it concludes that the evidence submitted by them concerning the ECC and CUP meetings had no impact on the gravity of the infringement, on the one hand, and that the non-participation of certain undertakings in certain groups of meetings justified a 3% reduction in the basic amount of the fine to take account of that gravity of the infringement, on the other.

69 In that regard, it should be noted at the outset that the applicants' line of argument is based on an incorrect premiss that the 3% reduction in the basic amount of the fine was granted to those undertakings on the basis of the less serious nature of their infringement. However, it is apparent from recitals 1001 to 1003 of the contested decision that 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% for all the cartel participants (see paragraph 24 above). It is also apparent from recitals 1022 and 1023 of the contested decision that the Commission granted that 3% reduction in the basic amount of the fine on account of mitigating circumstances to undertakings whose participation in the CUP meetings and the MK meetings was not established.

70 The statements of reasons given in the contested decision in relation to each of those two matters cannot be at odds with each other, given that they concern two different matters which fall within separate factual and legal frameworks. These are: (i) the examination of an undertaking's cooperation in the Commission's investigation under the 2006 Leniency Notice and (ii) the examination of the individual participation of certain undertakings in the infringement, or even their non-participation in certain groups of meetings, in connection with the mitigating circumstances provided for in point 29 of the 2006 Guidelines (see paragraphs 135 and 140 below).

71 The first part of the first plea must therefore be rejected.

(2) The second part of the first plea, alleging an error of law in the application of the third paragraph of point 26 of the 2006 Leniency Notice

72 In connection with the second part of the first plea, the applicants put forward three complaints, which it is appropriate to examine in turn. The first complaint alleges an error of law inasmuch as the Commission held the applicants liable on account of their participation in the ECC and CUP meetings. The second complaint alleges an error of law inasmuch as the Commission concluded that the evidence submitted by the applicants had no impact on the gravity of the infringement. The third complaint alleges that the Commission's interpretation of the third paragraph of point 26 of the 2006 Leniency Notice is contrary to the objectives of the leniency programme.

73 As a preliminary point, it must be recalled that the third paragraph of point 26 of the 2006 Leniency Notice provides that, 'if the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point 25 which the Commission uses to establish additional facts increasing the gravity or duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence'.

74 In other words, in order to be able to benefit from the partial immunity provided for in the third paragraph of point 26 of the 2006 Leniency Notice, apart from the fact that the undertaking must have been the first

to submit compelling evidence within the meaning of point 25 of that notice, a number of conditions must be satisfied: that evidence must have significant added value and must not require corroboration and it must also make it possible to establish facts, in addition to those which the Commission is in a position to establish, which increase either the gravity or the duration of the infringement (see, to that effect, judgment of 17 May 2013, *MRI* v *Commission*, T−154/09, EU:T:2013:260, paragraph 117).

75 Where the conditions for benefiting from partial immunity are satisfied, the Commission will not take those facts into account when setting the amount of the fine – which is determined depending on the gravity and the duration of the infringement, in accordance with Article 23(3) of Regulation No 1/2003 – that will be imposed on the undertaking which enabled those facts to be established by the evidence which it supplied to the Commission, as stated in the final paragraph of point 26 of the 2006 Leniency Notice (judgment of 17 May 2013, *MRI* v *Commission*, T−154/09, EU:T:2013:260, paragraph 118).

76 The purpose of that rule is to encourage undertakings to cooperate fully with the Commission, even if they have not been granted conditional immunity pursuant to point 8 of the 2006 Leniency Notice. In the absence of the rule laid down in the third paragraph of point 26 of that notice, such undertakings would fear that, by submitting evidence which might affect the duration or the gravity of the infringement and of which the Commission had no prior knowledge, they might run the risk of the fines which might be imposed on them being increased (judgment of 29 February 2016, *Deutsche Bahn and Others* v *Commission*, T−267/12, not published, EU:T:2016:110, paragraph 376).

77 It is in the light of those considerations that the complaints raised by the applicants in the context of the second part of the first plea must be examined.

(i) The first complaint, alleging an error of law inasmuch as the Commission held the applicants liable on account of their participation in the ECC and CUP meetings

78 The applicants argue that the Commission erred in using the evidence submitted by them concerning the CUP and ECC meetings to hold them liable for all aspects of the infringement, including those meetings. The applicants maintain that they were the first to submit evidence concerning the CUP meetings, the existence of which was unknown to the Commission until that date. In addition, the applicants were the only ones to submit evidence concerning the ECC meetings.

79 The Commission disputes those arguments.

80 In the present case, it must be noted that, first, the Commission held the first applicant liable on account of its direct participation in the cartel from 26 June 1998 to 23 April 2012 and held the second applicant liable in its capacity as parent company of the first applicant, for the period from 1 February 2007 to 23 April 2012 (see paragraphs 17 and 18 above).

81 Second, the Commission considered that the applicants had been the only ones to submit evidence concerning the anticompetitive exchanges which took place between 1998 and 2004, with the exception of one exchange which took place in 2003, and that that evidence had enabled it to increase the duration of the infringement by the period from 26 June 1998 to 28 August 2003 (recital 1080 of the contested decision, as well as footnotes 1708 and 1709 thereto).

82 In addition, the Commission considered that the applicants had been the first to submit evidence concerning the CUP meetings (recitals 1080 and 1096 of the contested decision, as well as footnote 1710 thereto) and that that evidence had enabled it to uncover an additional operative aspect of the cartel, namely the existence, nature and content of the CUP meetings, held between 2006 and 2008 (recital 1080 of the contested decision, as well as footnote 1710 thereto).

83 As a result of those considerations, first, the Commission granted the first applicant partial immunity from fines under the third paragraph of point 26 of the 2006 Leniency Notice in respect of the infringement period from 26 June 1998 to 28 August 2003. Although the Commission held the first applicant liable on

account of its direct participation in the cartel during the period from 26 June 1998 to 23 April 2012, it did not take account of the period from 26 June 1998 to 28 August 2003 when determining the multiplier for the duration of participation in the infringement (see paragraphs 17 and 26 above).

84 Thus, the Commission found that the period corresponding to that partial immunity from fines, granted in respect of the duration of the infringement, included the period during which all the ECC meetings took place, with the exception of the meeting of 7 November 2003 (see recitals 78 and 80 of the contested decision, as well as footnote 128 thereto, and paragraphs 12 and 26 above).

85 Second, the Commission found that the evidence provided by the applicants relating to the ECC and CUP meetings had not enabled it to establish additional facts increasing the gravity of the infringement. Consequently, the Commission refused to grant the applicants partial immunity from fines in respect of the gravity of the infringement, under the third paragraph of point 26 of the 2006 Leniency Notice (see paragraph 33 above).

86 Furthermore, the Commission considered, on the basis of all the evidence submitted by the applicants, that they had to be regarded as the second undertaking to provide significant added value (recitals 1082 and 1083 of the contested decision). Consequently, the Commission granted the applicants a 30% reduction in the amount of the fine that would otherwise have been imposed on them, in accordance with the second indent of the first paragraph of point 26 of the 2006 Leniency Notice (see paragraph 32 above).

87 In that context, it should be noted that, contrary to the applicants' assertions, the Commission did not err in holding them liable for the infringement in the terms mentioned in paragraph 80 above.

88 The partial immunity from fines provided for in the third paragraph of point 26 of the 2006 Leniency Notice concerns only the amount of the fine. As has been recalled in paragraph 75 above, where the conditions for benefiting from that partial immunity are satisfied, the only consequence flowing therefrom is that the Commission cannot rely on the evidence in question in order to determine the gravity or the duration of the leniency applicant's infringement. In other words, in that situation, the Commission does not take those facts into account when setting the amount of the fine.

89 Accordingly, the partial immunity from fines provided for in the third paragraph of point 26 of the 2006 Leniency Notice has no impact on the extent of liability for the infringement found in respect of undertakings which have benefited from such immunity.

90 Moreover, in so far as the applicants' arguments seek to challenge the Commission's refusal to grant them partial immunity in respect of the gravity of the infringement, these will be examined below, in connection with the second complaint.

91 The first complaint in the second part of the first plea, alleging an error of law inasmuch as the Commission held the applicants liable on account of their participation in the ECC and CUP meetings, must therefore be rejected.

(ii) The second complaint, alleging an error of law inasmuch as the Commission concluded that the evidence submitted by the applicants had no impact on the gravity of the infringement

92 The applicants dispute the Commission's conclusion, in recitals 1094 and 1096 of the contested decision, that the evidence submitted by them concerning the ECC and CUP meetings had no impact on the gravity of the infringement. According to the applicants, that evidence had made it possible to establish that the infringement also covered price agreements and was therefore not confined to discussions regarding pricing information and supply and demand information. Moreover, that evidence demonstrates the existence of a reporting mechanism and a monitoring mechanism implemented to ensure compliance with the price agreements by the undertakings concerned. Accordingly, that evidence was compelling for the purpose of increasing the gravity of the infringement. In support of their position, the applicants rely on the judgments of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P,

EU:C:2016:38), and of 26 April 2007, *Bolloré and Others* v *Commission* (T−109/02, T−118/02, T−122/02, T−125/02, T−126/02, T−128/02, T−129/02, T−132/02 and T−136/02, EU:T:2007:115).

93 The Commission disputes those arguments.

94 As has been recalled in paragraphs 73 and 74 above, the benefit of partial immunity from fines provided for in the third paragraph of point 26 of the 2006 Leniency Notice requires that a number of conditions be satisfied, namely: the undertaking in question was the first to submit compelling evidence within the meaning of point 25 of that notice; that evidence must make it possible to establish facts in addition to those which the Commission is in a position to establish; and those additional facts increase the gravity or the duration of the infringement.

95 It follows that it is not sufficient ground to apply the third paragraph of point 26 of the 2006 Leniency Notice that the evidence is compelling within the meaning of point 25 of that notice: it is also necessary that the evidence enable the Commission to establish additional facts increasing the gravity or duration of the infringement (judgment of 29 February 2016, *Deutsche Bahn and Others* v *Commission*, T−267/12, not published, EU:T:2016:110, paragraph 405).

96 In the present case, the Commission found that the first applicant was the only one to submit evidence concerning the ECC meetings and that the applicants were the first to submit evidence concerning the CUP meetings. The Commission found that the evidence submitted by the first applicant concerning the ECC meetings had enabled it to increase the duration of the infringement and, accordingly, granted it partial immunity from fines for the period from 26 June 1998 to 28 August 2003 (see paragraphs 80 to 84 above).

97 However, the Commission found that that evidence, in particular the evidence concerning the CUP meetings, had not enabled it to establish additional facts increasing the gravity of the infringement (recitals 1094 and 1096 of the contested decision). Consequently, it refused to grant the applicants partial immunity from fines in respect of the gravity of the infringement (see paragraph 85 above).

98 In that regard, it is apparent from the contested decision that the Commission found that, for the duration of the cartel, the parties had exchanged information regarding pricing and information regarding supply and demand and that, at some of the ECC and CUP meetings, the undertakings had even concluded price agreements. However, according to the Commission, both the concerted practices and the price agreements, as manifestations of collusive conduct in the present case, formed part of the same serious infringement of Article 101(1) TFEU. Thus, the fact that the parties participated not only in concerted practices but also in agreements had no impact on the gravity of the infringement. In addition, according to the Commission, the ECC and CUP meetings were not materially different from the other multilateral meetings referred to in paragraph 12 above, forming part of the same single and continuous infringement which is the subject of the contested decision (see recitals 72, 1094 and 1096 of the contested decision).

99 In particular, as regards the CUP meetings, the Commission found that, in view of the period during which those meetings were held and in view of their nature and the fact that they were held in parallel with the MK meetings, the fact that the existence of the CUP meetings was revealed by the applicants did not increase the duration or the gravity of the infringement (see recital 1096 of the contested decision).

100 Similarly, as regards the monitoring carried out in the context of the CUP meetings, the Commission considered that such monitoring was not a feature peculiar to the cartel liable to influence the gravity of the infringement, given that, inter alia, the undertakings monitored each other's behaviour in a general manner outside the CUP meetings (see recital 716 of the contested decision).

101 Accordingly, the Commission concluded that neither the ECC meetings nor the CUP meetings were different in nature from the other manifestations of collusive conduct in the present case, which all constituted concerted practices and/or price agreements which formed part of the same serious infringement of Article 101(1) TFEU. In particular, as regards the CUP meetings, the Commission

concluded that, even without those meetings, the infringement would have been just as long and would have constituted just as serious an infringement of the competition rules.

102 The arguments put forward by the applicants do not call those conclusions into question.

103 In that regard, it should be borne in mind that the concept of an agreement within the meaning of Article 101(1) TFEU, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention (see judgment of 16 June 2015, *FSL and Others* v *Commission*, T−655/11, EU:T:2015:383, paragraph 413 and the case-law cited).

104 Furthermore, the concept of a concerted practice within the meaning of Article 101(1) TFEU 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 16 June 2015, *FSL and Others* v *Commission*, T−655/11, EU:T:2015:383, paragraph 414 and the case-law cited).

105 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 (see judgment of 5 December 2013, *Solvay Solexis* v *Commission*, C−449/11 P, not published, EU:C:2013:802, paragraph 52 and the case-law cited; see also, to that effect, judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C−49/92 P, EU:C:1999:356, paragraph 132).

106 It follows that, whilst the concepts of an agreement and of a concerted practice have partially different elements, they are not mutually incompatible. The Commission is therefore not required to categorise either as an agreement or as a concerted practice each form of conduct found but may characterise some of those forms of conduct as 'agreements' and others as 'concerted practices' (see, to that effect, judgments of 8 July 1999, *Commission* v *Anic Partecipazioni*, C−49/92 P, EU:C:1999:356, paragraph 132, and of 16 June 2015, *FSL and Others* v *Commission*, T−655/11, EU:T:2015:383, paragraph 453).

107 Thus, 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, to that effect, judgment of 17 May 2013, *MRI* v *Commission*, T−154/09, EU:T:2013:260, paragraph 165 and the case-law cited).

108 That is the situation in the present case. By the contested decision, the Commission found that there was a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement consisting of agreements and/or concerted practices that had as their object the coordination of pricing behaviour in the aluminium electrolytic capacitors and tantalum electrolytic capacitors sector (see paragraphs 9 and 10 above).

109 In particular, it is apparent from recitals 704 to 743 of the contested decision that the Commission found that, since the infringement at issue was complex and of long duration, it was not necessary for it to characterise the forms of conduct as agreements or concerted practices. In that regard, the Commission, first of all, considered that the anticompetitive exchanges referred to in paragraphs 12 and 13 above all had the same anticompetitive object, namely coordinating pricing behaviour. Next, the Commission specified that the conduct of the undertakings included exchanges of information regarding pricing, exchanges of information regarding supply and demand and the conclusion of price agreements, together with a monitoring mechanism in order to ensure that those agreements were implemented. Moreover, the Commission considered that that monitoring mechanism was not a feature peculiar to the cartel, since, irrespective of the existence of such a mechanism, the undertakings monitored each other's behaviour in a

general manner. Lastly, the Commission considered that that conduct took the form of agreements and/or concerted practices and followed an overall plan pursuing a single anticompetitive aim.

110 It is true that, in the contested decision, the Commission mentions the ECC and CUP meetings as examples of multilateral meetings at which the undertakings concluded price agreements, together with a monitoring mechanism in order to ensure that those agreements were implemented (see recital 715(c) of the contested decision).

111 However, the fact remains that the Commission considered that all the multilateral meetings described in paragraph 12 above had common characteristics and that the subject matter of the discussions held at those multilateral meetings had remained the same or largely similar throughout the infringement period (recitals 70 to 72 and 741 of the contested decision). In addition, it considered that the monitoring mechanism was not a feature peculiar to the cartel, since the undertakings monitored each other generally outside that mechanism (recital 716 of the contested decision).

112 Thus, in the light of the case-law referred to in paragraphs 105 to 107 above, it must be observed that, in the context of the present complex infringement, which involved several undertakings pursuing a common objective of coordinating pricing behaviour for several years, it was not necessary for the Commission to characterise precisely each of the unlawful forms of conduct as an agreement or a concerted practice. In any event, those two forms of infringement are covered by Article 101 TFEU.

113 It follows that a distinction between the alleged higher gravity of 'agreements' in comparison with the less serious nature of 'concerted practices' cannot be established in the present case. In a context such as that of the present case, where the unlawful forms of conduct have been characterised without distinction as agreements 'and/or' concerted practices, each of them corroborating the existence of a complex, single and continuous infringement of Article 101 TFEU, a precise characterisation of those forms of conduct as agreements or concerted practices cannot be such as to establish a difference between the gravity of each form of conduct.

114 On the contrary, a precise characterisation of each unlawful form of conduct constituting the cartel as an agreement or concerted practice would not be liable to have an impact on the gravity of the infringement, since those two forms of infringement are covered by Article 101(1) TFEU and that provision lays down no specific characterisation for a type of complex infringement such as that at issue in the present case.

115 Furthermore, it should be noted that the judgments of 21 January 2016, *Galp Energía España and Others* v *Commission* (C−603/13 P, EU:C:2016:38), and of 26 April 2007, *Bolloré and Others* v *Commission* (T−109/02, T−118/02, T−122/02, T−125/02, T−126/02, T−128/02, T−129/02, T−132/02 and T−136/02, EU:T:2007:115), relied on by the applicants, provide no support for their position. Unlike the present case, the cases that gave rise to those two judgments concerned situations of more limited participation, or even non-participation, in certain elements of the cartel, such as compensation mechanisms or monitoring mechanisms (see judgments of 21 January 2016, *Galp Energía España and Others* v *Commission*, C−603/13 P, EU:C:2016:38, paragraphs 28, 29, 78, 86 and 93, and of 26 April 2007, *Bolloré and Others* v *Commission*, T−109/02, T−118/02, T−122/02, T−125/02, T−126/02, T−128/02, T−129/02, T−132/02 and T−136/02, EU:T:2007:115, paragraphs 418, 439, 563 and 566). Similarly, unlike those cases, in the present case no monitoring system or other independent mechanism has been identified as a separate component of the infringement which is the subject of the contested decision.

116 In the present case, it is apparent from the contested decision that, first, 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, the Commission took account of the nature of the infringement, namely the fact that it consisted of horizontal price coordination 'arrangements', which were among the most serious infringements of Article 101 TFEU. In addition, it took account of the geographic scope of the infringement, stating that it covered the whole EEA (see paragraph 24 above).

117 Second, the Commission found that the monitoring mechanism discussed at the CUP meetings was not a feature peculiar to the cartel, since the undertakings monitored each other generally outside that mechanism (see paragraph 111 above).

118 Thus, unlike the cases that gave rise to the judgments cited in paragraph 115 above, the infringement at issue in the present case has no other components that are independent of the set of agreements and/or concerted practices aimed at coordinating pricing behaviour which form that infringement. In particular, the CUP meetings formed part of that set of agreements and/or concerted practices and did not present any particular features liable to have a specific impact on the gravity of the infringement (see paragraphs 98 and 99 above).

119 In the light of all of the foregoing, it must be held that the Commission did not err in finding that the applicants had not submitted evidence making it possible to establish additional facts that increased the gravity of the infringement.

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

(iii) The third complaint, alleging that the Commission's interpretation of the third paragraph of point 26 of the 2006 Leniency Notice is contrary to the objectives of the leniency programme

121 The applicants submit that the Commission's interpretation of point 26 of the 2006 Leniency Notice in the present case is contrary to the objective of partial immunity inasmuch as such immunity is intended to ensure the effectiveness of the leniency programme. That interpretation would discourage the participants in a cartel, other than those which satisfy the necessary conditions to benefit from total immunity, from submitting relevant evidence. That interpretation does not remove the risk, for an undertaking which has submitted evidence, of having that evidence used against it and of having a higher fine imposed on it. By adopting such an interpretation, the Commission establishes a precedent whereby the participants in a cartel do not benefit from the cooperation shown by them during its investigation.

122 The Commission disputes those arguments.

123 As a preliminary point, it should be borne in mind that the 2006 Leniency Notice lays down two separate regimes for rewarding undertakings for their cooperation in the Commission investigation where, although they have been or are party to a cartel, they have contributed to action taken against it. In return for their cooperation, those undertakings may obtain either immunity from fines, where they have enabled the Commission to become aware of infringements, or a reduction in the amount of the fines, where they have provided, by their cooperation in the course of the investigation, evidence which represents significant added value (judgment of 1 February 2018, *Deutsche Bahn and Others* v *Commission*, C−264/16 P, not published, EU:C:2018:60, paragraph 67).

124 As regards the objective of the Commission's leniency programme, it should be borne in mind that the aim of that programme is not to offer to undertakings participating in secret cartels an opportunity to escape the financial consequences of their responsibility, but to facilitate the detection of such practices and then, in the administrative procedure, to assist the Commission in its efforts to reconstruct the relevant facts as far as possible. Accordingly, the benefits which may be obtained by undertakings participating in such practices cannot exceed the level that is necessary to ensure the full effectiveness of the leniency programme and of the administrative procedure carried out by the Commission (judgments of 29 February 2016, *Deutsche Bahn and Others* v *Commission*, T−267/12, not published, EU:T:2016:110, paragraph 355, and of 29 February 2016, *EGL and Others* v *Commission*, T−251/12, not published, EU:T:2016:114, paragraph 183).

125 As regards, in particular, the partial immunity from fines provided for in the third paragraph of point 26 of the 2006 Leniency Notice, it should be borne in mind that, as recognised by the case-law cited in paragraph 76 above, the purpose of that partial immunity is to encourage undertakings to cooperate fully with the Commission, even if they have not been granted conditional immunity pursuant to point 8 of that

notice. In the absence of the rule laid down in the third paragraph of point 26 of that notice, such undertakings would fear that, by submitting evidence which might affect the duration or the gravity of the infringement and of which the Commission had no prior knowledge, they might run the risk of the fines which might be imposed on them being increased.

126 In the present case, it should be noted that, on the one hand, the Commission rewarded the applicants' cooperation on two levels: in the first place, as regards the first applicant, under the third paragraph of point 26 of the 2006 Leniency Notice, with partial immunity from fines in respect of the duration of the infringement, for the infringement period from 26 June 1998 to 28 August 2003; and, in the second place, as regards both applicants, under the second indent of the first paragraph of point 26 of that notice, with a 30% reduction in the amount of the fine that would otherwise have been imposed on them (see paragraphs 26 and 32 above).

127 On the other hand, the Commission refused to grant the applicants partial immunity from fines in respect of the gravity of the infringement, under the third paragraph of point 26 of that notice, on the ground that the evidence submitted by them had not enabled it to establish additional facts increasing the gravity of the infringement (see paragraphs 33 and 97 above).

128 As has been noted in paragraph 119 above, the Commission did not err in finding that the evidence submitted by the applicants had not enabled it to establish additional facts increasing the gravity of the infringement and that, therefore, the conditions laid down by the third paragraph of point 26 of the 2006 Leniency Notice were not satisfied as regards the gravity of the infringement.

129 It follows that the Commission's interpretation of that provision in recitals 1094 and 1096 of the contested decision is not contrary to the *ratio legis* of that provision or to the objectives of the leniency programme, since the Commission confined itself to finding that one of the conditions required for the grant of partial immunity from fines was not satisfied in the present case.

130 It follows from the foregoing that the third complaint must be rejected, as must, accordingly, the second part of the first plea in its entirety.

(3) The third part of the first plea, alleging infringement of the principle of equal treatment

131 In connection with the third part of the first plea, the applicants submit that the Commission should have granted them a reduction in the basic amount of the fine of at least 3%, equivalent to the reduction it granted to the undertakings whose participation in certain groups of meetings was not established, namely Sanyo, NEC Tokin (Nec Corp. and Tokin Corp.), Matsuo and Nichicon. By failing to do so, the Commission treated the cartel participants who had concealed factual elements of the infringement concerning certain groups of meetings more favourably than the applicants, who disclosed the existence of one of those groups of meetings.

132 The Commission disputes those arguments.

133 As a preliminary point, it should be borne in mind that, according to settled case-law, the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such treatment is objectively justified (see judgments of 5 December 2013, *Solvay* v *Commission*, C-455/11 P, not published, EU:C:2013:796, paragraph 77 and the case-law cited, and of 11 July 2014, *Esso and Others* v *Commission*, T-540/08, EU:T:2014:630, paragraph 101 and the case-law cited).

134 In the present case, it must be observed that the applicants' argument is based on an incorrect comparison of the concept of partial immunity from fines, as provided for in the third paragraph of point 26 of the 2006 Leniency Notice, and the mitigating circumstances which must be taken into account by the Commission, such as those listed in point 29 of the 2006 Guidelines.

135 In the first place, the applicants' situation is not comparable, from a factual point of view, to that of the other cartel participants to whom they refer.

136 First, as regards participation in the CUP and MK meetings, it should be noted that the Commission found that the first applicant had participated in those meetings (see recitals 88 and 95 of the contested decision), which, moreover, is not disputed by the applicants.

137 By contrast, the Commission found that the participation of Sanyo, NEC Tokin and Matsuo in the CUP meetings had not been established and that there was no evidence that they had been aware of those meetings (recitals 754, 759 and 764 of the contested decision). Likewise, the Commission considered that Nichicon's participation in the MK meetings had not been established and that there was no evidence that it had been aware of those meetings (recital 761 of the contested decision).

138 Second, as regards cooperation in the Commission's investigation, it must be stated that the applicants submitted evidence which enabled the Commission to establish the existence, nature and content of the CUP meetings (see paragraph 82 above), which was not the case in respect of Sanyo, NEC Tokin, Matsuo and Nichicon.

139 Accordingly, the factual situation of the applicants and that of Sanyo, NEC Tokin, Matsuo and Nichicon are substantially different.

140 In the second place, the two situations are not comparable from a legal point of view. On the one hand, it was necessary for the Commission to assess whether the non-participation of Sanyo, NEC Tokin, Matsuo and Nichicon in some of the anticompetitive exchanges had to be taken into account as mitigating circumstances within the meaning of point 29 of the 2006 Guidelines. On the other hand, under the 2006 Leniency Notice, it was necessary for the Commission to assess whether the applicants' cooperation in its investigation should lead to their being granted partial immunity from fines.

141 In that regard, it should be borne in mind that, with respect to infringements which fall within the scope of the 2006 Leniency Notice, in principle, the party concerned cannot validly complain that the Commission failed to take into account the degree of its cooperation as a mitigating circumstance, outside the legal framework of that notice (see judgment of 29 February 2016, *EGL and Others* v *Commission*, T−251/12, not published, EU:T:2016:114, paragraph 190 and the case-law cited).

142 Accordingly, the cooperation provided by the applicants cannot be taken into account outside the scope of the 2006 Leniency Notice, in particular as a mitigating circumstance under point 29 of the 2006 Guidelines. In that regard, it should be noted that, according to the fourth indent of that point, the fact that the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so may be regarded as a mitigating circumstance capable of giving rise to a reduction in the basic amount of the fine.

143 Furthermore, contrary to what appears to follow from the applicants' line of argument, the conditions which may justify the application of mitigating circumstances are in no way comparable to those required for the application of partial immunity from fines, in particular as regards the assessment of the gravity of the facts at issue.

144 As is apparent from the case-law, the Commission may take into account the relative gravity of the participation of an undertaking in an infringement and the particular circumstances of the case when assessing the gravity of the infringement within the meaning of Article 23 of Regulation No 1/2003, or when adjusting the basic amount in the light of mitigating and/or aggravating circumstances (judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C−444/11 P, not published, EU:C:2013:464, paragraphs 104 and 105; see also judgment of 26 January 2017, *Laufen Austria* v *Commission*, C−637/13 P, EU:C:2017:51, paragraph 71 and the case-law cited).

145 On the other hand, it is apparent from the third paragraph of point 26 of the 2006 Leniency Notice that partial immunity from fines is to be granted, inter alia, where a leniency applicant provides the Commission with evidence which it uses to establish additional facts increasing the gravity of the infringement, that is to say, the overall gravity of the infringement.

146 In the present case, on the one hand, the 3% reduction granted to Sanyo, NEC Tokin, Matsuo and Nichicon took into account the relative gravity of their participation in the infringement, or even their non-participation in certain groups of meetings.

147 On the other hand, the refusal to grant the applicants partial immunity from fines in respect of the gravity of the infringement was based on the fact that the evidence concerning, inter alia, the CUP meetings had not enabled the Commission to increase the overall gravity of the infringement (see paragraphs 33 and 97 above).

148 It follows that less favourable treatment of the applicants is not demonstrated in the present case, since their situation and that of the abovementioned undertakings are not comparable, either from a factual or from a legal point of view.

149 The third part of the first plea must therefore be rejected, as must, accordingly, the first plea in law in its entirety.

(b) The second plea in law, relating to the Commission's refusal to depart from the general method laid down by the 2006 Guidelines and to grant a reduction in the amount of the fine under point 37 of those guidelines

150 In connection with the second plea, the applicants claim, in essence, that the Commission should have departed from the general method laid down by the 2006 Guidelines in order to grant them an additional reduction in the amount of the fine on the basis of point 37 of the 2006 Guidelines.

151 Point 37 of the 2006 Guidelines provides as follows:

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

152 Point 37 of the 2006 Guidelines thus permits the Commission to depart from the general method 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.

153 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 57 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).

154 As is apparent from the case-law referred to in paragraph 58 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.

155 It is in the light of those considerations that the second plea put forward by the applicants must be examined.

156 This plea consists, in essence, of two parts. The first part alleges failure to fulfil the obligation to state reasons. The second part alleges an error of law and infringement of the principles of proportionality and equal treatment, as well as the principle that the penalty must be specific to the offender and the offence.

(1) The first part of the second plea, alleging failure to fulfil the obligation to state reasons

157 The applicants claim that the contested decision does not contain an adequate statement of reasons as regards the Commission's refusal to depart from the general method laid down by the 2006 Guidelines and to grant them an additional reduction in the amount of the fine on the basis of point 37 of the 2006 Guidelines. In particular, the contested decision does not contain a response to the arguments raised by the applicants in that regard. According to the applicants, the strict application of the methodology laid down by the 2006 Guidelines in the present case results in a basic amount of the fine above the ceiling of 10% of turnover, which should have led the Commission to depart from that methodology, failing which the reduction granted to the applicants for their cooperation is ineffective following the application of that ceiling.

158 The Commission disputes those arguments.

159 As regards the obligation to state reasons, it should be recalled that it follows from settled case-law, referred to in paragraph 63 above, that 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 EU judicature to exercise its power of review.

160 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 58 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.

161 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 was 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 laid down 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).

162 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 21 above). Thus, since the Commission explained, in the contested decision, the various aspects of the application of that methodology (see paragraphs 21 to 34 above), it cannot be said to have failed in any way to fulfil the obligation to state reasons.

163 In any event, it must be held, as the Commission contends, that the contested decision contains an adequate statement of reasons as regards, in particular, the Commission's refusal to depart from the general method laid down by the 2006 Guidelines and to grant the applicants an additional reduction in the amount of the fine on the basis of point 37 of the 2006 Guidelines (see paragraph 29 above).

164 It is apparent from recitals 1052 and 1053 of the contested decision that the Commission set out three reasons in that regard, namely: in the first place, its broad discretion in applying point 37 of the 2006 Guidelines; in the second place, the different circumstances of the present case in relation to other cases in which a reduction in the amount of the fine was granted by the Commission; and, in the third place and in any event, the fact that, according to settled case-law, the Commission is not bound by its previous decision-making practice.

165 In addition, in recital 1062 of the contested decision, the Commission responded to the applicants' argument that any reduction in their fine on the basis of their being granted partial immunity should be considered after the application of the ceiling of 10% of turnover, as otherwise small single-product companies would be discouraged from cooperating and the Commission's leniency policy would be undermined. In that recital, the Commission stated, in essence, that the fact that a reduction in the amount of the fine granted to a party is superseded by the effects of another provision applied in favour of and for the benefit of that party – in the present case, the application of the ceiling of 10% of turnover provided for in Article 23(2) of Regulation No 1/2003 – cannot call into question the method applied by the Commission to calculate the amount of the fines.

166 It follows that the statement of reasons for the contested decision is sufficient to enable the applicants to ascertain the reasons for the Commission's decision in that regard and to enable the EU judicature to exercise its power of review.

167 Moreover, in so far as the applicants' complaint should be understood as meaning that they maintain that the Commission should have departed from the general method laid down by the 2006 Guidelines in order to grant them an additional reduction in the amount of the fine, it should be noted that such a complaint concerns the merits of the Commission's decision and must be examined in connection with the second part of the present plea.

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

(2) The second part of the second plea, alleging an error of law and infringement of the principles of proportionality and equal treatment, as well as the principle that the penalty must be specific to the offender and the offence

169 In connection with the second part of the second plea, the applicants allege an error of law and infringement of the principles of proportionality and equal treatment, as well as the principle that the penalty must be specific to the offender and the offence, as regards the Commission's refusal to depart from the general method laid down by the 2006 Guidelines and to grant them an additional reduction in the amount of the fine on the basis of point 37 of those guidelines.

170 In the first place, the applicants submit that, in the present case, the Commission was obliged to depart from the general method laid down by the 2006 Guidelines, in accordance with the case-law stemming from the judgments of 16 June 2011, *Putters International* v *Commission* (T−211/08, EU:T:2011:289), and of 13 December 2016, *Printeos and Others* v *Commission* (T−95/15, EU:T:2016:722). Those judgments show that the Commission is required to depart from the general method laid down by those guidelines where the application of the ceiling of 10% of turnover to several participants in a cartel leads to a situation in which any distinction on the basis of the gravity of the infringement or mitigating circumstances is unlikely to have an impact on the amount of the fines. According to the applicants, that is the case here, since the Commission was obliged to apply the ceiling of 10% of turnover to several undertakings engaging in 'mono-product' economic activity and participating in a cartel of long duration, namely the applicants, Elna, and Nippon Chemi-Con.

171 Similarly, according to the applicants, the Commission's previous decision-making practice shows that it departed from the 2006 Guidelines in cases, like the present case, which presented particular circumstances, such as the following Commission decisions relating to proceedings under Article 101 TFEU: Decision C(2014) 2074 final of 2 April 2014 (Case AT.39792 – Steel Abrasives); Decision C(2012)

2069 final of 28 March 2012 (Case COMP/39.452 – Mountings for windows and window doors); Decision C(2013) 8286 of 27 November 2013 (Case AT.39633 – Shrimps); and Decision C(2014) 9295 final of 10 December 2014 (Case AT.39780 – Envelopes).

172 In the second place, the applicants claim that the application of the ceiling of 10% of turnover in the present case did not make it possible to distinguish the applicants from the other cartel participants, to take account of the 'mono-product' nature of their activity or to reflect the degree of their cooperation, since the reduction granted to them is reflected only in the basic amount of the fine and not in the final amount of the fine. In particular, the application of the 10% ceiling did not make it possible to distinguish the applicants from the other 'mono-product' undertakings participating in the cartel, inter alia as regards the different duration of their participation in the infringement, and, therefore, the fines imposed on the applicants do not reflect the partial immunity that was granted to them in respect of the duration of the infringement.

173 In the third place, the applicants maintain that that situation undermines the objective of the leniency programme and discourages 'mono-product' undertakings from cooperating with the Commission, since those undertakings do not benefit from the cooperation shown by them during the Commission's investigation.

174 The Commission contends, in essence, that it was not required, in the present case, to depart from the general method laid down by the 2006 Guidelines.

175 As a preliminary point, it should be noted that, as has been recalled in paragraph 58 above, 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.

176 In addition, it is appropriate to recall the steps that were followed by the Commission in calculating the amount of the fines imposed on the applicants in the present case. In that regard, it is apparent from the file that, first of all, the basic amount of the fine to be imposed on the first applicant was calculated without taking account of the period from 26 June 1998 to 28 August 2003, since the Commission had granted it partial immunity from fines for that period, under the third paragraph of point 26 of the 2006 Leniency Notice (see paragraph 26 above).

177 Thus, following the steps referred to in paragraphs 21 to 27 above, the Commission set the basic amount of the fine to be imposed on the first applicant at EUR 61 434 000 and the basic amount of the fine to be imposed on the second applicant at EUR 39 598 000.

178 Next, given that the basic amount of the fine to be imposed on the first applicant exceeded 10% of its turnover in the preceding business year, the Commission applied that limit and, consequently, the basic amount of the fine was reduced to EUR 40 606 385, in accordance with the second subparagraph of Article 23(2) of Regulation No 1/2003 (see paragraph 31 above).

179 Lastly, the Commission applied a 30% reduction to that basic amount of EUR 40 606 385 under the second indent of the first paragraph of point 26 of the 2006 Leniency Notice. The total amount of the fines imposed on the applicants is therefore EUR 28 424 000 (see paragraphs 32 and 34 above).

180 It is in the light of those considerations that the arguments put forward by the applicants must be examined.

181 In the first place, it should be noted that the applicants err in claiming that the case-law shows that the Commission was required to depart from the general method laid down by the 2006 Guidelines on account of the fact that the use of the method laid down by those guidelines led to the application of the ceiling of 10% of turnover to a number of the cartel participants.

182 Contrary to the applicants' assertions, there is no support for their line of argument in the judgment of 16 June 2011, *Putters International* v *Commission* (T−211/08, EU:T:2011:289). In that regard, it should be noted that, in paragraph 75 of that judgment, first of all, the Court did indeed state that multiplication of the amount determined on the basis of the value of sales by the number of years of participation in the infringement could mean that, in the context of the 2006 Guidelines, the application of the 10% ceiling laid down in Article 23 of Regulation No 1/2003 was now the rule rather than the exception for any undertaking which operated mainly on a single market and had participated in a cartel for over a year. Moreover, the Court found that, in that case, any distinction on the basis of gravity or mitigating circumstances would as a matter of course no longer be capable of impacting on a fine which had been capped in order to be brought below the 10% ceiling.

183 However, in paragraph 75 of the judgment of 16 June 2011, *Putters International* v *Commission* (T−211/08, EU:T:2011:289), the Court, first of all, confined itself to noting that the failure to draw a distinction resulting from the new methodology for calculating fines under the 2006 Guidelines might require it to exercise its unlimited jurisdiction in those specific cases where the application of those guidelines alone did not enable an appropriate distinction to be drawn. Furthermore, as is apparent from paragraph 75 of that judgment, as well as paragraphs 81 to 87 thereof, the Court held that, in the case before it, the Commission was fully entitled to conclude that there were no grounds justifying the reduction in the fine sought by the applicant. Thus, it considered that it was not necessary to exercise its unlimited jurisdiction.

184 Furthermore, it must be observed that, in the case that gave rise to the judgment of 16 June 2011, *Putters International* v *Commission* (T−211/08, EU:T:2011:289), the final fine imposed by the Commission corresponded to the maximum fine, namely the fine corresponding to the ceiling of 10% of turnover for the preceding business year. That is not the case here, since, after the application of that ceiling, the applicants were still granted a 30% reduction in the amount of the fine that would otherwise have been imposed on them (see paragraphs 32, 178 and 179 above).

185 Similarly, the judgment of 13 December 2016, *Printeos and Others* v *Commission* (T−95/15, EU:T:2016:722), offers no support for the applicants' line of argument. First, in paragraph 50 et seq. of that judgment, the Court examined only whether the Commission had fulfilled its obligation to state reasons. Second, in paragraph 51 of that judgment, the Court does not refer directly to the judgment of 16 June 2011, *Putters International* v *Commission* (T−211/08, EU:T:2011:289), but confines itself to reiterating what the Commission noted in that regard in the contested decision.

186 Accordingly, the applicants' line of argument cannot usefully be based on those judgments. In general, that line of argument is not supported by the case-law.

187 The Court of Justice has previously held that it is not contrary to the principles of proportionality and equal treatment that, through the application of the method for calculating fines set out in the 2006 Guidelines, an undertaking may receive a fine which represents a proportion of its overall turnover that is greater than that represented by the fines imposed respectively on each of the other undertakings. It is inherent in that method of calculation, which is not based on the overall turnover of the undertakings concerned, that disparities may appear between those undertakings as to the relationship between their overall turnover and the amount of the fines imposed on them (see, to that effect, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C−101/15 P, EU:C:2016:631, paragraph 64).

188 It is also apparent from the case-law that the Commission is not required, when determining the amount of fines, to ensure, where such fines are imposed on a number of undertakings involved in the same infringement, that the final amounts of the fines reflect any distinction between the undertakings concerned in terms of their overall turnover (see judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C−101/15 P, EU:C:2016:631, paragraph 65 and the case-law cited).

189 Moreover, the Court of Justice has held that the difference in the proportion represented by the fine in relation to the total turnover of the undertakings concerned because of the less diversified nature of their activity does not, as such, constitute a sufficient justification for departing from the method of calculation that the Commission imposed on itself. That would be tantamount to conferring an advantage on certain undertakings on the basis of a criterion that is irrelevant in the light of the gravity and the duration of the infringement. When the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see, to that effect, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C−101/15 P, EU:C:2016:631, paragraph 66 and the case-law cited).

190 It follows from the foregoing that the fact that the Commission was obliged to apply the ceiling of 10% of turnover to the basic amount of the fines to be imposed on the applicants and on other 'mono-product' undertakings, assuming the latter to be established, did not require the Commission to depart from the method for calculating fines laid down in the 2006 Guidelines.

191 In the second place, it should be noted that, contrary to what the applicants appear to claim, the fact that the first applicant is a 'mono-product' undertaking does not in itself justify the Commission departing from the 2006 Guidelines in order to grant a reduction in the amount of the fines imposed on the applicants.

192 First of all, it is apparent from the case-law referred to in paragraph 189 above that the fact that an undertaking participating in a cartel has a small product portfolio does not constitute a sufficient justification for the Commission departing from the method for calculating fines that it has imposed on itself. On the one hand, the method for calculating fines is not, in any event, based on the overall turnover of the undertakings, but, on the contrary, on the value of the goods or services to which the infringement relates. Consequently, it is inherent in that method that disparities may appear between the undertakings as to the relationship between that turnover and the amount of the fines imposed on them. On the other hand, the less diversified nature of the activities of certain undertakings is not a relevant criterion in the light of the gravity and duration of the infringement and cannot therefore constitute a ground for conferring an advantage on those undertakings through the application of different methods of calculation.

193 Next, the fact that the applicants are highly specialised or that their activity is less diversified compared to other cartel participants is not sufficient, in itself, to establish that the Commission infringed the principles of equal treatment and proportionality by not applying specific criteria in order to calculate the amount of the fine imposed on the applicants. It follows from the case-law that the proportion of the overall turnover deriving from the sale of products in respect of which the infringement in question was committed is best able to reflect the economic importance of that infringement. Consequently, since the applicants derive a particularly large part, if not almost all, of their overall turnover from products which are the subject of the infringement, the fact that the amount of the fine imposed on the applicants represents a higher percentage of overall turnover by comparison with other cartel participants merely reflects the economic importance of that infringement for the applicants. Such a result is not contrary to the principles of equal treatment or proportionality (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 112 and the case-law cited).

194 Lastly, an undertaking such as the first applicant, which derives a particularly large part of its total turnover from the product encompassed by the cartel, therefore derives particularly significant profits from that cartel (see, to that effect, judgment of 12 December 2018, *Servier and Others* v *Commission*, T−691/14, under appeal, EU:T:2018:922, paragraph 1923).

195 In the third place, in so far as the applicants claim that, in the past, the Commission adopted a different approach to the calculation of fines imposed on 'mono-product' undertakings exceeding the 10% ceiling, it is sufficient to note that, according to settled case-law, the Commission is not bound by its previous decision-making practice and that practice does not, in any event, constitute a legal framework for the calculation of the amount of fines (see judgments of 11 July 2013, *Team Relocations and Others* v

Commission, C−444/11 P, not published, EU:C:2013:464, paragraph 82 and the case-law cited, and of 7 September 2016, *Pilkington Group and Others* v *Commission*, C−101/15 P, EU:C:2016:631, paragraph 68 and the case-law cited).

196 In the fourth place, the applicants' arguments alleging that the application of the ceiling of 10% of turnover in the present case did not make it possible to distinguish the applicants from the other 'mono-product' undertakings, inter alia as regards the different duration of their participation in the cartel, or to take into account the degree of the applicants' cooperation, which is not reflected in the final amount of the fines imposed on them, must be rejected.

197 In that regard, it should be noted that, as is apparent from recital 990 of the contested decision, the Commission applied distinct duration multipliers in respect of both the applicants and Elna and Nippon Chemi-Con (see paragraph 27 above and recital 1007, Table 1, of the contested decision). It is true that those multipliers were applied to the value of sales relevant to the calculation of the basic amount of the fines, in accordance with point 13 of the 2006 Guidelines (see paragraph 21 above). It is also true that, in view of the result of that operation, the Commission needed to apply the ceiling of 10% of turnover provided for in the second subparagraph of Article 23(2) of Regulation No 1/2003 in order to bring the basic amount of the fines imposed on those undertakings below that ceiling (see recital 1058 of the contested decision).

198 However, the applicants' line of argument that the application of the ceiling of 10% of turnover did not make it possible to distinguish the applicants from the other 'mono-product' undertakings fails to take account of the difference in purpose between the relevant criteria for determining the basic amount of the fine and the ceiling of 10% of turnover.

199 In that regard, it should be borne in mind that, according to point 2 of the 2006 Guidelines, the basic amount is to be determined according to the gravity and duration of the infringement, whereas the ceiling of 10% of turnover has a distinct and autonomous objective by comparison with the criteria of gravity and duration of the infringement.

200 Thus, it is clear from the case-law that, although Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, with the result that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance (see judgment of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission*, C−90/15 P, not published, EU:C:2017:123, paragraph 78 and the case-law cited).

201 First, that limit seeks to ensure that the fines are not excessive or disproportionate (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 281). Second, it aims to prevent fines being imposed which it is foreseeable that the undertakings, owing to their size, as determined, albeit approximately and imperfectly, by their total turnover, will not be able to pay. The only possible consequence of such a limit is that the amount of the fine calculated on the basis of the criteria of gravity and duration of the infringement will be reduced to the maximum permitted level where it exceeds that level. Its application implies that the undertaking concerned will not pay the full amount of the fine which in principle would be payable if it were assessed on the basis of those criteria (see judgment of 5 October 2011, *Romana Tabacchi* v *Commission*, T−11/06, EU:T:2011:560, paragraph 257 and the case-law cited).

202 It follows that, although the application of the ceiling of 10% of turnover is more likely for undertakings with a small product portfolio, the fact remains that such application cannot, in itself, have an impact on the method for calculating the amount of fines, since that method and that ceiling have distinct and autonomous objectives, as is apparent from paragraphs 199 to 201 above.

203 In the fifth place, it must be stated that the applicants err in claiming that the application of the ceiling of 10% of turnover in the present case did not make it possible to reflect the degree of cooperation which they brought to the Commission's investigation.

204 As a preliminary point, it should be noted that, as has been recalled in paragraph 124 above, the objective of the Commission's leniency programme is not to offer to undertakings participating in secret cartels an opportunity to escape the financial consequences of their responsibility, but to facilitate the detection of such practices and then, in the administrative procedure, to assist the Commission in its efforts to reconstruct the relevant facts as far as possible.

205 Thus, the reward provided by the leniency programme is not granted for the purposes of fairness but in exchange for cooperation that facilitated the Commission's work (see judgment of 29 February 2016, *EGL and Others* v *Commission*, T−251/12, not published, EU:T:2016:114, paragraph 184 and the case-law cited).

206 In the present case, it is apparent from the contested decision that the applicants benefited, first of all, from partial immunity from fines for the period from 26 June 1998 to 28 August 2003 under the third paragraph of point 26 of the 2006 Leniency Notice, next, from the application of the ceiling of 10% of turnover referred to in the second subparagraph of Article 23(2) of Regulation No 1/2003 and, lastly, from a 30% reduction in the amount of the fine that would otherwise have been imposed on them under the second indent of the first paragraph of point 26 of that notice (see paragraphs 26, 31 and 32 above).

207 As regards partial immunity from fines in respect of the duration of the infringement, it must be borne in mind that it is inherent in the logic of the leniency policy that that partial immunity, referred to in the third paragraph of point 26 of the 2006 Leniency Notice, never results in a reduction of the final amount of the fine, but in an exemption from the application of the multiplier for duration, in order to ensure that undertakings which have applied for leniency do not receive a fine for the period of the infringement in respect of which they have provided the Commission with information (see, to that effect and by analogy, judgment of 24 March 2011, *FRA.BO* v *Commission*, T−381/06, not published, EU:T:2011:111, paragraph 70).

208 Furthermore, as regards the application of the ceiling of 10% of turnover, it should be noted, as the Commission observed in recital 1062 of the contested decision, that the fact that a reduction in the amount of the fine granted to one undertaking is superseded by the effects of another provision applied in favour of and for the benefit of that undertaking – in the present case, the ceiling of 10% of its turnover, in accordance with Article 23(2) of Regulation No 1/2003 – cannot call into question the method applied by the Commission to calculate the amount of the fines.

209 In addition, the Commission acknowledged that the applicants had been the second undertaking to submit evidence representing significant added value and granted them a 30% reduction in the amount of the fine that would otherwise have been imposed on them, corresponding to the maximum percentage of reduction provided for in the second indent of the first paragraph of point 26 of the 2006 Leniency Notice.

210 Thus, the applicants' argument based on an alleged failure to draw a distinction as regards their cooperation in the Commission's investigation must be rejected. On the contrary, it follows from the foregoing that, in the present case, the application of the ceiling of 10% of turnover and the 30% reduction for cooperation resulted in a significant reduction in the fine imposed on them. The basic amount of the fine had been set at EUR 61 434 000 for the first applicant and at EUR 39 598 000 for the second applicant, that is, a total of EUR 101 032 000, while the final amount of the fine was EUR 28 424 000 (see paragraphs 177 and 179 above).

211 In the light of all the foregoing considerations, it has not been demonstrated in the present case that the principles of proportionality and equal treatment have been infringed through the application of the method for calculating fines set out in the 2006 Guidelines.

212 Furthermore, as regards the principle that penalties must be specific to the offender and the offence, it should be borne in mind that that principle requires, in accordance with Article 23(3) of Regulation No 1/2003, that the amount of the fine to be paid jointly and severally must be determined by reference to the gravity of the infringement for which the undertaking concerned is considered individually responsible and the duration of the infringement (see judgment of 19 June 2014, *FLS Plast* v *Commission*, C−243/12 P, EU:C:2014:2006, paragraph 107 and the case-law cited). It follows that, when determining how joint and several liability is to be imposed from an external perspective, the Commission is under an obligation, in particular, to adhere to the principle that the penalty must be specific to the offender and the offence (judgment of 10 April 2014, *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission*, C−231/11 P to C−233/11 P, EU:C:2014:256, paragraph 52).

213 The applicants' line of argument is not in any way concerned with challenging the finding of joint and several liability allegedly made in error by the Commission in imposing a single fine on separate undertakings.

214 The second part of the second plea must therefore be rejected, as must, consequently, the second plea in law.

215 In the light of the foregoing, it must be held that the applicants have not succeeded in proving that the Commission committed irregularities justifying annulment of the contested decision as regards the fines imposed on them.

216 The applicants' head of claim seeking annulment must therefore be rejected.

217 Furthermore, in so far as the applicants' line of argument in connection with the first and second pleas asks the Court to exercise its unlimited jurisdiction to reduce the amount of the fines imposed on them, that line of argument will be examined below.

2. The head of claim seeking a reduction in the amount of the fines imposed on the applicants

218 The applicants request that the Court exercise its unlimited jurisdiction to reduce the amount of the fines imposed on them, in so far as that amount is neither reasonable nor proportionate and does not reflect the 'exceptional' degree of cooperation shown by them in the Commission's investigation. It is apparent from all the applicants' written pleadings and from their answers to the questions put by the Court at the hearing that the applicants are asking the Court either to reduce the basic amount of the fine or to reduce the final amount of the fine, in the terms set out in paragraphs 219 to 221 below. Alternatively, the applicants request that the Court make such reduction in the amount of the fine as it considers appropriate, provided that there is an actual reduction in the amount of the fines imposed on them.

219 As regards the basic amount of the fine, the applicants maintain that the strict application of the methodology set out in the 2006 Guidelines and, in particular, the application of the 10% ceiling result in a basic amount of the fine which does not reflect the benefit of the partial immunity from fines granted to them in respect of the duration of the infringement. Similarly, that basic amount of the fine does not reflect their degree of cooperation during the Commission's investigation. Thus, the applicants request that the Court reduce the basic amount of the fine by at least 34%, so that that amount is brought below the ceiling of 10% of turnover.

220 That reduction in the basic amount of the fine by a minimum of 34% corresponds to the sum of several factors and results, in particular, from the application of the following reductions. First of all, the applicants request a 3% reduction to take account of the evidence submitted by them concerning the existence of the CUP meetings and the fact that they were 'more anticompetitive' than the other components of the infringement. Next, they seek a further 3% reduction to take account of the evidence submitted by them concerning the existence of the ECC meetings. According to the applicants, those two successive reductions are all the more justified because a 3% reduction was granted to the undertakings whose participation in the CUP meetings was not established. Lastly, a 20% reduction should be granted to them

to reward them for their exceptional cooperation during the Commission's investigation, which enabled the Commission to establish several distinct aspects of the infringement, in particular a monitoring mechanism.

221 As regards the final amount of the fine, the applicants claim that that amount does not reflect their 'exceptional' degree of cooperation in the Commission's investigation. Consequently, they request that the Court grant them an additional 20% reduction in the final amount of the fine.

222 The Commission disputes those arguments.

223 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).

224 In order to satisfy the requirements of Article 47 of the Charter of Fundamental Rights of the European Union when conducting a review in the exercise of its unlimited jurisdiction with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C−625/13 P, EU:C:2017:52, paragraph 180 and the case-law cited).

225 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).

226 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 prejudge the assessment of the fine by the EU judicature. Indeed, although the Commission must observe the principle of the protection of legitimate expectations when it applies its self-imposed rules, such as the 2006 Guidelines, that principle cannot bind the Courts of the European Union in the same way, in so far as they do not propose to apply a specific method of setting fines in the exercise of their unlimited jurisdiction, but consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations (see judgment of 14 May 2014, *Donau Chemie* v *Commission*, T−406/09, EU:T:2014:254, paragraph 59 and the case-law cited).

227 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). 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).

228 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 applicants 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 fines imposed on the applicants by the contested decision.

229 In the first place, as regards the request that the basic amount of the fine be reduced by at least 34%, it must be stated, first of all, that the applicants offer no explanation as to how they arrived at such a percentage of reduction, apart from the fact that that percentage would enable the basic amount of the fine to be brought below the ceiling of 10% of turnover.

230 Next, as regards the requests for 3% reductions in the basic amount of the fine, it should be noted that, contrary to the applicants' assertions, those reductions are not justified in the present case. First, as has been noted in paragraphs 135 and 140 above, the applicants are not entitled to claim that they should be granted a 3% reduction similar to that granted to the undertakings whose participation in the CUP meetings was not established, given that the applicants' factual and legal situation is not comparable to that of the latter undertakings.

231 Secondly, as has been held in paragraphs 101, 102 and 118 above, the fact that the CUP meetings were 'more anticompetitive' than the other exchanges constituting the cartel has not been demonstrated in the present case, contrary to the applicants' assertions.

232 Thirdly, as is apparent from paragraphs 26 and 32 above, the applicants' cooperation in the Commission's investigation, including as regards the evidence submitted by them concerning the ECC and CUP meetings, was rewarded on two levels. On the one hand, the first applicant was granted partial immunity from fines in respect of the duration of the infringement, for the period from 26 June 1998 to 28 August 2003, under the third paragraph of point 26 of the 2006 Leniency Notice. On the other hand, the applicants were granted, under the second indent of the first paragraph of point 26 of that notice, a 30% reduction in the final amount of the fine that would otherwise have been imposed on them.

233 Lastly, the applicants' line of argument must be examined in so far as it is based on the fact that the benefit of partial immunity from fines granted to them under the third paragraph of point 26 of the 2006 Leniency Notice in respect of the duration of the infringement was superseded by the effects of the application of the 10% ceiling provided for in Article 23(2) of Regulation No 1/2003.

234 In the present case, it should be noted that the Commission applied, as regards the first applicant, a multiplier of 8.65, which disregarded the period from 26 June 1998 to 28 August 2003 on the ground that the applicants had submitted compelling evidence which established additional facts increasing the duration of the infringement for that period (see paragraphs 26 and 27 above).

235 In addition, in so far as the basic amount of the fine to be imposed on the first applicant exceeded the 10% limit laid down in Article 23(2) of Regulation No 1/2003, that amount was brought below 10% of the first applicant's total turnover in the preceding business year (see paragraph 31 above).

236 It follows that, admittedly, the application of the 10% ceiling had the consequence, in the present case, that partial immunity from fines in respect of the duration of the infringement was no longer liable to have an impact on the amount of the fine. However, that fact cannot in itself justify an additional reduction in the amount of the fine in order to ensure compliance with the principles of equal treatment and proportionality.

237 First, as has been recalled in paragraph 207 above, it is inherent in the logic of the leniency policy that partial immunity from fines in respect of the duration of the infringement does not result in a reduction of the final amount of the fine, but in the application of a lower multiplier in order to avoid a fine being imposed for the period of the infringement in respect of which the undertakings which have applied for leniency have provided the Commission with information.

238 Second, it has not been shown that, in the present case, the application of the methodology set out in the 2006 Guidelines in conjunction with the application of the 10% ceiling would result in a failure to draw a distinction within the meaning of the case-law referred to in paragraph 183 above, as regards the final fine imposed on the applicants.

239 As has been noted in paragraph 193 above, the fact that the amount of the fine imposed on the applicants represents a higher percentage of overall turnover by comparison with other cartel participants merely reflects the economic importance of that infringement for the applicants. Such a result cannot therefore be contrary to the principles of equal treatment and proportionality.

240 In addition, in so far as the Commission granted the applicants a 30% reduction in the amount of the fine under the second indent of the first paragraph of point 26 of the 2006 Leniency Notice (see paragraph 32 above), the applicants err in claiming that the final amount of that fine does not reflect their cooperation in the Commission's investigation.

241 In the second place, as regards the request for an additional 20% reduction in the final amount of the fine, it has just been recalled in paragraph 240 above that, in the present case, the Commission rewarded the applicants for their cooperation in the investigation, granting them the maximum reduction provided for in the 2006 Leniency Notice for the undertaking which is the second to submit evidence having significant added value with respect to the evidence already in the Commission's possession.

242 As observed by the Commission, it should be noted that the applicants are not entitled to an additional 20% reduction on top of the 30% reduction already granted to them. Such a reduction would be equivalent to the maximum reduction that can be granted to the first undertaking to provide significant added value (see the first indent of the first paragraph of point 26 of the 2006 Leniency Notice).

243 The applicants were the second undertaking to provide such value and, therefore, a reduction of more than 30% in the final amount of the fine imposed on the applicants is not justified in the present case, in particular in comparison with the undertaking which was the first to provide added value.

244 It follows from the foregoing that none of the circumstances relied on by the applicants justifies the Court exercising its unlimited jurisdiction to reduce the amount of the fine, in particular on the basis of point 37 of the 2006 Guidelines. There is nothing to support the conclusion that the fines imposed on them by the contested decision is not commensurate with the gravity or the duration of the infringement or with the degree of cooperation provided by the applicants.

245 The head of claim seeking a reduction in the amount of the fines imposed on the applicants must therefore be rejected and, consequently, the action must be dismissed in its entirety.

IV. Costs

246 Pursuant to 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.

247 Since the applicants have been unsuccessful, they 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 Rubycon Corp. and Rubycon Holdings Co. Ltd to bear their 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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* Language of the case: English.

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1 This judgment is published in extract from.