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JUDGMENT OF THE GENERAL COURT (Sixth Chamber)
27 February 2014 (*) (1)

(Competition – Agreements, decisions and concerted practices – Worldwide market for liquid crystal display (LCD) panels – Agreements and concerted practices concerning prices and production capacity – Internal sales – Rights of the defence – Fines – Partial immunity from fines – Single and continuous infringement – Ne bis in idem principle)

In Case T-128/11,

LG Display Co. Ltd, established in Seoul (South Korea),

LG Display Taiwan Co. Ltd, established in Taipei (Taiwan),

represented by A. Winckler and F.-C. Laprévote, lawyers,

applicants,

v

European Commission, represented by P. Van Nuffel and F. Ronkes Agerbeek, acting as Agents, and by S. Kingston BL,

defendant,

APPLICATION for partial annulment of Commission Decision C(2010) 8761 final of 8 December 2010 relating to a proceeding pursuant to Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 – LCD – Liquid Crystal Displays), and for reduction of the fine imposed on the applicants by that decision,

THE GENERAL COURT (Sixth Chamber),

composed of H. Kanninen, President, G. Berardis (Rapporteur) and C. Wetter, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2013,

gives the following

Judgment

Background to the dispute

The companies involved in the present case

LG Display Co. Ltd ('LGD'), formerly known as LG Philips LCD Co. Ltd, is a company governed by Korean law which exercises control over a group of companies established and operating worldwide in the production of liquid crystal display panels ('LCD panels').

LGD was formed on 26 July 1999 through a joint venture agreement between LG Electronics, Inc. ('LGE'), a company governed by Korean law, and Koninklijke Philips Electronics N.V. ('Philips'), a company governed by Netherlands law.

From 26 July 1999 until 23 July 2004, LGE and Philips each owned 50% of the capital of LGD. Subsequently, their respective shares decreased to 37.9% and 32.87%.

LG Display Taiwan Co. Ltd, formerly known as LG Philips LCD Taiwan ('LGDT'), a company governed by Taiwanese law, is a wholly owned subsidiary of LGD, active in the production and supply of LCD panels.

Administrative procedure

In the spring of 2006, Samsung Electronics Co. Ltd ('Samsung'), a company governed by Korean law, submitted to the Commission of the European Communities an application for immunity from fines pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice').

In doing so, Samsung disclosed the existence of a cartel between several companies, including LGD and LGDT, concerning certain types of LCD panels.

On 17 July 2006, LGD also submitted to the Commission an application for immunity from fines pursuant to the 2002 Leniency Notice.

On 23 November 2006, the Commission granted conditional immunity to Samsung, in accordance with point 15 of the 2002 Leniency Notice, whilst it refused LGD such immunity.

On 27 May 2009, the Commission initiated the administrative proceedings and adopted a statement of objections, pursuant to Article 10 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18). The statement of objections was addressed to 16 companies, including the applicants, as well as LGE and Philips. In that regard, the Commission, in points 281 to 285 of the statement of objections, recalled inter alia that, according to the case-law, (i) European Union (EU) competition law recognises that different companies belonging to the same group form an economic unit, and therefore an undertaking within the meaning of Articles 81 EC and 82 EC, if the companies concerned do not determine independently their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290), (ii) it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company for the presumption that the parent company exercises decisive influence

over the conduct of the subsidiary on the market to be established (Case T-405/06 *ArcelorMittal Luxembourg and Others* v *Commission* [2009] ECR II-771, paragraph 91), and (iii) that that presumption can apply even where a company's capital is held by two other companies each holding 50% (see, to that effect, Case T-314/06 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 138). Next, in points 311 to 319 of the statement of objections, the Commission explained the reasons why, applying the case-law referred to above, LGE and Philips were to be held jointly and severally liable for the infringements committed by the applicants.

A CD-ROM containing the accessible parts of the Commission's case file was annexed to the statement of objections. The addressees of the statement of objections used their right of access to the parts of the Commission's file that were available only at the Commission's premises.

Within the period allowed, the addressees of the statement of objections made known in writing to the Commission their views on the objections raised against them.

LGD disputed that the access to the file exercise adequately ensured the protection of its rights of defence, on the ground that it did not have complete information concerning either the identity of the submitting party, or the date of the submission, for every document. It also maintained that, through the disproportionate acceptance of confidentiality claims, the Commission had applied excessive reductions in respect of Samsung's documents. In addition, LGD pointed out that some documents were missing from the file.

A number of the addressees of the statement of objections, including the applicant, availed themselves of their right to be heard orally during the hearing held on 22 and 23 September 2009.

On that occasion, LGD announced that it intended to submit an application pursuant to the final paragraph of point 23(b) of the 2002 Leniency Notice, for which it needed further information from the file. As the result of the intervention of the Hearing Officer, LGD obtained the necessary information and submitted, on 1 February 2010, an application, based on that provision of the 2002 Leniency Notice, by which it requested partial immunity in respect of its participation in the cartel in 2005 and 2006 ('the application for partial immunity').

By request for information dated 4 March 2010 ('the request for information') and by letter of 6 April 2010 supplementing it ('the supplementary letter'), the parties were invited, inter alia, to submit data concerning the value of sales to be taken into account for the calculation of the basic amount of the fines and to comment on that issue.

LGD provided the data concerning it by letter of 21 April 2010.

The contested decision

On 8 December 2010, the Commission adopted Decision C(2010) 8761 final of 8 December 2010, relating to a proceeding pursuant to Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 – LCD – Liquid Crystal Displays; 'the contested decision'), a summary of which is published in the *Official Journal of the European Union* of 7 October 2011 (OJ 2011 C 295, p. 8).

The contested decision is addressed to 6 of the 16 companies to which the statement of objections was addressed, including the applicants and Samsung. By contrast, LGE and Philips are no longer included as addressees.

In the contested decision, the Commission noted the existence of a cartel among six major international manufacturers of LCD panels, including the applicants, concerning the two following categories of products equal to or greater than 12 inches in size: LCD panels for information technology, such as those for notebooks and PC monitors ('LCD-IT panels'), and LCD panels for televisions ('LCD-TV panels') (referred to collectively as 'cartelised LCD panels').

According to the contested decision, that cartel took the form of a single and continuous infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA), which took place from 5 October 2001 until at least 1 February 2006 ('the infringement period'). During that period, the participants in the cartel held numerous multilateral meetings, which they called 'Crystal Meetings', mostly in Taiwanese hotels. Those meetings had a clearly anti-competitive object, since they provided an opportunity for the participants, inter alia, to fix minimum prices for cartelised LCD panels, to discuss their future prices in order to avoid price reductions and to coordinate increases in prices and levels of production. During the infringement period, the cartel participants also met bilaterally and frequently exchanged information on matters dealt with in the 'Crystal Meetings'. They also took steps in order to verify whether the decisions adopted at those meetings had been applied (recitals 70 to 74 of the contested decision).

In fixing the fines imposed by the contested decision, the Commission used its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

In accordance with the 2006 Guidelines, the Commission, first, established the value of the sales of the cartelised LCD panels either directly or indirectly concerned by the infringement. To that end, it established the following three categories of sales made by the participants in the cartel:

'direct EEA sales', namely sales of cartelised LCD panels to another undertaking within the EEA;

'direct EEA sales through transformed products', namely sales of cartelised LCD panels incorporated, within the group to which the producer belongs, into finished products which are then sold to another undertaking within the EEA; and

'indirect sales', namely, sales of cartelised LCD panels to another undertaking situated outside the EEA, which then incorporates the panels in finished products which it sells within the EEA (recital 380 of the contested decision).

However, the Commission took the view that it needed to examine only the first two categories mentioned in paragraph 22 above, as the inclusion of the third category was not necessary for the fines imposed to achieve a sufficient level of deterrence (recital 381 of the contested decision).

Instead of taking into account the value of sales made by an undertaking during the last full business year of its participation in the infringement, as it normally does under point 13 of the 2006 Guidelines, the Commission considered it more appropriate to use, in the present case, the average annual value of sales for the entire duration

of the infringement, taking into particular account the exponential growth of sales for the majority of the undertakings concerned over the years covered by the contested decision (recital 384 of the contested decision).

Despite the applicants' objections, the Commission held that the relevant sales value was to be calculated taking account also of the applicants' sales to LGE and to Philips. In the Commission's view, first, sales to those companies were also covered by the discussions between the participants in the cartel in question and, second, the prices of those sales were influenced by the actual market circumstances, that is to say, the existence of cartelised prices. Thus, for the applicants, the total of relevant sales made during the infringement period was fixed at EUR 2 296 240 479, the yearly average of which, obtained by dividing that amount by the duration of the cartel which is 4.33 years, amounted to EUR 530 309 579 (recitals 386 and 396 as well as Table 4 of the contested decision).

Second, the Commission observed that, in view of the gravity of the infringement committed, the proportion of the value of sales of the products at issue to be taken into account for the calculation of the basic amount of the fine was to be fixed at 16% for all the participants in the cartel (recital 416 of the contested decision).

Third, the Commission applied to the applicants a multiplier relating to the duration of the infringement of 4.16, on the ground that the participation of those two companies in the infringement had to be regarded as ending on 31 December 2005, owing to the partial immunity that the Commission intended to grant them for 2006 (recitals 417 and 418 as well as Table 5 of the contested decision).

Fourth, the Commission took the view that the facts of the case justified the application to all the cartel participants of an increase in the basic amount of the fine equal to 16% of the average value of the relevant sales in order to ensure deterrence, in accordance with point 25 of the 2006 Guidelines (recitals 419 and 424 of the contested decision). The Commission thus rejected the applicants' arguments against that increase, which related, in particular, to the fact that their sales to LGE and to Philips, on the one hand, due to their internal nature, did not generate any unlawful profit, and, on the other hand, were not influenced by the cartel, as demonstrated by the econometric study they had submitted (recitals 419 to 424 of the contested decision).

Fifth, the Commission did not consider that there were aggravating or mitigating circumstances in respect of any of the cartel participants. Thus, the Commission rejected, inter alia, the applicants' arguments that their cooperation had to be taken into account not only in the context of the 2002 Leniency Notice, but also as a mitigating factor within the meaning of the 2006 Guidelines (recitals 426 to 428, 440 and 441 of the contested decision).

Sixth, pursuant to the 2002 Leniency Notice, the Commission, first of all, confirmed the total immunity granted to Samsung. Then it reduced the amount of the fine to be imposed on the applicants by 50%, by reason of the evidence which they had provided and which represented significant added value with respect to the evidence already in the Commission's possession, in accordance with point 21 and the first indent of point 23(b) of the 2002 Leniency Notice. Finally, it granted the applicants' application for partial immunity, but only in respect of 2006. According to the Commission, it was only in respect of 2006 that the evidence submitted by the applicants amounted to evidence of facts previously unknown to the Commission. However, so far as 2005 was concerned, the information provided by the applicants was added to information which the Commission had already received from Samsung and therefore did not concern facts previously unknown to the Commission (recitals 455 to 467 of the contested decision).

On the basis of those considerations, the Commission, in Article 2 of the contested decision, imposed on the applicants joint and several liability for payment of a fine of EUR 215 000 000.

Procedure and forms of order sought

By application lodged at the Court Registry on 23 February 2011, the applicants brought the present action.

After the Commission lodged its rejoinder on 8 December 2011, the applicants submitted an offer of further evidence, on the basis of Article 48(1) of the Rules of Procedure of the General Court, in support of the fourth plea in law raised in their application ('the offer of further evidence').

The Commission submitted its observations on the offer of further evidence on 26 January 2012.

Upon hearing the Report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, put questions in writing to the parties, which answered them within the period prescribed.

At the hearing on 26 April 2013, the parties presented oral argument and replied to oral questions put by the Court.

Following the hearing, the oral procedure having remained open, the Court put further questions in writing to the parties, which answered them within the period prescribed.

The oral procedure was closed by decision of the President of the Sixth Chamber of the Court on 12 July 2013.

The applicants claim that the Court should:

partially annul the contested decision and substantially reduce the fine imposed on them pursuant to that decision;

order the Commission to pay the costs;

take any other measures that it considers appropriate.

The Commission contends that the Court should:

dismiss the action;

order the applicants to pay the costs.

Law

The applicants do not contest the factual findings made by the Commission in the contested decision. They do, however, maintain that the Commission made a number of serious legal errors, as a result of which the fine imposed on them is unfair and unjustified.

In support of their action, the applicants put forward four pleas in law as follows:

the first plea alleges that the Commission, wrongly and in breach of their rights of defence, included their internal sales in the calculation of the fine;

the second plea alleges that the Commission wrongly refused to grant them immunity from fines in respect of the year 2005;

the third plea alleges that the Commission wrongly refused to regard their cooperation as a mitigating circumstance for the purpose of calculating the fine;

the fourth plea complains about the exclusion of the Japanese LCD-panel suppliers from the proceedings.

As a preliminary point and concerning the applicants' third head of claim, the Court considers that examination of the case does not call for the adoption of any measures other than those referred to in paragraphs 35 and 37 above.

First plea in law, alleging that the Commission, wrongly and in breach of the applicants' rights of defence, included their internal sales in the calculation of the fine

By their first plea, the applicants challenge, in several respects, the fact that the Commission included, in the calculation of the value of sales relevant for the purpose of setting their fine, the sales that they had made to LGE and Philips. In that regard, the applicants maintain that the Commission thereby increased the fine it imposed on them by approximately 500%, since the applicants' sales to those companies represented 81% of the value used by the Commission for calculating the basic amount of the fine, as referred to in the 2006 Guidelines.

This plea is, in essence, divided into four parts relating to:

as regards the first part, infringement of the 2006 Guidelines;

as regards the second part, infringement of the rights of the defence;

as regards the third part, infringement of the principle of equal treatment;

as regards the fourth part, put forward in the alternative, lack of proof that the applicants' sales to LGE were covered by the infringement.

First part, concerning infringement of the 2006 Guidelines

In the first part of the first plea, the applicants complain, first, that the definitions of sales included in the contested decision (see paragraph 22 above) are inconsistent and, second, that the Commission's inclusion of sales to undertakings related to the applicants is not well founded.

– Alleged inconsistencies in the contested decision's definitions of sales

The applicants maintain that the definitions of relevant sales in the contested decision lack clarity and are contradictory. Nor do those definitions correspond to those used during the administrative procedure, or even to those in the request for information and the supplementary letter (see paragraph 15 above). Furthermore, the applicants claim that, in accordance with the Commission's previous practice, only sales to independent customers are related to the infringement and must therefore be taken into account, pursuant to the 2006 Guidelines.

It should be recalled that, according to point 13 of the 2006 Guidelines, '[i]n determining the basic amount of the fine to be imposed, the Commission takes the value of each undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA'.

It must be observed that, in recital 380 to the contested decision, the Commission defined the sales categories set out in paragraph 22 above.

Although the names of those categories are to some extent different from those used in the request for information and the supplementary letter, the fact remains that the substance of those definitions is the same.

It is to be noted that, in the request for information, 'direct EEA sales' were defined as all sales of cartelised LCD panels made to independent third parties in the EEA by any of the legal entities directly or indirectly controlled by LGD.

The request for information also defined 'indirect EEA sales', which became, in the contested decision, 'direct EEA sales through transformed products', as sales where the cartelised LCD panels were transferred to other companies in the group of which the applicants formed part for transformation into another product, such as a notebook or desktop monitor or TV, and the first sale of the transformed products, incorporating the cartelised LCD panels, to an independent third company was made in the EEA by any entity directly or indirectly controlled by a participant in the cartel.

The Commission's aim in using those categories was to take into account both sales made by vertically integrated undertakings and sales made by other undertakings.

In that regard, it should be observed that, according to settled case-law, in the context of competition law, the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed. That concept must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons (Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11, and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 95).

It is in the light of that concept that the notion of 'real sale', which underpins the sales categories used by the Commission in the contested decision, is to be understood.

As can be seen from recitals 9 and 381 of the contested decision, the notion of 'real sale' covers, in the first place, the situation in which cartelised LCD panels manufactured by one of the cartel participants were sold as such to independent third parties in the EEA and, in the second place, the situation in which cartelised LCD panels manufactured by one of the cartel participants were first transferred to companies, in some cases subsidiaries, within the same undertaking as the one taking part in the cartel, those companies then incorporating the cartelised LCD panels into finished products which they finally sold in the EEA to independent third parties. As regards the second situation, the Commission correctly stated that it was only at the time of the sale to an independent third party of the finished product containing a cartelised LCD panel that a 'real sale' of that LCD panel may be regarded as having taken place. No significance may be attached to the fact that, within the same undertaking, several companies play a part in operations which culminate in the sale to an independent third party of a finished product which contains a cartelised LCD panel.

Finally, in view of the concept of 'real sale', the definitions set out in recital 380 of the contested decision are not inconsistent with the statements made in other recitals, contrary to what the applicants have maintained. Although recital 50 of the contested decision refers to sales in the EEA by subsidiaries of the cartel participants of finished products incorporating cartelised LCD panels, that reference is compatible with the definitions in recital 380 of the decision, read in the light of the concept of 'real sale', which was explained in recitals 9 and 381 of the contested decision and the validity of which the Court confirms.

It is apparent from the foregoing that the applicants' arguments concerning the definitions of sales set out in recital 380 of the contested decision are unfounded.

That being so, it is not necessary to rule on whether, as the Commission maintains, the fact that the category of 'direct EEA sales through transformed products' was not applied in the applicants' case (as stated in recital 16 of the contested decision) means that their challenge to that category is inadmissible (see, by analogy, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52; Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26, and judgment of 11 June 2009 in Case T-151/08 *Guedes – Indústria e Comércio* v *OHIM – Espai Rural de Gallecs (Gallecs)*, not published in the ECR, paragraph 70).

– The inclusion of sales to undertakings related to the applicants

The applicants maintain, in essence, that the fact that they do not form a single undertaking with LGE and Philips within the meaning of the case-law cited in paragraph 54 above, while it means that LGE and Philips cannot be regarded as jointly and severally liable for the infringement committed by the applicants, is irrelevant for the purpose of establishing whether the cartelised LCD panels which the applicants sold to LGE and Philips were among the sales to which the infringement established in the contested decision relates, for the purposes of point 13 of the 2006 Guidelines.

In that regard, the Court observes that the Commission has not maintained that the infringement related to the applicants' sales to LGE and Philips merely because they were not sales between companies forming part of a single undertaking within the meaning of the case-law referred to in paragraph 54 above.

The fact that in the contested decision the Commission did not find that the applicants, LGE and Philips formed a single undertaking was a necessary condition for including the applicants' sales to LGE and Philips in the category of 'direct EEA sales', which is based on the premise that the sales in question were to independent third parties. However, the Commission was still required to explain in what way the applicants' sales to LGE and Philips were linked to the cartel.

Concerning that issue, the Commission, in recital 396 of the contested decision, took the view that that link consisted in the fact that (i) sales of cartelised LCD panels to customers, such as LGE and Philips, which were related to cartel participants, were part of the cartel discussions and (ii) that prices for sales to those customers were influenced by the actual market circumstances, that is, the existence of cartelised prices.

It is necessary to determine whether that explanation is well founded, starting with the second aspect thereof.

The Court observes, first of all, that it does not follow from point 13 of the 2006 Guidelines that only the value of sales for transactions actually affected by the infringement may be taken into account in order to determine the relevant value of sales (see, to that effect, Case T-211/08 *Putters International* v *Commission* [2011] ECR II-3729, paragraph 58).

The wording of point 13 of the 2006 Guidelines covers, in fact, sales in the relevant market, which is the market concerned by the infringement. *A fortiori*, that provision does not relate solely to the cases for which the Commission has documentary evidence of the infringement (see, to that effect, *Putters International* v *Commission*, paragraph 59).

That interpretation is confirmed by the objective of the EU competition rules. The interpretation put forward by the applicants would mean that, in order to determine the basic amount of the fines to be imposed in cartel cases, the Commission would be obliged in each case to ascertain the individual sales which were affected by the cartel. An obligation of that kind has never been imposed by the Courts of the European Union and there is no indication that the Commission intended to assume such an obligation in the 2006 Guidelines (*Putters International* v *Commission*, paragraph 60).

Furthermore, it is settled case-law that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market. In particular, the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (*Putters International* v *Commission*, paragraph 61; see also, to that effect, Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 121, and Case T-151/94 *British Steel* v *Commission* [1999] ECR II-629, paragraph 643).

In the present case, it is clear that the applicants' sales of cartelised LCD panels to LGE and Philips were made on the market concerned by the infringement.

Where a product covered by a cartel is sold in the internal market, competition within that market is distorted and the Commission must take that into account in calculating the fine it imposes on the undertaking which has profited from the sale. In that regard, Article 101 TFEU, like the other competition rules laid down in the Treaties, is intended to protect not only the interests of competitors or of consumers but also the structure of the market and thus competition as such (Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 38, and Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 63). In the present case, the distortion of competition in the internal market originates in the sale between the applicants and LGE and Philips.

It follows that, contrary to the applicants' contention, it is irrelevant whether LGE and Philips actually paid the applicants higher prices because of the cartel and whether they passed that possible overcharge on in the case of the finished products that incorporated the cartelised LCD panels which they sold to the European consumer.

Accordingly, the Commission was entitled to take into account the applicants' sales to LGE and Philips and the first part of the first plea must therefore be regarded as unfounded for the reasons set out above.

In any event, as will be shown below, it is apparent from the file that sales of cartelised LCD panels to customers related to the cartel participants had been included in the cartel discussions.

– Proof of the fact that sales to customers related to the cartel participants were included in the cartel discussions

It should be observed that, in recital 396 of the contested decision, the Commission referred to general rules concerning sales to related customers and referred to the documents mentioned in recitals 76 and 107 of that decision.

Thus, in the first place, according to the notes taken by one of the cartel participants, a company governed by Taiwanese law, at a meeting on 14 September 2001, it was agreed to set an upper limit for discounts on sales internal to the groups to which the participants belonged (recital 76 of the contested decision).

In the second place, the notes made by the same cartel participant in respect of a meeting held on 15 November 2001 show that, on that occasion, a number of suggestions as to how price competition could be avoided were put forward, including the suggestion that exceptional cases should be decreased, in particular cases attributable to sales to strategic clients and clients internal to each participant (recital 107 of the contested decision).

Other material proving that sale prices for related customers were influenced by the cartel and were discussed within it is found in several places in the contested decision.

First, it is apparent from Table 2 and recitals 88 and 89 of the contested decision that, between January and June 2002, sales, by the applicants, of certain cartelised LCD panels were made to a very great extent at prices influenced by the cartel. Since the applicants themselves have admitted that they supplied more than 50% of LGE's and Philips' purchases, even close to 100% for some products, and that those companies taken together accounted for approximately 80 to 85% of the applicants' sales in the EEA, it must be concluded that those sales were made to a large extent at prices influenced by the cartel. Although, as the applicants have pointed out in their written response to a question from the Court, the prices charged by them did not coincide exactly with those decided on in the framework of the cartel, it must be stated that the prices charged by the applicants followed the same upward trend as that of the prices decided upon in the cartel.

Second, the notes of the meeting on 13 June 2002 between the applicants and another cartel participant, which are mentioned in recital 132 of the contested decision and were produced by the Commission at the Court's request, show that the parties specifically discussed the customer Philips.

Third, minutes, drawn up by the applicants, of the 'Crystal Meeting' on 6 September 2005 mention Philips in the list of customers, which follows information about the prices agreed upon (recital 214 of the contested decision). The same is true of two sets of minutes of the 'Crystal Meeting' on 6 October 2005, the first most probably emanating from the applicants and the second from the cartel participant mentioned in paragraph 75 above (recitals 217 and 218 of the contested decision). Furthermore, sales of another cartel participant to a company belonging to its group are also mentioned as having been discussed at that meeting.

Fourth, the minutes of the 'Crystal Meeting' on 6 January 2006, presented by the cartel participant referred to in paragraph 75 above, mentions Philips among the customers to whom sales were made at prices that had been discussed among the cartel participants, as is stated in recital 226 of the contested decision. In that regard, it should be pointed out that it is apparent from those minutes that the applicants' sales to Philips were at prices comparable to those charged by other participants. The same is true of the intragroup sales of another participant.

It is necessary to determine whether the evidence described above permits the conclusion that that the Commission established that the applicants' sales to LGE and Philips were influenced by the infringement, a contention which the applicants challenge.

As regards the notes relating to the meeting of 14 September 2001, the Court observes, concurring with the applicants, that the meeting took place outside the infringement period, which did not begin until 5 October 2001. That being so, the Commission cannot rely on that document. However, that circumstance is not decisive, provided that the other evidence set out in the contested decision, which does relate to the infringement period, is sufficient to support the Commission's conclusion that sales to customers which were part of groups to which the cartel participants belonged were covered by the cartel.

As regards the minutes, referred to above, which originate from the cartel participant mentioned in paragraph 75 above, the applicants' attempt to reduce their importance on the ground that they come from a minor participant in the cartel is to no avail, inasmuch as that fact does not affect the reliability of those documents. Thus, the minutes in fact bear out the proposition that there was a rule that sales internal to groups were included within the cartel, irrespective of whether it was a question of the applicants' sales to LGE and Philips or of other intragroup sales.

As to the fact, relied on by the applicants, that the minutes of the meeting of 15 November 2001 refer to a suggestion and not to a rule, the Court notes that the participants monitored whether decisions taken within the cartel were complied with and, if they were not, reacted (see recitals 103, 104, 106 and 107 of the contested decision). In addition, and above all, the data in Table 2 of the contested decision show that these alleged suggestions were followed.

It is true that, as the applicants point out, the Commission does not have any evidence regarding specifically internal sales in the period from July 2002 to September 2005. However, by that argument, the applicants do not dispute that the Commission proved, to the requisite legal standard, that the cartel had lasted throughout the whole infringement period but merely argue that, for a part of the total duration of the cartel, evidence was not produced of the fact that their sales to LGE and Philips were also covered by the cartel. The Commission was not obliged to produce evidence relating to all the actions relating to the infringement for the whole of the period taken into account, provided that the various actions which form part of that infringement pursued a single aim and came within the framework of a single and continuous infringement (see, to that effect, Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraph 169), which was the case here.

As regards the minutes of the meeting on 6 January 2006, the Court rejects the applicants' claim that that document cannot be relied on against them on the ground that they were granted partial immunity for 2006. The fact that partial immunity has been granted means that the Commission cannot take account of that year when setting the fine to be imposed on the applicants but it does not also mean that the evidence showing that the cartel discussions during that period covered, inter alia, the prices charged to Philips must not be taken into account in establishing which sales were concerned by the cartel throughout the whole infringement period.

As regards the econometric study produced by the applicants before the Commission, which they claim demonstrates that average prices charged on sales to LGE and Philips were on average 9% lower than prices charged to their other customers, it must be observed that the Commission, in particular in Annex II to the contested decision, explained the reasons why the results of that study were not reliable, whilst the applicants have not put forward the least argument to disprove the Commission's case.

It follows from the foregoing that the Commission has proved to the requisite legal standard that intragroup sales, and thus the applicants' sales to LGE and Philips, were also affected by the cartel.

In view of all the foregoing considerations, the first part of the first plea must be rejected.

Second part, concerning an infringement of the rights of the defence

The applicants maintain that the Commission infringed their rights of defence, on the ground that the statement of objections did not enable them to understand that their sales to LGE and Philips would be included in the calculation of the fine. Given its very significant consequences for the amount of the fine, the inclusion of those sales is, in the applicants' submission, an essential parameter of the Commission's calculation, which ought to have been mentioned in the statement of objections. Furthermore, the Commission's assertion that the cartel also covered sales made by the cartel participants to companies forming part of their respective groups shows that those sales were a central element of the infringement, and that element should thus have been clearly stated in the statement of objections. That is all the more true in the applicants' case as the majority of their sales of LCD panels were within their group.

– Preliminary observations

It should be recalled that, according to settled case-law, the statement of objections must be couched in terms which, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission and to defend themselves properly before the Commission adopts a final decision. That obligation is satisfied if the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of making known their views (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 42; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 109; and Case T-461/07 *Visa Europe and Visa International Service* v *Commission* [2011] ECR II-1729, paragraph 56).

With regard more particularly to the calculation of fines, it is also settled case-law that the Commission fulfils its obligation to respect the right of undertakings to be heard where it makes it clear in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently'. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (*Musique Diffusion française and Others* v *Commission*, paragraph 21; Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 181; and Case T-343/08 *Arkema France* v *Commission* [2011] ECR II-2287, paragraph 54).

Accordingly, so far as concerns the determination of the amount of fines, the rights of defence of the undertakings concerned are guaranteed before the Commission through the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement (Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 235, and Case T-24/07 *ThyssenKrupp Stainless* v *Commission* [2009] ECR II-2309, paragraph 282).

However, where it has indicated the elements of fact and of law on which it would base its calculation of the fines, the Commission is under no obligation to explain the way in which it would use each of those elements in determining the level of the fine. To give indications as regards the level of the fines envisaged, before the undertakings have been given an opportunity to submit their observations on the allegations against them, would be to anticipate the Commission's decision and would thus be inappropriate (Case T-310/01 *Schneider Electric* v *Commission* [2002] ECR II-4071, paragraph 438; judgment of Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 141; and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 369).

– Application to the present case

The applicants do not dispute that the statement of objections gave an adequate description of the products covered by the cartel, the market players and the sector concerned; nor do they dispute that the statement of objections described the main items of evidence on which the Commission was minded to rely as well as the legal classification of that evidence. Furthermore, the statement of objections made clear the Commission's intention to impose fines on the cartel participants (point 345 of the statement of objections) and included its views on the question as to whether the infringement had been committed intentionally or negligently (point 344 of the statement of objections), on the duration of the infringement (points 336 to 339 of the statement of objections) and on factors that might be used for the purpose of evaluating the gravity of the infringement. In accordance with the 2006 Guidelines, those factors included the nature of the infringement, the combined market share of all the

undertakings concerned, the geographic scope of the infringement and whether or not the infringement had been implemented. In that regard, the statement of objections stated in particular that price-fixing arrangements were, by their very nature, the worst kind of infringement of Article 101 TFEU and Article 53 of the EEA Agreement and that the participants had colluded to set up a secret and institutionalised scheme designed to restrict competition in the economic sector in question, that the cartel concerned a significant part of the industry and was conceived, directed and encouraged at the highest levels in each undertaking concerned and that the cartel arrangements were worldwide (points 347 and 348 of the statement of objections).

It should also be observed, first and foremost, that, as has been stated in paragraphs 65 to 72 above, the Commission's ability to include sales of cartelised LCD panels made by the applicants to LGE and Philips in the value of relevant sales for the purpose of calculating the fine does not depend on whether those sales were made at prices influenced by the cartel but merely on the fact that the sales were made on a market affected by a cartel in which the applicants were participating.

The Commission was therefore not obliged to specify in the statement of objections that it would take those sales into account in the calculation of the fine because they were made at prices influenced by the cartel.

For the sake of completeness, it should be stated that, although it is true that the statement of objections did not expressly state that the applicants' sales to LGE and Philips were affected by the cartel, there is nothing to suggest that the Commission, at this stage in the proceedings, was excluding those sales from the scope of the cartel.

First, if the Commission had intended to exclude those sales, it would have expressly made mention of such an exclusion, since the sales concerned represented a very high percentage of the applicants' overall sales, throughout the whole infringement period.

Second and above all, it is apparent from the applicants' response to the statement of objections that they had interpreted it to the effect that the Commission considered that their sales to LGE and Philips were affected by the cartel. Indeed, in Section V of their response, the applicants sought to show that those sales were made on special conditions because of the relationship between them and LGE and Philips. They referred, in particular, to the conditions of sale provided for by the joint venture agreement that had created LGD (see paragraph 2 above), which should have prevented the sales from being regarded as sales made on the free market.

Likewise, the applicants referred to the fact that exclusion of their sales to LGE and Philips was, in their view, consistent with the Commission's practice and that of other competition authorities. The fact that they made such a reference also shows that the applicants had understood that the Commission considered those sales to be affected by the cartel.

Furthermore, the applicants referred to the fact that the statement of objections seemed to have excluded the internal sales of other addressees, whereas theirs had been included. They also cited a memorandum which they had already sent to the Commission to explain that their sales to LGE and Philips should be excluded, account being taken inter alia of the alleged failure to demonstrate that those sales were made at prices set in application of the cartel.

All the efforts made by the applicants to explain, in response to the statement of objections, why their sales to LGE and Philips were to be regarded as unaffected by the cartel would be meaningless if, on reading the statement of objections, the applicants had concluded that the sales in question were excluded from the infringement of which the Commission suspected them and would not be taken into account in the calculation of the fine.

Admittedly, as the applicants submit, it is true that one of the arguments which they put forward in their response to the statement of objections was based on the alleged inconsistency between the fact that the statement of objections was also addressed to LGE and to Philips, which were considered to form a single undertaking with the applicants, and the fact that those companies agreed to pay higher, cartelised, prices.

However, while that argument may have ceased to be relevant once the Commission, in the contested decision, abandoned its view that a single undertaking was in issue, the fact remains that the applicants, on reading the statement of objections, had understood that their sales to LGE and Philips had been regarded as covered by the cartel.

It should also be noted that the fact that the Commission altered its position concerning whether the applicants belonged, with LGE and Philips, to a single undertaking does not, in itself, affect the legality of the contested decision.

As regards the applicants' argument that the statement of objections, in contrast to the contested decision, did not classify the sales affected by the cartel into different categories (see paragraph 22 above), that circumstance does not affect the fact that the statement of objections made it clear what the infringement was which the Commission was alleging the applicants had committed.

The classification of sales into a number of categories is not a characteristic of the infringement, or an additional objection, but merely an issue related to the calculation of the fine, on which the applicants certainly had to be able to make known their views, but on which the Commission was not obliged to adopt a position either in the statement of objections or by issuing a supplementary statement of objections.

In that regard, it should be recalled that, in order to observe the rights of defence of the addressees of a decision concerning competition matters, the Commission is required to send a second statement of objections when it intends to take into account, in the decision that it will adopt, an objection which was not covered by the first statement of objections (see, to that effect, Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 65).

Since the objection concerning the applicants' sales to LGE and Philips was already clear from the statement of objections, as can be seen from the applicants' own reading thereof (see paragraphs 101 to 104 above), the Commission was not required to adopt a supplementary statement of objections.

Moreover, that no new objection was involved is confirmed by the fact that both when responding to the statement of objections (see paragraphs 101 to 104 above), and in the subsequent stages of the administrative procedure and

in the proceedings before this Court, the applicants have always asserted that those sales should have been excluded on the ground that they were not made at prices calculated by reference to the cartel.

Finally, the Court rejects the applicants' argument that, even if the statement of objections could be considered to contain all the elements of fact on which the contested decision is based, the Commission none the less infringed their rights of defence, since it failed to characterise those elements of fact or used them for purposes other than those referred to in the statement of objections. In that regard, it should be noted that, contrary to what is maintained by the applicants, the alleged increase in the fine applied to them in the present case is not comparable to the increase that was in issue in the case giving rise to the judgment in Case T-410/03 *Hoechst* v *Commission* [2008] (ECR II-881, paragraphs 424 to 438). In that judgment, the Court found there to be an infringement of the applicant's rights of defence on the ground that, by a Commission decision, the aggravating circumstance was found against the applicant of having been the leader of the cartel in issue in the case, although, in the statement of objections which preceded the decision in question, the Commission had simply addressed certain facts which might have been relevant for establishing the role of leader but had not characterised them as an aggravating circumstance against that applicant.

Nothing comparable has occurred in the present case, since the definition of the value of relevant sales for the calculation of the fine is not an aggravating circumstance arising from facts that the Commission should have characterised at the time of the statement of objections.

Thus, in accordance with the case-law referred to in paragraphs 92 to 95 above, the Commission was entitled, following the statement of objections, to draw up the definitions of the various categories of sale on which it intended to rely, provided that the applicants were able to comment on this point.

Since it may be concluded that the inclusion in the infringement of the applicants' sales to LGE and Philips is not a new objection calling for the adoption of a supplementary statement of objections, but that the applicants had nevertheless to be given the opportunity to make known their views on the methodology for taking those sales into account, it is necessary to consider whether, following the statement of objections, the Commission afforded the applicants the possibility of commenting on this issue.

In that regard, it must be observed that, besides sending the request for information (see paragraphs 51 and 52 above), the Commission, in the supplementary letter, specifically asked LGD to give its opinion on the question of the value of sales to be taken into account for calculating the basic amount of the fine. That letter expressly stated that, in calculating 'direct EEA sales', all companies not covered in the definition given for 'indirect EEA sales' would be considered as independent third parties.

On the same date, the applicants received an e-mail from the Commission requesting them to submit figures for their sales to LGE and Philips.

In response to the abovementioned requests, the applicants presented, inter alia by letter of 21 April 2010, arguments setting out their position on whether the sales to LGE and Philips should be taken into account in the value of relevant sales and claiming that those sales should be excluded.

That letter was followed by a video conference on 27 April 2010, between the Commission and the applicants' Korean representatives, with the applicants' external legal counsel attending at the Commission's offices. The Commission's internal note of that conference states that the case team explained that its position was that LGE and Philips would not be held jointly and severally liable for the infringement, contrary to what had been envisaged in the statement of objections, and that the applicants' sales to those companies would consistently be treated as sales to independent third parties. The note also states that the case team drew the applicants' attention to evidence establishing that the sales to LGE and Philips could be regarded as part of the cartel.

The applicants reacted to that video conference by letter of 30 April 2010, in which they argued that, for the reasons set out in the documents already submitted to the Commission and in spite of the explanations hitherto provided by the Commission's case team, they considered that their sales to LGE and Philips should be excluded from the value of sales for the purpose of calculating the fine.

In addition, by letter of 19 November 2010, the applicants further explained the reasons why the sales in question should be excluded.

In view of the numerous exchanges between the Commission and the applicants in which the question of the latter's sales to LGE and Philips was discussed, there are no grounds for maintaining that the applicants' rights of defence were not observed in this regard.

Finally, as to whether the Commission had sufficient evidence to hold that the sales in question were affected by the infringement, that is a different question, which has been considered in paragraphs 65 to 89 above and which does not relate to an infringement of the rights of the defence.

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

Third part, concerning an infringement of the principle of equal treatment

The applicants maintain that, amongst the cartel participants, those which, like them, form part of vertically integrated groups received a heavier fine, in breach of the principle of equal treatment.

The applicants further submit that the Commission was wrong to treat finished products sold in the EEA which included cartelised LCD panels differently depending on whether those panels were incorporated in the finished products by companies belonging to the same group ('direct EEA sales through transformed products', which were taken into account by the Commission) or by unrelated undertakings located outside the EEA ('indirect sales', which were not taken into account by the Commission).

According to the applicants, discrimination also arises from the fact that the Commission took into account the sales of cartelised LCD panels to parent companies, such as the applicants' sales to LGE and Philips, whilst excluding sales made by the cartel participants to subsidiaries within the same group.

Furthermore, the applicants maintain that the Commission did not follow its practice in previous decisions, consisting in taking into account only sales to independent customers.

It must be recalled that the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union.

According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission and Others* [2010] ECR I-8301, paragraph 55 and the case-law cited).

When the amount of the fine is determined, the principle of equal treatment means that the Commission cannot, by the application of different methods of calculation, discriminate between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others* [2012] ECR, paragraph 58 and the case-law cited).

In the present case, it is necessary to ascertain whether the fact that the Commission took into account the applicants' sales to LGE and Philips as 'direct EEA sales' constitutes discrimination.

In that regard, it must be observed that the Commission, in order not to treat the cartel participants differently depending on whether or not they were vertically-integrated undertakings, decided to take account of the first 'real sale' within the EEA of cartelised LCD panels. A sale was regarded as 'real' when either (i) a cartelised LCD panel as such, or (ii) a cartelised LCD panel incorporated, within the same undertaking, into a finished product, was sold in the EEA by the undertaking participating in the cartel to an independent third party. With this in view, the Commission placed the sales of the cartel participants in the categories set out in paragraph 22 above.

In essence, the Commission considered that the cartel participants which were vertically-integrated undertakings should not receive more favourable treatment than that applied to the other participants.

As regards the applicants, the Commission ultimately concluded that they did not form a single undertaking with LGE and Philips. It is to be noted in that regard that the applicants have not produced any evidence casting doubt on the Commission's conclusion.

Thus, the applicants' sales to LGE and Philips were included in the category of 'direct EEA sales'.

If the Commission had not adopted that approach, it would have conferred an advantage on the applicants by comparison with the other cartel participants which, like them, were not vertically integrated in that they did not form a single undertaking with the companies to which they sold their cartelised LCD panels.

The fact that the Commission, with regard to cartel participants which, unlike the applicants, had been regarded as vertically-integrated single undertakings, included the relevant sales in the category of 'direct EEA sales through transformed products' cannot be criticised from the point of view of compliance with the principle of equal treatment, since the existence of a single undertaking gives rise to a different situation, which justifies the application of that other category to the aforementioned participants.

With regard to the applicants' argument relating to the alleged discrimination that operated by reference to whether intra-group sales were to subsidiaries or to parent companies, suffice it to observe that the Commission, correctly, applied the concept of a single undertaking. Thus, wholly-owned subsidiaries were regarded as forming part of the same undertaking as the cartel participants, whereas companies with a shareholding in companies forming part of the cartel were not regarded as parent companies where it was not shown that the conditions laid down in that regard by the case-law were met. The Commission considered that it had not been shown that those conditions were met in the case of LGE and Philips vis-à-vis the applicants, which do not challenge that finding. However, when one of the undertakings participating in the cartel made sales within the EEA to independent third parties, those sales were taken into account by the Commission, whatever the status (subsidiary or parent) within that undertaking of the company which had actually sold the cartelised LCD panels.

As regards the fact that the Commission decided not to include in the calculation of the fine the third category of sales defined in recital 380 of the contested decision, namely 'indirect sales' (see paragraph 22 above), it should be observed that, although it is true that certain cartelised LCD panels supplied by the cartel participants to third parties established outside the EEA may have ended up in finished products sold within the EEA, it cannot be denied that the link between the cartel and the territory of the EEA, for the purposes of point 13 of the 2006 Guidelines, was weaker than the link which existed in the case of the two categories of sales which the contested decision did take into account.

Moreover, since the exclusion of indirect sales was applied to all the cartel participants, no finding of discrimination can be made in that regard.

As regards the applicants' reliance on Commission Decision C(2007) 5791 final of 28 November 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/39.165 – Flat Glass) (summary published in OJ 2008 C 127, p. 9), first of all, it is settled case-law that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (see Case C-549/10 P *Tomra Systems and Others* v *Commission* [2012] ECR, paragraph 104 and the case-law cited).

It is important to emphasise that the Commission is obliged to examine each case in the light of the circumstances specific to it. In that regard, the Commission, in this case, did not consider that LGE and Philips formed a single undertaking with the applicants and, as a consequence, took into account all the sales of cartelised LCD panels which the applicants made to LGE and Philips within the EEA. In adopting that approach, the Commission applied to the applicants the same method as that used in the decision which they invoke, in which it had taken into account the sales which the participants in the cartel in question had made to other undertakings.

In any event, the Commission was obliged to observe the principle of legality. Thus, in accordance with what has been stated in paragraphs 65 to 72 above, it was entitled to take into account all the sales made by the applicants on the market affected by the cartel, provided that those sales have a link with the internal market.

In the light of the foregoing considerations, the third part of the first plea must be rejected.

Fourth part, concerning the lack of evidence that the applicants' sales to LGE were affected by the infringement

In the alternative, the applicants maintain that, even if sales to customers related to the cartel participants could be regarded as being within the category of 'direct EEA sales', the evidence used in the contested decision to demonstrate that those internal sales were also covered by the cartel never refer to LGE, but solely to Philips.

Thus, the applicants submit that the Court should exclude the value of the sales they made to LGE from the amount on the basis of which their fine was set.

It must be borne in mind, first and foremost, that the inclusion of the applicants' sales to Philips is consistent with the principles set out in paragraphs 65 to 72 above.

In any event, the Commission is correct in its contention that, since it proved the existence of a general rule that the cartel also concerned sales internal to groups, it was not necessary, in order to be able to take account also of the applicants' sales to LGE, to have specific evidence concerning sales to that company.

Next, the observations made in paragraph 78 above concerning the interpretation of Table 2 of the contested decision confirm that sales to LGE were also covered by the cartel.

It must also be borne in mind that, for a part of the infringement period, LGE and Philips each held 50% of LGD's capital. Subsequently, their respective shares fell to 37.9% and 32.87%. In those circumstances, failing any explanation on the applicants' part, it is not credible that the applicants would have charged Philips prices set by reference to the cartel whilst LGE allegedly benefitted from prices independent of the cartel.

It follows that the fourth part of the first plea is unfounded.

In view of all the foregoing, the first plea must be rejected in its entirety.

Second plea in law, alleging that the Commission wrongly refused to grant the applicants immunity from fines for 2005

The applicants submit that the Commission should have granted them partial immunity, pursuant to the final paragraph of point 23(b) of the 2002 Leniency Notice, not only for 2006 but also for 2005. By virtue of their oral request for leniency of 17 July 2006 and their further oral statement of 20 July 2006, which was accompanied by a considerable amount of documentary evidence, the applicants were, so they argue, the first to inform the Commission of facts previously unknown to it, namely that the LCD-panel cartel had continued in 2005. In that regard, the applicants submit that the documents produced by Samsung on 18 July 2006, subsequent to their oral request, did not serve to establish that 'Crystal Meetings' were organised throughout 2005 and that Samsung's further oral statement of 20 July 2006, while describing contacts between competitors in 2005, was not accompanied by any documentary evidence.

The applicants further submit that, as the Commission's Hearing Officer confirmed, the access they were given to the file was flawed. Thus, they were not in a position to know what information Samsung had already provided to the Commission. They also maintain that the Commission infringed their right to be heard since it did not determine their request for partial immunity prior to the adoption of the contested decision.

It should be recalled that point 23 of the 2002 Leniency Notice is worded as follows:

'The Commission will determine in any final decision adopted at the end of the administrative procedure:

whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:

first undertaking to meet point 21: a reduction of 30-50%,

…

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

The Court must reject at the outset the applicants' argument that the Commission responded to their request for partial immunity only in the contested decision. That approach corresponds to what is provided for by point 23 of the 2002 Leniency Notice, from which it is apparent that the Commission is to give a determination on reductions from fines and requests for partial immunity in the final decision adopted at the end of the administrative procedure. It is only in respect of requests for full immunity that, in accordance with points 15 and 19 of the notice, applicants are first to obtain conditional immunity during the procedure, unconditional immunity being granted at the end of the administrative procedure, if the requisite conditions are met.

Next, the Court must also reject the applicants' arguments relating to the alleged difficulties regarding access to the file. That argument is ineffective in the context of this plea, since an undertaking, when it makes an application under the 2002 Leniency Notice, must provide the Commission with all the relevant information it has available, whilst the right to have access to the file plays no role in that regard. In so far as the applicants' argument may be interpreted as meaning that they are complaining that they were unable to determine, for the purpose of preparing their action, whether the Commission had learned from the information provided by Samsung that the infringement had continued in 2005, it must be observed that the applicants do not challenge the Hearing Officer's finding that, in essence, despite a series of difficulties during the procedure, their rights of defence were ultimately respected.

In any event, it must be recalled that, according to the case-law, the rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission may have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such an infringement where it adequately demonstrates, not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no error, for example because it would have been able to use for its defence documents to which it was denied access during the administrative procedure (Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 31, and Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraph 28). In the present case, the applicants have not explained in what respect the alleged infringement of their rights of defence, during a stage of the administrative procedure, affected their ability to defend themselves.

Having rejected those arguments, the Court will, first, set out the rules relating to the 2002 Leniency Notice, in particular the scope of the final paragraph of point 23(b) thereof and, second, determine whether, in applying that provision, the Commission should have held that the year 2005 was also covered by the partial immunity granted to the applicants.

General principles

It follows from the introduction to the 2002 Leniency Notice that the logic of that notice is to encourage undertakings participating in illegal cartels to cooperate with the Commission in its efforts to combat cartels on the ground that agreements of that type constitute practices which are among the most serious restrictions of competition. In that context, in order to encourage such cooperation, the Commission envisages a system designed to grant undertakings which cooperate with it either immunity or reductions of the fines that might be imposed on them (Case T-39/06 *Transcatab* v *Commission* [2011] ECR II-6831, paragraph 378).

It is inherent in that logic that the effect sought by the 2002 Leniency Notice is to create a climate of uncertainty within cartels by encouraging those participating in them to denounce the cartels to the Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from fines by denouncing the other participants in the infringement, thereby exposing them to the risk that they face being fined. In the context of that system, and according to the same logic, the undertakings that are quickest to provide their cooperation are supposed to benefit from greater reductions of the fines that would otherwise be imposed on them than those granted to the undertakings that are less quick to cooperate (*Transcatab* v *Commission*, paragraph 379).

The chronological order and the speed of the cooperation provided by the members of the cartel therefore constitute fundamental elements of the system put in place by the 2002 Leniency Notice (*Transcatab* v *Commission*, paragraph 380).

Furthermore, the interpretation of the purpose of a provision of the 2002 Leniency Notice must be consistent with the specific logic of that notice. From that aspect, the final paragraph of point 23(b) of that notice must be interpreted as being aimed at rewarding an undertaking, even if it was not the first to submit an application for immunity in relation to the cartel concerned, if it is the first to provide the Commission with evidence concerning facts of which the Commission was not aware and which have a direct bearing on the gravity or duration of the infringement. In other words, if the evidence supplied by an undertaking relates to facts which enable the Commission to modify the assessment which it then has of the gravity or duration of the infringement, the undertaking which provides that evidence is rewarded by immunity concerning the assessment of the facts which that evidence is capable of demonstrating (*Transcatab* v *Commission*, paragraph 381).

Thus, the final paragraph of point 23(b) of the 2002 Leniency Notice does not concern cases in which an undertaking merely submits new or more complete evidence relating to facts of which the Commission is already aware. Nor does that paragraph apply to cases in which an undertaking informs the Commission of new facts which, however, are not capable of modifying the Commission’s assessment in relation to the gravity or duration of the infringement. That provision applies, on the contrary, exclusively to cases in which two conditions are satisfied: first, the undertaking in question is the first to prove facts of which the Commission was previously unaware; and, second, those facts, which have a direct bearing on the gravity or the duration of the suspected cartel, enable the Commission to make new findings concerning the infringement (*Transcatab* v *Commission*, paragraph 382).

It is appropriate to adopt a restrictive interpretation of the conditions laid down for applying the last paragraph of point 23(b) of the 2002 Leniency Notice, by limiting it to cases in which a company party to a cartel provides the Commission with new information relating to the gravity or the duration of the infringement, and by excluding cases in which a company has merely provided information which strengthens the evidence of the existence of the infringement. In that regard, it should be recalled that, since the leniency procedure is an exception to the rule that an undertaking must be punished for any infringement of the rules of competition law, the relevant rules must for that reason be interpreted strictly. Moreover, the effectiveness of leniency programmes would be undermined if undertakings no longer had an incentive to be the first to submit information revealing the existence of a cartel to the Commission.

Finally, according to the case-law, unilateral statements which are not supported by precise and consistent documentary evidence of the infringement are not evidence having a direct bearing on the gravity or duration of the infringement for the purposes of point 23(b) of the 2002 Leniency Notice. Indeed, the evidence provided by an undertaking under point 23(b) of that notice must be sufficiently precise and substantiated to enable the Commission to use it, after verification, in its final decision (order of 15 June 2012 in Case C-494/11 P *Otis Luxembourg and Others* v *Commission*, not published in the ECR, paragraph 89).

It is in the light of those considerations that the Court must ascertain whether the Commission erred in imposing a penalty on the applicants for their conduct during 2005.

Application to the present case

First of all, the Court finds that the applicants do not challenge the Commission’s chronology of the events of July 2006. Thus, it is common ground that:

the applicants made an oral statement on 17 July 2006;

Samsung produced certain items of evidence on 18 July 2006;

Samsung made an oral statement on 20 July 2006, at 09.40;

the applicants made an oral statement and produced evidence on 20 July 2006 at 15.30.

It follows that, in order to qualify for partial immunity for 2005, the applicants must show that the information which they submitted on 17 July 2006 met the conditions provided for by the last paragraph of point 23(b) of the 2002 Leniency Notice, as summarised in paragraph 166 above. Failing that, the applicants would have to show, first, that, despite the information disclosed by Samsung on 18 and 20 July 2006, the Commission did not know that the infringement established in the contested decision had continued in 2005, and, second, that the information which they produced on 20 July 2006 met the conditions in question.

The Court must determine whether, by the arguments put forward in support of this plea, the applicants have succeeded in establishing that they should have been granted partial immunity for 2005.

In the first place, the applicants maintain that the Commission misinterpreted the final paragraph of point 23(b) of the 2002 Leniency Notice, by requiring that, in order to obtain partial immunity, they should provide evidence that was sufficient to establish the facts in issue. In fact, the wording of the notice, as interpreted by the Commission in other cases, merely provides that the evidence should be relevant. Moreover, the Commission gave Samsung preferential treatment by granting it immunity on the basis of information the quality of which was no higher than that of the information provided by the applicants.

In that regard, it must be observed that, in accordance with the principles set out in paragraphs 161 to 168 above, the Commission correctly considered the information provided by the applicants on 17 July 2006 to be too vague to satisfy the conditions laid down by the provision in question, as interpreted by the case-law.

A reading of the applicants' statement of 17 July 2006 supports the conclusion that the Commission was justified, in recital 467 of the contested decision, in stating as follows:

'… In this case the mere allegations made orally on 17 July 2006 that meetings, similar to those of 5 and 19 October 2001, continued until early 2005 and that thereafter some exchange of information continued for some period of time, or that sometimes minimum prices and pricing guidelines were discussed and agreed to, but otherwise those meetings typically related to exchanges of price, capacity and production information were not sufficient to establish that the infringement lasted into 2005. By the time [LGD] submitted evidence of that kind regarding 2005 and even the first two months of 2006, notably by its submission of 20 July 2006, Samsung, as immunity applicant, had already sufficiently informed the Commission on the continuation of the infringement in 2005 in its submissions of 18 and 20 July 2006 …'

Contrary to the applicants' contention, their statement cannot be regarded as including precise and substantiated evidence, having a direct bearing on the duration of the infringement within the meaning of the case-law referred to in paragraph 168 above, that the infringement carried on throughout the whole of 2005. Even though the statement indicates that information on prices, the market and worldwide supply conditions as well as information concerning dealings with certain customers was exchanged at meetings over the period from October 2001 to early 2005, it is then a question, after that date, of 'some exchange of information' for 'some period of time', without it being specified what type of information was involved. The references which are made in the statement to exchanges of information on prices relate to the abovementioned meetings that were held between 2001 and early 2005. Nothing in the statement mentions an exchange of information on prices for the period after the start of 2005. Nor does the statement specify at what point in 2005 the nature of the meetings changed but merely indicates that a change occurred at the start of the year.

Accordingly, the information contained in the applicants' statement so far as 2005 is concerned is too vague to have a direct bearing on the duration of the cartel.

As to the fact that the Commission applied less restrictive criteria to Samsung when it granted it immunity from fines, it need only be stated that the test to be applied for that purpose, which is described in point 8(b) of the 2002 Leniency Notice, is different from the test provided for in the final paragraph of point 23(b) of the notice. Point 8(b) provides that full immunity is to be granted to the undertaking which is the first to submit evidence which in the Commission's view may enable it to find there to be a cartel.

The fact that different tests are involved is an objective ground which justifies the Commission not treating Samsung and the applicants in the same way, without infringing the principle of equal treatment (see the case-law cited in paragraph 131 above).

In the second place, the applicants contend that the Commission failed to explain how the information provided by Samsung on 18 and 20 July 2006 was relevant or how that information undercut the value of the information which they provided on 17 and 20 July 2006. They maintain that the majority of the documents submitted by Samsung on 18 July 2006 do not establish that the infringement had continued in 2005 since those documents related to products or producers which are not covered by the contested decision, contained information that was received only from customers and did not contain any precise evidence relating to multilateral contacts between competitors or, in any event, to the applicants' participation in the cartel. They submit that the inadequacy of the evidence produced by Samsung on 18 July 2006 is confirmed by the fact that the contested decision mentions only three of the documents provided by Samsung on that occasion, whereas the documents produced by the applicants on 20 July 2006 were used to prove the holding of 11 of the 15 'Crystal Meetings' which took place in 2005 and which are referred to in the contested decision. They further submit that the Commission failed to respond to the arguments, advanced by the applicants in the request for partial immunity, concerning the alleged inadequacy of the information produced by Samsung on 18 July 2006. In any event, the evidence produced by Samsung relates, in the applicants' submission, only to bilateral contacts, none of which concerned them.

As regards the fact that the Commission allegedly failed to explain how the information provided by Samsung on 18 and 20 July 2006 was relevant or how that information undercut the value of the information provided by the applicants on 17 and 20 July 2006, it is important to observe, first of all, that the duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished from the question whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. That statement of reasons may be adequate even though it sets out reasons which are incorrect (Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 181, and order of 12 July 2012 in Case C-278/11 P *Dover* v *Parliament*, not published in the ECR, paragraph 36).

The Commission, in recitals 465 to 467 of the contested decision, explained the reasons why the applicants' request for partial immunity could be granted only for 2006 and thus complied with the duty to state reasons. Whether the explanations advanced by the Commission are well founded is a different issue, which must be dealt with in the examination of the other arguments put forward by the applicants.

So far as concerns the relevance of the information submitted by Samsung, first, it is not necessary to draw a distinction between the information depending on whether it was provided on 18 July 2006 or 20 July 2006, since the applicants' statement that was also made on 20 July 2006 – but at 15.30 – is in any event later than that of Samsung, which was made at 09.40.

Second, it must be noted that, among the documents provided by Samsung on 18 July 2006, is an e-mail dated 4 January 2005, which is referred to in recital 191 of the contested decision and from which it can be seen that Samsung had data relating to production at another cartel participant, which came from an internal source at the latter.

Similarly, Samsung produced a further e-mail dated 14 January 2005, mentioned in recital 195 of the contested decision, which includes the prices that another cartel participant charged a customer for certain cartelised LCD panels. That e-mail also mentions the possibility of Samsung asking other cartel participants, including the applicants, for the prices they intended to suggest to that customer.

Next, an e-mail of 26 August 2005, mentioned in recital 212 of the contested decision, describes the forecasts of one of the cartel participants concerning the way demand would develop and the intentions of that participant regarding the prices it would charge.

In addition, Samsung also disclosed the existence of an e-mail dated 6 December 2005, drawn up – as is made clear by the Commission's written answer to a question from the Court – by a director of a cartel participant, which contains information on the prices of certain cartelised LCD panels charged by one of the cartel participants and mentioning the fact that it was impossible to reach other participants at that time.

It must be noted that those e-mails concern a number of categories of cartelised LCD panels.

Moreover, it is true that the item of evidence provided by Samsung that is referred to in paragraph 187 above is not mentioned in the contested decision, which most often relies on evidence provided by the applicants so far as the year 2005 is concerned. However, the fact that the contested decision does not refer to every piece of evidence provided by Samsung does not affect the fact that, at the time of the applicants' statement on 20 July 2006, the Commission knew, because of the evidence provided by Samsung, that bilateral contacts between certain cartel participants had continued in 2005.

The fact that the Commission made frequent use of the information provided by the applicants on 20 July 2006 confirms that that information in fact had greater evidential value than the information previously disclosed by Samsung. However, it was precisely for that reason that the Commission took the view that the evidence provided by the applicants represented 'significant added value' within the meaning of points 21 and 22 of the 2002 Leniency Notice, justifying a reduction of 50% of the fine. In that regard, it must be pointed out that the test for granting that reduction is different from the test, set out in paragraph 166 above, which must be used for determining whether the applicants' statement of 20 July 2006 could give rise to a grant of partial immunity for 2005 as well.

Third, regarding Samsung's oral statement of 20 July 2006, it contains a certain number of references to the continuation of the infringement in 2005 as well as details concerning the authors of internal e-mails submitted by Samsung two days previously. Those details make it possible to reject the applicants' assertions that the information provided by Samsung concerned exchanges solely with customers and not with competitors as well.

Fourth, as regards the fact that the information provided by Samsung does not relate to the 'Crystal Meetings', but only to bilateral contacts, it should be borne in mind that the contested decision, inter alia in recital 70, defines the infringement in issue as covering not only the 'Crystal Meetings' but also meetings and bilateral contacts between the participants. Therefore, evidence concerning the existence of those contacts in the course of 2005 is relevant for the purpose of proving that the single infringement established in the contested decision continued throughout that year.

As regards the contention that the evidence produced by Samsung did not specifically refer to the applicants' participation in the cartel in 2005, the first point to make is that, as has been noted in paragraph 185 above, one of the e-mails produced by Samsung mentions the possibility of the applicants being asked to state their intentions with regard to certain prices, which shows their continued involvement in the cartel. Second, according to the case-law, where there is a single and continuous infringement, an undertaking that has participated in an infringement by virtue of its own conduct, which met the definition of an agreement or a concerted practice within the meaning of Article 101(1) TFEU and which was intended to help to bring about the infringement as a whole, may also be responsible for the conduct of other undertakings followed in the context of the same infringement throughout the period of its participation in the infringement (Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 160, and judgment of 2 February 2012 in Case T-83/08 *Denki Kagaku Kogyo and Denka Chemicals* v *Commission*, not published in the ECR, paragraph 242).

It follows from the foregoing that the arguments whereby the applicants seek to obtain partial immunity for 2005 are unfounded.

That being so, the Court must consider, finally, the applicants' argument, put forward in the alternative, concerning the fact that the partial immunity which the Commission granted them for January 2006 meant that that month should have been excluded from every stage of the calculation of the fine so far as they were concerned.

In that regard, the Court notes that, as is indicated in Table 5 of the contested decision, the Commission excluded January 2006 from the calculation of the multiplier for duration so far as the applicants were concerned. A multiplier of 4.16 was applied in the applicants' case, whilst a multiplier of 4.25 was applied to the other cartel participants, corresponding to the duration of the whole infringement period, rounded down.

However, in defining the value of sales of goods related to the infringement (the value from which the basic amount is obtained for the purpose of calculating the fine), the Commission, for all the parties to the infringement, calculated their average sales over the whole infringement period, including January 2006.

The Commission therefore, for the applicants as well, took into account their total sales throughout the whole infringement period, including January 2006, and divided the amount obtained by 4.33, the duration of the whole infringement period, rounded up.

It should be observed that, as the Commission acknowledged in recital 468 of the contested decision, the fact that the applicants were granted partial immunity for 2006 means that they must be treated as if they had only participated in the infringement from 5 October 2001 to 31 December 2005 for the purpose of determining the fine to be imposed on them. In terms that are closer to those of the final paragraph of point 23(b) of the 2002 Leniency Notice, account must not be taken of facts later than 31 December 2005 when setting that fine.

In taking the approach that it did with the applicants, the Commission failed to respect its own undertaking not to take into account the period covered by partial immunity, granted under the final paragraph of point 23(b) of the 2002 Leniency Notice.

That provision does not stipulate that the Commission is to disregard the facts to which that immunity relates solely for the purpose of calculating the multiplier for duration; it must be recognised as having a more general scope, which thus means those facts cannot be taken into account in relation to any aspect of the setting of the fine, including the calculation of the average value of relevant sales. In essence, partial immunity, as contemplated in the 2002 Leniency Notice, thus amounts to a 'legal fiction' whereby, for the purpose of setting the fine, the Commission must reason as if the undertaking that has been granted partial immunity had not participated in the infringement during the period covered by the grant.

For that reason the Court must reject the Commission's argument that partial immunity does not affect the choice of reference year(s) used to calculate the value of relevant sales in determining the basic amount of the fine, as that value serves solely to estimate the cartel participant's ability to inflict harm.

It follows that the present plea must be upheld in part, in so far as the Commission, incorrectly, took January 2006 into account in the calculation of the value of the applicants' sales for the purpose of setting the fine to be imposed on them.

Third plea in law, alleging that the Commission wrongly refused to regard the applicants' cooperation as a mitigating circumstance in calculating the fine

The applicants maintain that their extraordinary cooperation with the Commission, admittedly taken into account in the application of the 2002 Leniency Notice, should have given rise to a further reduction of 10% in the fine, on the ground that that cooperation constitutes a mitigating circumstance, as provided for in the fourth indent of point 29 of the 2006 Guidelines.

According to the fourth indent of point 29 of the 2006 Guidelines, the fact that 'the undertaking concerned has effectively cooperated with the Commission outside the scope of the [2002] Leniency Notice and beyond its legal obligation to do so' may amount to a mitigating circumstance capable of giving rise to a reduction of the fine.

In that regard, that provision must be interpreted to the effect that it does not allow an undertaking to receive two reductions of the fine, one under the 2002 Leniency Notice and another under the 2006 Guidelines, in respect of the same cooperation with the Commission.

It follows from the case-law that, in relation to infringements which fall within the scope of the 2002 Leniency Notice, an interested party cannot, as a rule, validly complain that the Commission failed to take into account the extent of its cooperation as a mitigating circumstance outside the legal framework of the Leniency Notice (see, to that effect, Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 586, and Case T-189/06 *Arkema France* v *Commission* [2011] ECR II-5455, paragraph 178). Since the Commission has taken the applicants' cooperation into account by reducing the fine pursuant to the 2002 Leniency Notice, it cannot validly be complained that it did not apply a further reduction to the fine imposed on the applicants, outside the scope of that notice.

It follows that the case-law which states that, in exceptional situations, the Commission is required to grant a reduction of the fine to an undertaking on the basis of the fourth indent of point 29 of the 2006 Guidelines (see, to that effect, Case T-343/08 *Arkema France* v *Commission*, paragraph 170, and *Transcatab* v *Commission*, paragraph 330) must be interpreted as meaning that a prerequisite for the existence of such situations is that the cooperation of the undertaking concerned, while going beyond its legal obligation to cooperate, none the less does not give rise to the right to a reduction of the fine under the 2002 Leniency Notice.

In the present case, since the Commission alleges that the applicants took part in a cartel, there is no question that there was an infringement which fell within the scope of the 2002 Leniency Notice (see, by analogy, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 381).

Similarly, it is not disputed that the applicants were granted a reduction of the fine pursuant to that notice.

In those circumstances, the applicants would be able to receive a further reduction, by way of a mitigating circumstance, only on the basis of cooperation other than that already taken into account under the 2002 Leniency Notice, which met the conditions necessary for the fourth indent of point 29 of the 2006 Guidelines to apply.

In recitals 461 to 463 of the contested decision, the Commission, applying the 2002 Leniency Notice, granted the applicants a reduction of 50% in the fine, on the basis of the documents relating to the 'Crystal Meetings' which the applicants had submitted and the translations relating thereto. The Commission therefore could not subsequently reduce the applicant's fine on the basis of that cooperation.

As to the fact that the applicants produced documents concerning the Japanese suppliers of LCD panels, suffice it to observe that those suppliers are not covered by the contested decision. Consequently, this is not a question of effective cooperation by the applicants in the specific administrative procedure concerning the infringement established in the contested decision but, at most, information relating to another suspected infringement (see, to that effect, judgment of 28 April 2010 in Case T-448/05 *Oxley Threads* v *Commission*, not published in the ECR, paragraphs 129 and 130).

As regards the applicants' acceptance that English should be used, instead of German, as the language of the administrative proceedings, it must be noted that that fact, although it may have reduced the Commission's administrative burden, clearly does not meet the conditions referred to in paragraph 211 above (see, to that effect, judgment of 12 December 2012 in Case T-400/09 *Ecka Granulate and non ferrum Metallpulver* v *Commission* [2012], not published in the ECR, paragraph 67).

Finally, the fact that the applicants expressed their readiness to settle the case does not constitute a form of cooperation which would have facilitated the Commission's task of proving the infringement established in the contested decision.

In the light of the foregoing considerations, the third plea must be rejected.

Fourth plea in law, concerning the exclusion from the proceedings of the Japanese suppliers of LCD panels

In the context of the fourth plea, the applicants take issue with the Commission for having excluded the Japanese suppliers of cartelised LCD panels from the infringement found in the contested decision. In that regard, they maintain that the Commission:

artificially split up a single and continuous infringement;

infringed the obligation to state reasons;

infringed the principle of legal certainty and the *ne bis in idem* principle;

infringed the principle of proportionality.

The concept of a single and continuous infringement

The applicants maintain that the Commission artificially split up the single and continuous infringement found in the contested decision, by excluding the Japanese suppliers of LCD panels from that decision, even though the Commission had extensive evidence, mentioned moreover in the statement of objections, showing that those suppliers were involved in the cartel censured by the Commission. They state that other competition authorities have included those suppliers in their proceedings concerning the LCD-panel cartel.

According to the applicants, while it is true that the Japanese suppliers did not directly participate in the 'Crystal Meetings', the fact remains that they were informed of the results of those meetings and that they held meetings in parallel to the 'Crystal Meetings', at which very similar discussions took place.

It should be recalled at the outset that the concept of a single infringement covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim intended to distort competition or in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, which are aware that they are participating in the common object) (see Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 89 and the case-law cited).

It must also be noted that an infringement of Article 101(1) TFEU may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or more elements of that series of acts or continuous conduct could also constitute, in themselves and in isolation, an infringement of that provision. Where the various actions form part of an overall plan, owing to their identical object, which distorts competition within the single market, the Commission is entitled to impute responsibility for those actions to the undertakings concerned on the basis of their participation in the infringement considered as a whole (see *Amann & Söhne and Cousin Filterie* v *Commission*, paragraph 90 and the case-law cited).

In that regard, the Court observes, in the first place, that, whilst that case-law permits the Commission to proceed, by means of a single set of proceedings and a single decision, against several instances of conduct which could have been proceeded against individually, that does not mean that the Commission is obliged to act in that way. Thus, no objection can, as a rule, be made where the Commission proceeds separately against different instances of conduct which it could have grouped together in a single and continuous infringement. Moreover, each of those instances of conduct could contain within it several infringements.

Accordingly, the Commission has a discretion as to the scope of the proceedings which it initiates. In that regard, according to the case-law, it cannot be obliged to find and penalise all anti-competitive conduct, nor could the Courts of the European Union hold – if only for the purposes of reducing the fine – that the Commission, in the light of the evidence available to it, should have found that there was an infringement during a particular period by a particular undertaking (see, to that effect, *Tokai Carbon and Others* v *Commission*, paragraphs 369 and 370).

The exercise of that discretion is subject to review by the Courts. However, it follows from the case-law that only if it transpired that the Commission, without an objective reason, made a single factual situation the subject of two separate sets of proceedings could its choice be regarded as a misuse of powers (see, to that effect, Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949, paragraph 89).

In the present case, the Commission considered that it did not have – or did not yet have – sufficient evidence against the Japanese suppliers and thus chose not to proceed against them at the same time as against the applicants and the other addressees of the contested decision. That situation constitutes an objective reason which justifies the Commission's choice. It goes without saying that, in proceedings brought against the Japanese suppliers, the Commission is obliged to observe inter alia the principle *ne bis in idem* with regard to the applicants.

It should also be recalled that, according to the case-law, where an undertaking has acted in breach of Article 101(1) TFEU, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, even where, as in the present case, those undertakings' circumstances are not the subject of proceedings before the Courts of the European Union (*Ahlström Osakeyhtiö and Others* v *Commission*, paragraph 197, and Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission* [2003] ECR II-5761, paragraph 430).

In the second place, and in any event, it is also important to make clear that the single objective to which the overall plan characterising a single and continuous infringement is directed cannot be determined by a general reference to the existence of distortion of competition in the market concerned by the infringement, since an impact on competition, whether it is the object or the effect of the conduct in question, is an inherent element of any conduct covered by Article 101(1) TFEU. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of part of its meaning, since it would have the consequence that different instances of conduct which relate to a particular economic sector and are prohibited under Article 101(1) TFEU would have to be systematically characterised as constituent elements of a single infringement. Thus, for the purposes of characterising various instances of conduct as a single and continuous

infringement, it is necessary to establish whether they display a link of complementarity, in that each of them is an impediment to the normal pattern of competition, and, through their interaction, contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of an overall plan having a single objective. In that regard, it will be necessary to take into account any circumstance capable of establishing or casting doubt on that link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various instances of conduct concerned (see, to that effect, *Amann & Söhne and Cousin Filterie* v *Commission*, paragraph 92 and the case-law cited).

In the present case, it should first of all be observed that the infringement alleged by the Commission against the addressees of the contested decision resides in the fact that they participated (i) in the 'Crystal Meetings', during which they fixed minimum prices for cartelised LCD panels, discussed future prices in order to avoid price reductions and coordinated their price increases as well as their levels of production, and (ii) in bilateral meetings concerning the matters discussed at the 'Crystal Meetings' (see paragraph 20 above).

The applicants accept that the Japanese suppliers did not participate in the 'Crystal Meetings' but in other meetings, which the addressees of the contested decision did not attend.

Even if the Japanese suppliers had also implemented, either amongst themselves or also with the addressees of the contested decision, a cartel seeking to distort competition as regards the prices of LCD panels, their strategy in that regard cannot be considered necessarily to form part of the same overall plan or to use the same methods as those elaborated by the addressees of the contested decision.

The lack of proof of an overall plan and common methods is an objective ground permitting the Commission to proceed against the infringement committed by the applicants without including in the same proceedings any infringement that might have been committed by the Japanese suppliers.

As regards the applicants' argument concerning the fact that the statement of objections mentioned the Japanese suppliers, whilst no reference is made to them in the contested decision, first, suffice it to observe that those suppliers were not, in any event, addressees of the statement of objections. It cannot therefore be maintained that the Commission altered the scope of the infringement.

Second, according to settled case-law, the Commission is not obliged to explain any differences there may be between its definitive assessments in the final decision imposing a penalty and its provisional assessments in the statement of objections (see *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 65 and the case-law cited).

It is also necessary to reject the argument which the applicants seek to draw from the fact that the Commission has maintained, in its pleadings before the Court, that it was in order to comply with the principles established in Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225 ('*Pergan*'), paragraphs 72 to 81, that it omitted any reference to the Japanese suppliers in the contested decision although they had been mentioned in the statement of objections, while not being addressees thereof.

In that regard, it should be observed that it follows from *Pergan* that, in order to respect, inter alia, the presumption of innocence, the Commission must refrain from publishing, in its decisions, references from which it might be inferred that an undertaking is accused of an infringement when the undertaking is not named as an addressee in the operative part of that decision. However, the fact that the Commission, following the principles established in *Pergan*, did not mention the Japanese suppliers in the contested decision merely means that it respected the presumption of innocence with regard to those suppliers. The fact that they are not mentioned cannot, however, be interpreted as meaning that the Commission has taken a position, even implicitly, on the involvement of the Japanese suppliers in anti-competitive practices concerning cartelised LCD panels.

It follows that the Commission did not misapply the concept of a single and continuous infringement.

Alleged breach of the obligation to state reasons

The applicants complain that the Commission did not give any explanation of the reasons why the Japanese suppliers were excluded from the contested decision. That exclusion, which affects the definition of the scope of the infringement, should have been soundly reasoned, as the Commission cannot simply shelter behind its discretion.

In that regard, the Court observes that the Commission had no obligation to explain in the contested decision the reasons why proceedings had not been taken against the Japanese suppliers. The obligation to state the reasons on which a measure is based cannot encompass an obligation for the institution from which it emanates to give reasons for the fact that it did not adopt other measures of a similar kind addressed to third parties (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 414, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 63). The arguments raised by the applicants must therefore be rejected.

Alleged infringements of the principles of legal certainty and *ne bis in idem*

According to the applicants, the exclusion of the Japanese suppliers infringes the principle of legal certainty and the *ne bis in idem* principle, on the ground that they are left with uncertainty concerning possible future Commission investigations into those suppliers, which could result in further fines for the applicants or, in any event, cause them to incur significant additional costs in order to defend themselves on the very same issues as those that have already been covered in the contested decision. The applicants also submit that that exclusion exposes them to an additional risk of claims for damages.

The Court would point out that it is precisely the *ne bis in idem* principle which guarantees the applicants' legal certainty.

The *ne bis in idem* principle must be observed in proceedings for the imposition of fines under competition law. That principle precludes, in competition matters, an undertaking being found liable or proceedings being brought against it afresh on the grounds of anti-competitive conduct for which it has been penalised or declared not liable by an earlier decision that can no longer be challenged (see Case C-17/10 *Toshiba Corporation and Others* [2012] ECR, paragraph 94 and the case-law cited).

In the present case, the applicants cannot rely on the *ne bis in idem* principle, since their action is directed against the decision bringing to an end the first procedure which the Commission opened against them in respect of an infringement concerning cartelised LCD panels. That principle may, in fact, be relied on only against a decision closing a second procedure that might be initiated in respect of the same infringement. However, the *ne bis in idem* principle cannot play any role in relation to the contested decision, the existence of which is a condition *sine qua non* if that principle is to be relied on with regard to the second procedure.

Legal certainty for the applicants is ensured by the fact that any Commission decision proceeding against them in respect of the same infringement as the one to which the contested decision relates would be contrary to the *ne bis in idem* principle. It is clearly not possible to rely on that principle as a preventive step in the context of the present action, which has been brought against the contested decision.

The fact that the Commission has opened an investigation into the Japanese suppliers, in the context of which it has requested information from the applicants, has no impact on the legality of the contested decision or on the amount of the fine imposed on them. The fact that the Commission proceeded against the applicants in respect of the infringement established in the contested decision does not mean that they are dispensed from their duty to cooperate with the Commission in proceedings which may lead to a finding that an infringement has been committed by other undertakings, or even by them, provided that the facts relied on by the Commission for that purpose are different from those on which the contested decision – which did not concern the Japanese suppliers – is based.

It follows that the applicants' offer of further evidence, in which they state that the Commission has involved them in a new investigation into LCD panels, which is currently under way, is not relevant for the purposes of the present action, since the Commission's behaviour vis-à-vis the applicants in the context of a possible second investigation into an LCD-panel cartel cannot affect the validity of the contested decision.

In the light of the foregoing, it must be concluded that the Commission has not infringed either the *ne bis in idem* principle or the principle of legal certainty.

Alleged infringement of the principle of proportionality

The applicants submit that the Commission has infringed the principle of proportionality, since, in view of the risks to which the exclusion of the Japanese suppliers exposes them, the Commission did not take account of all the circumstances of the infringement in determining the fine that it imposed on them. In that regard, the applicants refer to the case-law that an undertaking that has committed only one infringement cannot be subject to the same fine as that imposed on undertakings that have participated in two or more infringements (Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraphs 217 to 220, and Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraphs 189 to 192). They also refer to Case T-113/07 *Toshiba* v *Commission* [2011] (ECR II-3989, paragraph 287), in which a Commission decision was invalidated on the ground that the Commission had given more favourable treatment to some of the cartel participants.

The Court observes that the proportionality of a fine must be assessed in the light of all of the circumstances of the infringement (see Case T-52/02 *SNCZ* v *Commission* [2005] ECR II-5005, paragraph 58 and the case-law cited). The risks to which the applicants refer of having to bear additional costs as a result of the Commission opening a second procedure in respect of, inter alia, the Japanese suppliers cannot be regarded as circumstances relating to the infringement committed by the applicants, which was established in the contested decision.

Similarly, since the contested decision does not apply to the Japanese suppliers, the applicants have not explained in what respect their situation is comparable to the cases with which the judgments they rely on are concerned (see paragraph 247 above), in which (i) some undertakings had participated in just one infringement whilst others had participated in several infringements or (ii) different criteria were applied to undertakings which had participated in the same infringement for the purpose of calculating their respective fines.

Accordingly, the Commission has not infringed the principle of proportionality.

In the light of all the foregoing, it must be found that the applicants have not shown that, by excluding the Japanese suppliers from the procedure, the Commission made errors in setting the fine it imposed on them; the fourth plea must therefore be rejected in its entirety.

Exercise of the Court's unlimited jurisdiction

As well as partial annulment of the contested decision, the applicants request that the Court reduce the fine imposed on them by the Commission, relying (i) on the fact that the Commission made the errors referred to by the pleas examined above and (ii), as regards the exclusion from the procedure of the Japanese LCD-panel suppliers, on the possibility that the opening of an investigation into those suppliers will cause them harm.

It is apparent from the examination of the applicants' pleas in law that the only error the Commission made in setting their fine was to take January 2006 into account in the calculation of the average value of their sales (paragraphs 195 to 203 above). Moreover, for the reasons given in paragraph 244 above, the opening by the Commission of an investigation into the Japanese suppliers cannot be regarded as having caused the applicants harm. In any event, that circumstance has had no impact on the gravity or duration of the infringement committed by the applicants.

In those circumstances, it is necessary to consider the applicants' request that the Court correct the error relating to January 2006 and, as a consequence, reduce the fine imposed on them by the Commission.

It should be recalled that the review of legality of decisions adopted by the Commission is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.

It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicant received a fine whose amount properly reflects the gravity of the infringement in

question (see, to that effect, Case T-343/06 *Shell Petroleum and Others* v *Commission* [2012] ECR, paragraph 117 and the case-law cited).

In the present case, the parties are agreed that the consequence of excluding January 2006 from the calculation of the average value of the applicants' relevant sales is – if the same method as that used in the contested decision is applied to that average – that the fine to be imposed on the applicants amounts to EUR 210 000 000.

Accordingly, in the absence of other factors capable of justifying a more significant reduction of the fine imposed on the applicants in the contested decision and having regard to all the circumstances of the case, the fine must be reduced to EUR 210 000 000.

Furthermore, in view of all the foregoing, the remainder of the claims made in the application must be rejected.

Costs

Recoverable costs

The applicants claim that the Commission should be ordered to pay not only the costs of the proceedings but should also reimburse them for all other expenses or costs incurred in complying with the contested decision, on the ground that the Commission, first, requires a bank guarantee from a bank with an AA rating, which is not available to any Korean bank and is available to only a few European banks, and, second, applies to provisional payments a rate which is below market rate.

In that regard, it must be recalled that, according to settled case-law, expenses incurred in providing a bank guarantee in order to avoid the enforcement of a decision are not expenses incurred for the purpose of the proceedings within the meaning of Article 91(b) of the Rules of Procedure (see, to that effect, Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 356, and *Shell Petroleum and Others* v *Commission*, paragraph 282). Consequently, the applicants' claim that the Commission should be ordered to bear such costs must be rejected as inadmissible.

Costs of the proceedings

Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

As the action has been successful in part, the Court considers it fair, having regard to the circumstances of the case, to order the applicants to bear their own costs and to pay three-quarters of the costs incurred by the Commission, and to order the Commission to bear one-quarter of its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

Sets at EUR 210 000 000 the fine imposed jointly and severally on LG Display Co. Ltd and LG Display Taiwan Co. Ltd in Article 2 of Commission Decision C(2010) 8761 final of 8 December 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 – LCD – Liquid Crystal Displays);

Dismisses the action as to the remainder;

Orders LG Display and LG Display Taiwan to bear their own costs and to pay three-quarters of the costs incurred by the European Commission;

Orders the Commission to bear one-quarter of its own costs.

Kanninen Berardis Wetter

Delivered in open court in Luxembourg on 27 February 2014.

[Signatures]

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* Language of the case: English.

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1 This judgment is published in extract form.