JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

8 July 2020 (*)

(Competition — Agreements, decisions and concerted practices — Market for smart card chips — Decision finding an infringement of Article 101 TFEU — Exchanges of commercially sensitive information — Unlimited jurisdiction — Calculation of the amount of the fine — Taking into consideration of the participation only in a part of a network of bilateral contacts between competitors)

In Case T-758/14 RENV,

Infineon Technologies AG, established in Neubiberg (Germany), represented by M. Dreher, T. Lübbig and M. Klusmann, lawyers,

applicant,

v

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

defendant,

APPLICATION under Article 263 TFEU for the annulment of Commission Decision C(2014) 6250 final of 3 September 2014 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39574 — Smart Card Chips) or, in the alternative, for a reduction in the fine imposed on the applicant,

THE GENERAL COURT (Seventh Chamber),

composed of V. Tomljenović (Rapporteur), President, A. Marcoulli and A. Kornezov, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 November 2019,

gives the following

Judgment

Background to the dispute

1 This matter is part of the litigation arising out of the infringement of Article 101(1) TFEU and Article 53 of the Agreement on the European Economic Area (EEA) which the Commission found to have taken place (‘the infringement at issue’) by Decision C(2014) 6250 final of 3 September 2014 relating to proceedings under Article 101 TFEU and Article 53 EEA (Case AT.39574 — Smart Card Chips) (‘the contested decision’).

2 The contested decision was addressed to four companies, the first being the applicant, Infineon Technologies AG, the second Koninklijke Philips Electronics NV and its wholly owned subsidiary Philips France SAS (together ‘Philips’), the third Samsung Electronics Co., Ltd and Samsung Semiconductor Europe GmbH (together ‘Samsung’), and the fourth Renesas Electronics Corp., which succeeded Renesas Technology Corp., which had been formed by Hitachi Ltd and Mitsubishi Electric Corp., and Renesas Electronics Europe Ltd (together ‘Renesas’).

3 In the contested decision, the Commission found that, between 24 September 2003 and 8 September 2005, the four undertakings referred to in paragraph 2 above, which were active in the smart card chips sector, had been part of a cartel.

4 According to the Commission, the infringement at issue, which was a single and continuous infringement, consisted, for the four undertakings mentioned in paragraph 2 above, in the coordination of their market behaviour by means of the exchange of commercially sensitive information concerning pricing generally and prices charged to specific customers, contract negotiation, production capacity or utilisation of that capacity and their future conduct on the market.

5 Having found that the conduct of those undertakings had as its object the restriction of competition within the European Union and had an appreciable effect on trade between Member States and between contracting parties to the EEA Agreement, the Commission required the undertakings in question to bring that infringement to an end and imposed fines on them.

6 As regards the calculation of the basic amount of the fine, the Commission considered that it was necessary to take into account a multiplier for gravity of the infringement at issue of 16% of the value of sales, a duration of 18 months and 7 days, in the case of the applicant, and, in respect of the additional amount for deterrence, a multiplier of 16% of the value of sales (recitals 405 to 420 of the contested decision).

7 The Commission then granted the applicant a 20% reduction in the amount of the fine, on the basis that it was only responsible for the infringement at issue in so far as it participated in collusive arrangements with Samsung and Renesas, and not with Philips, and because it had not been shown that the applicant was aware of the cartel contacts between the other participants in the cartel (recitals 423 to 425 of the contested decision). An additional reduction of 10% was applied to the basic amount of the fines imposed on the cartel participants because of the excessive length of the administrative procedure (recital 428 of the contested decision).

8 By the first paragraph of Article 2(a) of the contested decision, the Commission imposed a fine of EUR 82 784 000 on the applicant for its participation in the infringement at issue.

Judgment of 15 December 2016, Infineon Technologies v Commission (T-758/14)

9 By application lodged at the Registry of the General Court on 13 November 2014, the applicant brought an action for annulment of the contested decision in so far as that decision concerned it or, in the alternative, for cancellation or reduction of the amount of the fine imposed on it.

10 By judgment of 15 December 2016, *Infineon Technologies* v *Commission* (T-758/14, not published, EU:T:2016:737; ‘the original judgment’), the Court dismissed the action in its entirety.

11 In the first place, the Court held that the Commission had been correct to find that the applicant had participated in anticompetitive discussions with Samsung and Renesas between 24 September 2003 and 31 March 2005, and that it had had sufficient evidence for that finding. The Court held that, since prices in the market for smart card chips were determined in principle on an annual basis, the infringement would be established if the Commission had demonstrated that the applicant had participated in at least one anticompetitive meeting during each of the three years of the infringement (the original judgment, paragraphs 160 and 211).

12 In the second place, as regards the amount of the fine imposed on the applicant, the Court found that there had been no breach of the principles of equal treatment and proportionality. The Court observed that, although the Commission had applied the same gravity multiplier of 16% to all the undertakings participating in the infringement, it had nevertheless taken the relative extent of the applicant’s participation into account by granting it a reduction of 20% on the basis of mitigating circumstances (the original judgment, paragraph 239).

13 Moreover, the Court found that the applicant had not put forward any specific argument permitting the inference that a reduction of 20% in the amount of the fine was not proportionate, in the present case, to the fact that it had participated only partially in the infringement at issue. The Court observed that

the applicant had merely claimed that it had played a minor role in the infringement at issue (the original judgment, paragraphs 239 and 263).

Judgment of 26 September 2018, Infineon Technologies v Commission (C-99/17 P)

14 By application lodged at the Registry of the Court of Justice on 24 February 2017, the applicant brought an appeal against the original judgment, pursuant to Article 56 of the Statute of the Court of Justice of the European Union.

15 By its judgment of 26 September 2018, *Infineon Technologies* v *Commission* (C-99/17 P, EU:C:2018:773; 'the judgment on appeal'), the Court of Justice set aside the original judgment inasmuch as the General Court had rejected the applicant's claim in the alternative for a reduction of the amount of the fine that the Commission had imposed on it. The Court of Justice referred the case back to the General Court for it to give judgment on the claim for a reduction of the amount of the fine.

16 In essence, the Court of Justice upheld the General Court's reasoning as regards the review of the legality of the decision, but concluded that the General Court had misconstrued the extent of its unlimited jurisdiction by not examining all the factual and legal circumstances so as to ensure that the fine was proportionate to the infringement committed, particularly with regard to the number of anticompetitive contacts in which the applicant had participated (the judgment on appeal, paragraphs 206, 207 and 213).

Procedure and forms of order sought

17 Following the judgment on appeal, and pursuant to Article 216(1) of the Rules of Procedure of the General Court, the case was assigned to the Seventh Chamber by decision of 15 October 2018.

18 In accordance with Article 217(1) of the Rules of Procedure, the applicant and the Commission lodged their written observations at the Court Registry on 5 December 2018.

19 Following a proposal from the Judge-Rapporteur, the General Court (Seventh Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure pursuant to Article 89 of the Rules of Procedure, requested the applicant to produce a document.

20 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 14 November 2019.

21 The applicant claims that the Court should:

– annul the contested decision in so far as it relates to it, in particular Article 1(a), the first paragraph of Article 2(a), and the second paragraph of Article 4 thereof;

– in the alternative, order a substantial reduction in the fine imposed on it under the first paragraph of Article 2(a) of the contested decision;

– order the Commission to pay the costs.

22 Moreover, in its observations of 5 December 2018, the applicant claims that the Court should:

– evaluate the evidence it did not evaluate prior to the delivery of the original judgment, reassess the proportionality of the fine imposed on the applicant under Article 2 of the contested decision and substantially reduce it to a proportionate amount;

– for that purpose, conduct a hearing and, in particular, in preparation for that hearing, summon the participants in the alleged meetings as witnesses (Article 93 of the Rules of Procedure), and hear those witnesses;

– order the Commission to pay the costs of the whole proceedings.

23 The Commission contends that the Court should:

– dismiss the action in so far as the applicant seeks a reduction of the fine imposed on it;

– order the applicant to pay the costs of the proceedings in Cases C-99/17 P and T-758/14 RENV.

Law

The scope of the action following referral back to the General Court

24 It follows from the judgment on appeal that the Court must, at this stage, in the exercise of its unlimited jurisdiction, rule on the application for a reduction in the amount of the fine imposed on the applicant, by reviewing the proportionality of the amount of the fine imposed in relation to the number of contacts (the judgment on appeal, paragraph 207).

25 In the first place, it must be observed that the scope of unlimited jurisdiction is strictly limited, unlike the review of legality provided for in Article 263 TFEU, to determining the amount of the fine (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 76 and the case-law cited).

26 In the second place, it should be recalled that, in order to satisfy the requirements of the principle of effective judicial protection enshrined in Article 47(1) of the Charter of Fundamental Rights of the European Union, the Court, in the exercise of its unlimited jurisdiction, must conduct an independent and complete analysis of the fine imposed, even if it ratifies, in certain respects, the appraisal carried out by the Commission and the result that it had reached (see, to that effect, judgment of 30 April 2014, *FLSmidth* v *Commission*, C-238/12 P, EU:C:2014:284, paragraph 60).

27 In the third place, it should be borne in mind that, in the independent analysis undertaken in the exercise of its unlimited jurisdiction, the EU judicature is bound to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see judgment of 26 January 2017, *Villeroy & Boch Austria* v *Commission*, C-626/13 P, EU:C:2017:54, paragraph 82 and the case-law cited).

28 It is in the light of that case-law that it is necessary to delimit the analysis which the Court must carry out in the exercise of its unlimited jurisdiction in the context of the present action.

29 In the present case, as the Court of Justice observed in paragraph 203 of the judgment on appeal, the applicant put forward a number of arguments claiming that the amount of the fine imposed by the Commission was disproportionate in relation to the number of anticompetitive contacts in which it participated and which were identified by the Commission in the contested decision.

30 According to the Court of Justice, the General Court should have responded to the argument raised by the applicant according to which the Commission had infringed the principle of proportionality by setting the amount of the fine imposed without taking into account the limited number of contacts in which the applicant participated, in order to be able to review, in the exercise of its unlimited jurisdiction, the proportionality of the fine in relation to the number of anticompetitive contacts found against the applicant (the judgment on appeal, paragraphs 206 and 207). Thus, the Court of Justice held that, since the General Court refrained from examining the proportionality of the fine in relation to the number of contacts found against the applicant, it had not carried out an overall analysis taking account of all the relevant circumstances (the judgment on appeal, paragraph 213).

31 Moreover, it must be observed that, in paragraph 221 of the judgment on appeal, the Court of Justice stated as follows in relation to the referral of the case back to the General Court: ‘it is necessary to refer the case back to the General Court for it to assess the proportionality of the amount of the fine imposed in relation to the number of contacts found against the appellant, if necessary by examining whether the Commission established the six contacts on which the General Court has not yet adjudicated’.

32 In the light of the foregoing, first, it is for the Court to rule on the six contacts not examined in the original judgment, by analysing the arguments put forward by the applicant to dispute the existence of those contacts and their anticompetitive nature.

33 Second, it is necessary to examine the claim for a reduction in the amount of the fine submitted in the application in the alternative, by the carrying out of an overall examination of the amount of the fine in the light of all the legal and factual circumstances of the case. That examination must, in particular, take account of the arguments put forward by the applicant challenging the amount of the fine and alleging infringement of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') and breach of the principles of equal treatment and proportionality.

Whether the six contacts not examined in the original judgment took place and were anticompetitive

34 As was indicated in paragraph 136 of the original judgment, it is apparent from Table 4 of the contested decision that the Commission considered the applicant to have engaged in a total of 11 unlawful contacts during the relevant infringement period. In addition, it is apparent from recitals 90, 96, 97, 98, 100, 102, 110, 116, 122, 125, 127 and 130 of the contested decision that the Commission identified unlawful discussions during each of the contacts that took place during the infringement period in respect of which it penalised the applicant. The information derived from that table and from those recitals, as regards the contacts in which, according to the Commission, the applicant participated, is set out in the table below.

	Date	Undertakings	Participants	Contested decision
1st contact	24.9.2003	Infineon — Samsung	Mr L. (Infineon) and Mr K. (Samsung)	Recital 90
2nd contact	3.11.2003	Infineon — Samsung	Mr L. (Infineon) and Mr K. (Samsung)	Recital 96
3rd contact	6.11.2003	Infineon — Renesas	Mr D. (Infineon) Mr H. and Mr M. (Renesas)	Recital 97
4th contact	17.11.2003	Infineon — Samsung	Mr K., Mr L. and Mr D. (Infineon), and Mr K. and Mr N. (Samsung)	Recital 100
5th	18-	Infineon —	Infineon	Recitals 98

contact	20.11.2003	Renesas	employee at the ‘Cartes’ trade fair and Mr D. (Renesas)	and 102
6th contact	18.3.2004	Infineon — Renesas	Mr K. (Infineon) and Mr H. (Renesas)	Recital 110
7th contact	1-8.6.2004	Infineon — Samsung	Mr S. and Mr H. (Infineon) and Samsung employee participating in the ‘Card Show’ trade fair	Recital 116
8th contact	9.9.2004	Infineon — Samsung	Mr D. and Mr L. (Infineon) and Mr K. and Mr G. (Samsung)	Recital 122
9th contact	Around 10.9.2004	Infineon — Renesas	Infineon employee and Renesas employee	Recital 125
10th contact	4.11.2004	Infineon — Samsung	Mr D. (Infineon) and Mr K. and Mr N. (Samsung)	Recital 127
11th contact	31.3.2005	Infineon — Renesas	Mr S. (Infineon) and Mr B. (Renesas)	Recital 130

35 In the original judgment, the Court analysed the 1st, 2nd, 6th, 7th and 11th contacts. In the context of the exercise of unlimited jurisdiction, it is therefore necessary to examine the existence and the content of the six contacts in which the applicant was found to have engaged by the Commission in the contested decision and which were not analysed in the original judgment, namely the 3rd, 4th, 5th, 8th, 9th and 10th contacts.

The third contact, of 6 November 2003, between the applicant and Renesas

36 It is apparent from recital 95 of the contested decision that, in an internal Renesas email, Mr H. indicated that he planned to have dinner with the applicant's marketing manager. It is apparent from the file that, by that email, dated 2 November 2003, Mr H. replied to a colleague's suggestion to check with the applicant the level of its capacities.

37 Furthermore, it is apparent from recital 97 of the contested decision that a dinner took place on 6 November 2003, attended by Mr H. and Mr M., employees of Renesas, on the one hand, and Mr D., an employee of the applicant, on the other, accompanied by a colleague from the applicant's Tokyo (Japan) office. At that dinner, the applicant's employees were reported to have stated that the applicant had experienced 'an upturn in Q4 and flat Q1'. The applicant's employee, Mr D., was also reported to have expressed concerns about the real level of demand in the first quarter of 2004, without being able to substantiate those concerns.

38 It should be noted that the applicant does not dispute the existence of the meeting in question, but claims that the exchanges which took place during that meeting were part of legitimate discussions relating to the conclusion of a licensing agreement and were therefore in accordance with competition law.

39 In that regard, first, it should be noted that the fact that a meeting concerned legitimate discussions does not mean that other subjects could not also have been addressed, at which confidential and commercially sensitive information might have been disclosed.

40 Second, it should be noted, as is apparent from Renesas's internal communication, reproduced in recital 95 of the contested decision, that, on 2 November 2003, Mr H. informed his colleagues that he intended to have dinner with the applicant's marketing manager in the next few days. He also indicated that he hoped to have a clearer picture of capacity levels in the first quarter following that dinner with the applicant.

41 Next, it is apparent from an email sent by Mr H. on 7 November 2003 that Mr H. had in fact dined with the applicant's marketing manager the previous evening, on 6 November 2003. In that email, Mr H. states that the applicant's employee informed him of the state of its sales for the fourth quarter of the current year and his forecast for the first quarter of the following year. The applicant's employee is also reported to have expressed his concerns about the applicant's demand, namely its sales forecasts, in the first quarter of the following year, although he had no information from customers to support this.

42 Furthermore, it is apparent from that internal conversation that that email of 7 November 2003 is a reply to an email from another Renesas employee, Mr L., of 5 November 2003, in which the latter gives his demand forecasts for January and expresses his doubts as to demand for February and March 2004 and asks his colleague, Mr H., for his point of view before taking appropriate decisions to adapt to market demand.

43 It must therefore be held that the information sent by Mr H. in his email of 7 November 2003 concerns the demand situation and, in that context, that the applicant's sales forecasts, which had been communicated to Mr H. by the applicant's representative the day before, were disclosed in that email.

44 Third, in order to challenge the anticompetitive nature of the discussion in question, the applicant relies on extracts from the oral statement of the Renesas employee in question, dated 19 June 2009, which it reproduced in the application and in its observations submitted following the judgment on appeal. According to that statement, during the meeting of 6 November 2003, 'the general market environment in the South Asian region' was '[probably]' addressed.

45 However, it must be observed that that statement, which was produced several years after the discussion, cannot call into question the written report sent by one of the participants in the meeting the day after it was held. That report on the content of the exchange, as reproduced in recital 97 of the contested decision, is not limited to a specific geographical area concerning the applicant's data but, on the contrary, suggests that the information was relevant to Renesas's business decisions, in particular

with regard to customers who were mainly established in Europe, as is apparent from recitals 36 and 37 of the contested decision.

46 Furthermore, it is also apparent from that oral statement that the employee in question did not recall the specific points discussed at the meeting. Therefore, if the market environment in South-East Asia was addressed, which is not, in any event, certain, that does not mean that the state of demand in Europe was not also addressed.

47 Fourth, contrary to what the applicant claims, the fact that the applicant's employee was unable to back up his concerns with information from customers has no bearing on the assessment of the veracity and sensitivity of that information. Since Mr D. was the 'Smart Card marketing' manager within the applicant, the very fact that he acknowledged, in November 2003, that he had no information based on exchanges with customers in respect of their orders for the first quarter of the following year may be regarded as highly indicative of the fact that the applicant was indeed having difficulties on the market in question.

48 Moreover, although in the email of 7 November 2003, Mr H., a Renesas employee, stated that 'this lack of clarity is sometimes a "feature" of [their] business', it must be held, contrary to what the applicant claims, that that sentence refers to the lack of clarity in the picture of the market that undertakings in the industry may have, and not to the information supplied by the applicant's employee. Subsequently in the email, Mr H. gives his recommendation on the strategy to adopt, particularly in the light of the information on the state of the applicant's demand obtained at the meeting of 6 November 2003. Consequently, the applicant is wrong to claim that the information which it gave concerning its demand forecasts was of no interest to Renesas.

49 Fifth, as regards the period concerned by the information exchanged, the applicant submits that the period known as 'Q4' runs from July to September, its tax year ending on 30 September, and that, therefore, the information provided was not up to date. It must be stated that the applicant's arguments are not convincing. As the Commission observes, the exchange of information in question was transmitted in the context of an internal communication within Renesas, in which the period from January to March of the year, namely the first quarter of the calendar year, was referred to as 'Q1'. That is demonstrated, inter alia, by other extracts from Renesas's internal communication, such as the email of 5 November 2003 from Mr L., in which he states that 'the Q1 SC demand looks very strong but still unsure for [February] and March'.

50 Consequently, it must be held that the applicant, by indicating, in November 2003, 'an upturn in Q4 and flat Q1', gave information to Renesas as to its forecasts for current demand, in the fourth quarter, namely from October to December 2003, and for future demand, in the first quarter of the following year, namely from January to March 2004.

51 In that regard, it should be borne in mind that exchanges of information on arrangements relating to future demand constitute commercially sensitive information (see, to that effect, judgment of 9 September 2015, *Samsung SDI and Others* v *Commission*, T-84/13, not published, EU:T:2015:611, paragraph 51).

52 In the present case, in the light of the market characteristics as described by the Commission in recitals 59 to 68 of the contested decision, the applicant's forecasts of future demand constitute information capable of influencing Renesas's conduct. It must be held that, in so far as Renesas was aware of the applicant's forecasts, it was able to anticipate the approach which the applicant would adopt on the market and adapt its own approach accordingly.

53 The Commission was therefore fully entitled to conclude that the contact between the applicant and Renesas of 6 November 2003 was anticompetitive.

The fourth contact, of 17 November 2003, between the applicant and Samsung

54 It is apparent from recital 100 of the contested decision that, on 17 November 2003, a meeting took place in Munich (Germany) between Mr K. and Mr N., Samsung employees, and Mr K., Mr L. and Mr D., employees of the applicant. The existence of that meeting appears to be established by an

internal business trip report of Samsung's employee, Mr K., which is corroborated by a series of emails between Samsung and the applicant between the end of September 2003 and mid-November 2003, and an internal Samsung email concerning steps to book a flight and hire a car for 15 November 2003, in order to travel to Munich on 17 November 2003.

55 The Commission states that, according to Samsung's internal report drawn up by Samsung's employee, Mr K., during that meeting, the applicant communicated to Samsung its forecasts for market developments in 2004. The applicant is reported to have indicated to Samsung that it envisaged a promising market with increasing competition in the second half of 2004, especially in the market for 64 K products, and to have indicated to Samsung its forecasts as to the breakdown of expected sales in the market as a whole. It is reported that the applicant also complained about the fall in prices on the market for 64 K products, on which it was therefore experiencing difficulties. Lastly, according to that report, the applicant gave Samsung information about its production technology and stated, inter alia, that it planned to develop 0.13µm technology, which it would present to the press at the next 'Cartes' trade fair.

56 As regards, in the first place, the existence of the meeting, which the applicant disputes, it should be noted that, contrary to what the applicant claims, the Commission adduced direct evidence of the meeting held between the applicant and Samsung in Munich on 17 November 2003, namely the report of that meeting, drawn up by one of the participants.

57 It is true that the Commission also adduced indirect evidence of that meeting. In this respect, the Court of Justice has had the opportunity to rule on the evidence of anticompetitive practices by a body of evidence. In most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgment of 17 September 2015, *Total Marketing Services* v *Commission*, C-634/13 P, EU:C:2015:614, paragraph 26 and the case-law cited).

58 The principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent (judgment of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraph 37).

59 In the present case, it is apparent from the documents in the case that, in the context of an exchange of emails between the applicant and Samsung between September and November 2003, the two undertakings planned a meeting on 17 November 2003 in Munich, during which it was planned that, inter alia, a smart card market overview in 2004, production technologies and means of stimulating demand for smart card chips from the point of view of the end consumer would be discussed.

60 Moreover, a Samsung internal email, exchanged between Mr K. and Mr N. on 3 November 2003 and mentioned in recital 90 of the contested decision, indicated that a meeting was scheduled with the applicant on 17 November 2003 in Munich. The content of that email shows that Samsung intended to address inter alia the subject of maintaining prices in the context of the meeting with the applicant scheduled for 17 November 2003.

61 It is also apparent from an internal Samsung email, dated 12 November 2003, that a flight from Munich and a hire car to go to Munich were requested by a Samsung employee for that meeting. The hire of the car from 15 to 17 November 2003 is confirmed by a receipt showing Munich as the place to which the car was returned. In this respect, it must be stated that the reservation dates for the hire car and the flights coincide with the date of the meeting.

62 In addition, a table annexed to Samsung's letter to the Commission of 6 September 2013, which sets out the programme of the business trip of Samsung's representative, which was organised in Germany and Paris (France) between 16 and 21 November 2003, indicates that a meeting with the applicant was scheduled for 17 November 2003 between 14.00 and 15.30.

63 In that regard, in so far as the applicant submits that the evidence gathered by the Commission could be explained by the fact that an internal Samsung meeting at Samsung's premises in Munich had been scheduled, it should be noted that such an explanation does not call into question the possibility that

such a meeting took place on the morning of 17 November 2003 and that the meeting between Samsung and the applicant, at the applicant's premises in Munich, took place from 14.00 to 15.30 on that same day, as corroborated, inter alia, by the internal business trip report of the Samsung employee, Mr K. In addition, since the flight from Munich to Paris was booked for the same day at 17.50, Samsung's representative could have met the applicant's representative before travelling to Paris to attend the 'Cartes' trade fair the following day. When questioned specifically in that regard during the hearing, the applicant did not dispute that such a programme was feasible.

64 Moreover, to the extent that the applicant claims that access by Samsung employees to its premises was not recorded by the security services, this argument is not conclusive as to whether such a meeting was held. As the Commission rightly points out, it would not be strange if no written record were kept of the presence of representatives of a competitor when the object of such a meeting is anticompetitive. In this respect, it is appropriate to recall the case-law cited in paragraph 57 above, according to which the existence of a concerted practice must, in most cases, in the absence of direct evidence, be inferred from a number of coincidences and indicia taken together.

65 Lastly, a business trip report, internal to Samsung, drawn up by Mr K., as a participant at the meeting with the applicant, sets out what the applicant is reported to have said during the meeting of 17 November 2003. Although that report was placed in the file only in October 2012, and was not included in Samsung's initial leniency application, it must be pointed out, as the Commission observes, that the information reported therein as having been exchanged at the meeting of 17 November 2003 is similar to that exchanged at an earlier meeting between the applicant and Samsung, which took place on 24 September 2003, in particular regarding forecasts as to the market volume for SIM products in 2004. Thus, the similarity of the information reported following those two contacts makes the existence of the contact of 17 November 2003 and the content of the exchanges relied on by the Commission credible.

66 In so far as the applicant challenges the reliability of the report of the Samsung employee, Mr K., it should be noted that the arguments relied on by the applicant correspond, in essence, to the arguments challenging, in general, Samsung's credibility as a witness and, more particularly, the reliability of the statements and documents drawn up by Samsung's employee, Mr K.; those arguments were rejected in paragraphs 145 to 158 of the original judgment, which was confirmed by the Court of Justice in paragraphs 93 to 101 of the judgment on appeal.

67 It must be concluded that the material analysed in paragraphs 59 to 62 and 65 above constitutes, as a whole, credible evidence that the meeting took place between the applicant and Samsung on 17 November 2003.

68 As regards, in the second place, the anticompetitive nature — which the applicant contests — of the exchange which took place at the meeting of 17 November 2003, it is apparent from the evidence adduced by the Commission in recital 100 of the contested decision that the applicant and Samsung discussed their forecasts on market developments and expected overall sales in 2004 and, in particular, on competition in the 64 K product market and the distribution of overall sales in the market. The applicant is reported to have stated that, according to its forecasts, 70% of future sales on the market would be accounted for by 32 K and 64 K chips. Thus, contrary to the applicant's submission, even if Samsung had at the time considered establishing legitimate technological cooperation relations with, inter alia, the applicant, there is no reference to that technological cooperation in the exchanges of information described above.

69 Thus, it is apparent from the report of the meeting drawn up by the Samsung employee, Mr K., that the applicant complained about the fall in prices on the 64 K product market and indicated that it was facing difficulties on that market. The applicant is moreover reported to have disclosed to Samsung that it would reveal to the press, at the 'Cartes' trade fair due to be held the following day, the fact that it was developing 0.13µm production technology. The applicant is also reported to have indicated that it seldom uses the 'Foundry' production technology.

70 In that regard, it should be noted that the fact that the applicant admits that it was experiencing difficulties and that it was having to struggle against the fall in prices for 64 K chips constitutes

information concerning its current state and its business strategy. It is information that is inherently confidential and commercially sensitive and, therefore, capable of influencing the conduct of its competitor, Samsung, especially since such exchanges took place in a highly concentrated market with few operators.

71 Furthermore, as the Commission notes in recital 100 of the contested decision, the exchange of information at the meeting of 17 November 2003 can be seen as a follow-up or update of the information that had been exchanged at the meeting of 24 September 2003 between the applicant and Samsung, which meeting was found to be anticompetitive in paragraph 166 of the original judgment, a finding that was not called into question by the Court of Justice in the judgment on appeal.

72 In this respect, the circumstances indicated by Samsung's employee, Mr K., in his report, namely that the overall results of the meeting were not considered satisfactory for Samsung, that the applicant was 'very passive to exchange the information' and that there were tensions at the meeting as a result of an 'anti-trust investigation', do not detract from the anticompetitive nature of these exchanges, contrary to what the applicant claims. The information exchanged and which was validated by the applicant, the main market player, was liable to enable Samsung to better assess the market situation and thus to influence its business strategy at the time.

73 Thus, it is apparent from paragraphs 68 to 71 above that the applicant exchanged commercially sensitive information with Samsung at the meeting of 17 November 2003, at least on its strategy in the face of the price decrease in the market for 64 K products.

74 The Commission was therefore fully entitled to conclude that the contact between the applicant and Samsung of 17 November 2003 took place and was of an anticompetitive nature.

The fifth contact, of 18 to 20 November 2003, between the applicant and Renesas

75 It is apparent from recital 98 of the contested decision that, in the context of the 2003 'Cartes' trade fair, which took place in Paris between 18 and 20 November 2003, the smart card chip producers participating in that fair met bilaterally to discuss the market for 2004 and to exchange commercially sensitive information.

76 Moreover, it is apparent from recital 102 of the contested decision that a bilateral meeting between the applicant and Renesas took place during the 2003 'Cartes' trade fair, at which those companies are reported to have exchanged information on their capacities. The Commission relies on the statement of a Renesas employee, Mr D., on the meeting he reportedly had with the applicant at that fair. It further relies on a report drawn up by Renesas, following its participation in the 2003 'Cartes' trade fair, which was circulated within that company by an email of 26 November 2003, sent by Mr H. It emerges from that report that the applicant is reported to have indicated to Renesas that its capacity for the fourth quarter of 2003 and the first quarter of 2004 was in the order of 90%.

77 As regards, in the first place, the existence of a bilateral contact between the applicant and Renesas during the 'Cartes' trade fair in 2003, contact which is disputed by the applicant, it should be noted that it is apparent from a Renesas internal email of 26 November 2003, reproduced in recital 98 of the contested decision, that Mr H., a Renesas employee, refers to 'meetings with most competitors … including [the applicant]'.

78 Furthermore, the applicant does not, as such, dispute the content of the statement of the Renesas employee, Mr D., which it reproduces itself in the context of its observations following the judgment on appeal, claiming that it is imprecise. It is apparent from that statement, reproduced by the applicant, that the Renesas employee, 'Mr [D.,] does not specifically recall whom from [the applicant] he spoke to at the CARTES Show' and that 'this discussion took place either at Renesas' or [the applicant's] stand'. In addition, the Renesas employee, Mr D., stated that he recalled that the discussion with the applicant related 'to the demand and supply situation' and that '[the applicant] disclosed that it was running almost at full capacity'.

79 It is apparent from the items of evidence set out in paragraphs 77 and 78 above, taken together, that Mr D. admitted the existence of contact with the applicant and that the information that he reports to

have been exchanged at the 'Cartes' trade fair corresponds to that listed in the report drawn up following that fair and which is attached to the internal email sent by Mr H. on 26 November 2003, that is to say, only a few days after the fair, in which report he states that he met the applicant. Thus, the Commission was entitled to conclude that there was contact between the applicant and Renesas during the 2003 'Cartes' trade fair which took place between 18 and 20 November 2003.

80 As regards, in the second place, the anticompetitive nature of the meeting, it must be stated that the information set out in the report of Mr H., a Renesas employee, on his meetings at the 2003 'Cartes' trade fair, concerns, in the applicant's case, production capacities, migration to new technologies and the state of the market.

81 First, as regards the information on the migration by the applicant to 0.13µm production technology, it should be observed that, as the applicant claims in paragraph 118 of the application, that information had already been made public in one of its press releases, of 8 August 2002, in which it was stated that the applicant and the company AC had signed a cooperation agreement to develop that technology. Moreover, it should be observed that, in recital 102 of the contested decision, the information disclosed by the applicant regarding its migration to 0.13µm technology is not regarded as anticompetitive.

82 Second, it should be noted that Renesas's report, referred to in paragraph 80 above, contains detailed information on the applicant's current and future production capacities, namely that its capacity rate for the fourth quarter of 2003 and the first quarter of 2004 was around 90%.

83 While it is true that the Renesas report does not expressly state that the information concerning the applicant was disclosed by the applicant, it should be recalled that, in the internal email of 26 November 2003 to which that report was annexed, Mr H. stated that he had met the applicant and that, in Mr D.'s statement, referred to in paragraph 78 above, that Renesas employee indicated that he had met the applicant and that the applicant had stated that it was operating at almost full capacity.

84 In addition, in so far as the applicant claims that that information was already public, having in particular been disclosed during a telephone call with investors on 10 November 2003, the transcript of which it provides, that argument must be rejected. Thus, in the transcript of that telephone call, it is reported that 'utilization rates are pretty high', that 'currently[,] internal capacity for advanced logic is almost fully utilized' and that 'for power semiconductor products utilization varies … between 70 and 100 percent, so on average 85 percent …'. It is apparent from the transcript of that telephone call that the applicant provided, in vague terms, information corresponding to its overall capacity level and for the production of power semiconductor products. It did not provide information on its level of capacity for smart card chips.

85 In the context of a market such as that for smart card chips, which is highly concentrated in terms of both supply and demand, and characterised by a sustained fall in prices under the pressure exerted by customers, information on a producer's capacity rate, particularly when it is the largest producer on the market, confirmed by the producer itself, is capable of influencing competitors' pricing decisions. In the present case, as the Commission rightly observes in recital 102 of the contested decision, that information was important for Renesas, in so far as it enabled that company not to reduce its prices.

86 Furthermore, it should be noted that the information given by the applicant to Renesas on its capacity is similar to that given to Samsung at the meeting of 24 September 2003, which meeting was found to be anticompetitive in the original judgment and the judgment on appeal (the original judgment, paragraph 166).

87 It should be pointed out, as the Commission observes, that it is apparent from paragraph 166 of the original judgment that exchanges of commercially sensitive information between producers of smart card chips concerning production capacities constitute a restriction of competition by object.

88 Consequently, the Commission was entitled to conclude that the contact between the applicant and Renesas which took place between 18 and 20 November 2003 at the 2003 'Cartes' trade fair was anticompetitive.

The eighth contact, of 9 September 2004, between the applicant and Samsung

89 According to recital 122 of the contested decision, on 9 September 2004, two employees of the applicant and employees of Samsung met in Munich and discussed sales of smart card chips in 2004, their forecasts for the market for mobile phone chips, known as 'SIM chips', in 2005, production capacities and actual production. The Commission relies on the notes taken by the Samsung employee, Mr K., at or following the meeting.

90 It is apparent from the notes of the Samsung employee, Mr K., that, after exchanging views on the chip market in 2004 and forecasts for 2005, the applicant stated that it had recently reduced sales of 16 K products. The applicant is also reported to have indicated that it had refused to supply those products to major customers during the fourth quarter of 2004 and that it was therefore envisaged that customers would turn to Samsung for those products.

91 Moreover, it is apparent from the notes of the Samsung employee, Mr K., that the applicant envisaged a significant price drop, at least for 64 K products.

92 With regard to stocks and production capacities, it is apparent from the notes of the Samsung employee, Mr K., that the applicant's employees reportedly indicated that in the third and fourth quarters there had been duplicate orders, which would have to be cancelled. Those employees are reported to have stated that, despite that situation, the applicant did not have a large quantity of stock at that time. However, they reportedly indicated that they forecast oversupply for the first quarter of 2005, in particular in China, due to the possibility of a decrease in demand for 16 K products.

93 The applicant does not dispute the existence of a meeting between two of its employees and representatives of Samsung on 9 September 2004, but the content of that meeting as found by the Commission. Thus, it claims that it was an informal meeting in which Samsung attempted to recruit its employees and disputes the probative value of the evidence on which the Commission relied. In addition, it argues that the information in question was not commercially sensitive or was publicly available. In any event, on the assumption that the applicant's employees had revealed confidential and commercially sensitive information, they would have been acting *ultra vires*.

94 First, it is necessary to reject, for the same reasons as those set out in paragraph 66 above, the applicant's argument calling into question the credibility of the Samsung employee, Mr K., and the reliability of his notes.

95 Second, as regards the nature of the information exchanged, it should be observed, in the light of the notes of the Samsung employee, Mr K., that the applicant informed Samsung of its commercial strategy regarding sales to major customers of 16 K products during the fourth quarter of the current year, and of the action that it was going to take on duplicate orders. In addition, it indicated its forecasts on future price developments, in particular with regard to 64 K products.

96 As was established in paragraph 174 of the original judgment and paragraphs 157 and 158 of the judgment on appeal, exchanges of information concerning price forecasts, future sales and current and future production capacities between competitors constitute a restriction of competition by object.

97 In so far as the applicant submits that the information exchanged concerning its commercial strategy, the reduction of its sales of 16 K products, its refusal to sell those products to major customers, and the forecasts of its stock levels were common knowledge and not surprising for Samsung, those arguments must be rejected.

98 It is true that the market studies and press releases submitted by the applicant had highlighted the decreasing price trend for 16 K products for 2002 and 2003 and the arrival of 128 K products which certain producers had started to mass-produce. However, this material does not show that Samsung was already aware of the applicant's decision to refuse to supply 16 K products in the fourth quarter of 2004 to major customers. Nor does it prove that the commercial strategy which the applicant was going to pursue regarding duplicate orders and the situation of its stocks were known.

99 Furthermore, the market study relied on by the applicant, dated 8 August 2003, indicates that the price reductions for 16 K products would be offset by higher prices for 32 K and 64 K products, demand for

which was expected to increase. However, the applicant specifically indicated to Samsung that it expected significant price reductions in the 64 K product market and oversupply.

100 In addition, even if that information were not surprising for Samsung, it should be noted that, in a market as concentrated as that for smart card chips, the fact that information is not surprising for a competitor does not in any way detract from the anticompetitive nature of the exchange where the information is commercially sensitive and the exchange is capable of influencing the competitor's conduct. In the present case, the information that the applicant had decided to reduce and target its sales of 16 K products, that it had no surplus stocks and that it anticipated oversupply during the following quarter, and significant price reductions for 64 K products, must be regarded, in a concentrated market such as that in the present case, as being capable of influencing Samsung's commercial and pricing strategy.

101 Third, as regards the applicant's alternative argument, which it reiterated during the hearing, that even if commercially sensitive information had been exchanged with Samsung, *quod non*, its employees would have been acting *ultra vires* as the applicant did not give them any instructions in this respect, that argument cannot be upheld.

102 It is apparent from the case-law that an undertaking, as an economic unit comprising personal, tangible and intangible elements, remains liable for the actions of its employees, even if they act in breach of the instructions given to them (see, to that effect, judgment of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008 :254, paragraphs 429 to 431).

103 Consequently, the fact that the exchange of information took place at an informal meeting, during which Samsung tried to recruit the applicant's staff, has no bearing on the anticompetitive nature of the exchange, since Mr D. and Mr L. were still employees of the applicant at the time of the meeting.

104 Fourth, with regard to the applicant's arguments, which are based on differences in the text of the translations of the report of the meeting of 9 September 2004, which was drawn up by the Samsung employee, Mr K., it should be noted that the differences raised by the applicant relate only to the details of the incident concerning the orders which were reportedly duplicated. Those differences therefore have no effect on the anticompetitive nature of the other information exchanged during the contact of 9 September 2004, as described in paragraphs 89 to 92 above.

105 Those translation differences do not concern the information that the applicant had recently reduced sales of 16 K products, refusing to supply those products to major customers in the fourth quarter of 2004, the information concerning the applicant's capacities and growth forecasts for 2005, or the information concerning the sharp price falls on the market for 64 K products. Consequently, the exchange between the applicant and Samsung on 9 September 2004 was still of an anticompetitive nature, despite the translation differences noted by the applicant.

106 In addition, the reference to orders reported as having been duplicated is found in the third paragraph of the different versions of the report, although the corrected translation seems to be slightly more detailed. Accordingly, in the different versions of the text of the report of the meeting of 9 September 2004 to which the applicant draws attention, reference is made to discussions on sensitive information of the applicant concerning its situation with regard to surplus stocks of 16 K products and its plans to deal with them.

107 Accordingly, it must be concluded that the Commission was right to find that the contact between the applicant and Samsung on 9 September 2004 was anticompetitive.

The ninth contact, of around 10 September 2004, between the applicant and Renesas

108 It is apparent from recital 125 of the contested decision that, in a Renesas internal email of 10 September 2004, the subject matter of which is 'Hot News', the Renesas employee, Mr D., drew up a report of forecasts on demand and supply in the smart card chip market for 2005. The Renesas employee, Mr D., stated that that report was drawn up on the basis of meetings with three customers that reportedly took place during the current week and on recent discussions with the applicant, another producer and Samsung. As regards supply, the Renesas employee, Mr D., stated that, following a

request for a price reduction made by one of their largest customers, another producer and Samsung agreed to reduce their prices in order to increase their market rate, whereas the applicant adopted a more wait-and-see position.

109 As regards the existence of that contact, which the applicant disputes, the applicant claims that the evidence on which the Commission relies does not show that it had directly communicated information on its pricing strategy. According to the applicant, that information could have been obtained from other public sources or from the customer itself.

110 It should be noted that the evidence on which the Commission relies in relation to the contact of around 10 September 2004 between Renesas and the applicant consists of two Renesas internal emails, dated 10 September 2004, sent by the Renesas employee, Mr D., and an oral statement of that Renesas employee, Mr D., submitted by Renesas in the context of its application under the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).

111 The first email of 10 September 2004, the subject matter of which is 'Confidential-Discussion with Samsung-Mr K. …', contains information and indications on the capacity levels of Samsung, one other producer and Renesas in 2004, on market forecasts for 2004 and 2005, and on Samsung's pricing policy intentions towards customer A in 2005. In addition, it is stated that 'apparently' the applicant agreed to reduce its prices for that customer, but to a more reasonable extent.

112 The second email of 10 September 2004, the subject matter of which is 'Hot News', refers (i) to meetings in that week with three customers, including A, and (ii) to 'recent discussions with [the applicant, another producer] and Samsung'. The Renesas employee, Mr D., reports in that email on market forecasts and demand for 2005 resulting from discussions and recent contacts which he states that he had with other undertakings, including the applicant, as well as information on the applicant's position regarding its pricing policy for 2005 also vis-à-vis customer A.

113 In the oral statement of the Renesas employee, Mr D., the latter stated that information relating to the applicant was obtained 'most likely' from Samsung.

114 First, it must be stated that, in the first email of 10 September 2004, the subject matter of which is 'Confidential-Discussion with Samsung-Mr K. …', the Renesas employee, Mr D., states that the information to which he refers and some of which concerns the applicant is sensitive and confidential and was obtained from the Samsung employee, Mr K., during a discussion with him. It is thus clearly apparent from that email that the information concerning market forecasts for 2004 and 2005, and the applicant's pricing intentions with regard to customer A, were in fact obtained from Samsung, and not from the applicant.

115 Second, in the second email of 10 September 2004, the subject matter of which is 'Hot News', the Renesas employee, Mr D., refers to 'recent discussions with, [among others, the applicant]'. It is true that it is apparent from that wording that a discussion had recently taken place between Renesas and a representative of the applicant. However, as the applicant rightly submits, it cannot be inferred from that communication that sensitive information, such as information concerning the applicant's intention to adopt a wait-and-see approach towards customer A, was given directly by the applicant to Renesas.

116 Third, as regards the oral statement of the Renesas employee, Mr D., the latter states that the information on the applicant's pricing intentions for customer A was 'most likely' obtained from the Samsung employee, Mr K. He then states that he seems to recall 'that information about [the] more "wait-and-see" attitude in the [A] contract negotiations, which was slightly different from the information previously disclosed by [the Samsung employee,] Mr [K.], was passed to him by Mr [B.]', another Renesas employee.

117 In that regard, it must be noted that the wording of the recollections of the Renesas employee, Mr D., does not indicate that the information on the applicant's approach towards customer A was communicated to him directly by the applicant. Rather, it is apparent from the statement of the Renesas employee, Mr D., that, in his view, that information was communicated to him either by Samsung or by Mr B., a Renesas employee, without any information being given as to how Mr B. might have obtained the information in question.

118 In addition, it should be noted that two types of information on the applicant's pricing intentions with regard to customer A were communicated to Renesas. It is apparent from the first email of 10 September 2004, the subject matter of which is 'Confidential-Discussion with Samsung-Mr K. …', that the Samsung employee, Mr K., stated to the Renesas employee, Mr D., that '[the applicant] also agreed to reduce [its] price at [A], but in a much more reasonable magnitude'.

119 Moreover, in the email of 10 September 2004, the subject matter of which is 'Hot News', the Renesas employee, Mr D., reports information which differs slightly from that in the first email. In that second email, the Renesas employee, Mr D., reports that the applicant indicated that it was adopting a 'more wait-and-see [position]' in its pricing strategy with respect to customer A.

120 It is apparent from the oral statement of the Renesas employee, Mr D., that he 'believes that information about [the] more "wait-and-see" attitude in the [A] contract negotiations, which was slightly different from the information previously disclosed by [the Samsung employee,] Mr [K.], was passed to him by Mr [B.]', a Renesas employee.

121 However, there is no indication of how Mr B. obtained the information in question, which is set out in the second email of 10 September 2004. Admittedly, it cannot be ruled out that the information in Mr B.'s possession was obtained directly from the applicant. However, in view of the slightly different but more precise information on the applicant's pricing policy with regard to customer A, which emerges from the first email of 10 September 2004, nor can it be ruled out that the information in question was provided to Renesas by Samsung. Moreover, in so far as the Renesas employee, Mr D., also mentions a meeting that same week with the customer A in question, it cannot be ruled out that the information on the applicant's pricing intentions was transmitted by the customer in question in the context of the negotiations with Renesas.

122 In any event, it is apparent from paragraphs 111 to 121 above that the evidence relied on by the Commission is somewhat inconsistent both as regards the alleged source of the information concerning the applicant and as regards the content of that information. In those circumstances, the probative value of that evidence can only be reduced.

123 The applicant, for its part, submits that the information contained in the emails of 10 September 2004 was in the public domain. In that regard, it should be noted that some of the evidence submitted by the applicant may corroborate, inter alia, that certain forecasts on the development of the applicant's market rate for 2005 could have been based on information which was public in September 2004. However, none of that evidence relates to the applicant's approach towards customer A's request for a price reduction.

124 In the light of the foregoing considerations, it must be concluded that the Commission has not proved to the requisite legal standard the existence of anticompetitive contact between the applicant and Renesas around 10 September 2004.

The 10th contact, of 4 November 2004, between the applicant and Samsung

125 In recital 127 of the contested decision, the Commission, relying on notes from the Samsung employee, Mr K., observed that, on 4 November 2004, during the 2004 'Cartes' trade fair, the applicant and Samsung met in Paris and were reported to have exchanged information on their expected sales levels for 2004, their sales forecasts for 2005 and their production capacities for SIM chips, and to have discussed the risks of competition by undertaking E on the prices of low-end products in the market.

126 It is apparent from the report drawn up by the Samsung employee, Mr K., on the meeting of 4 November 2004 with the applicant that the two undertakings discussed sales forecasts for 2004 and 2005 at that meeting. The applicant was reported to have indicated to Samsung that it planned to sell up to 300 million product units.

127 The notes of the Samsung employee, Mr K., further report that the two undertakings also exchanged information on production capacity for SIM products, the applicant informing Samsung that its '8 inch Wafer capability is 14K for SIM cards, and it is expected that Infineon would achieve 25% higher

capacity by the mass production of SL66PE (0.22u Shrink) products starting in the 1st quarter'. It is apparent from those notes that the applicant also stated that it 'ha[d] no plans to build extra capacity', but that it was planning to build 'Fab + COB [capacity]' in China, while refusing to disclose more.

128 It is further apparent from the report of the Samsung employee, Mr K., that, with respect to price competition exerted by E, the applicant, responding to Samsung's concern, stated that, although it 'was worried about price competition in low-end markets, it expected that it would be very hard, for a while, for [E] to increase its market share', that it 'had the opinion that the bottleneck situation of COB capability would be maintained for a while' and that it 'was aware that [E]'s products have a weakness in mass production'.

129 The applicant does not dispute the existence of that contact, but calls into question its anticompetitive nature.

130 In that regard, it should be noted, as the applicant has done, that the appearance of undertaking E on the market was known in the industry, as is apparent in particular from a press article from 2001 submitted by the applicant. However, it must be stated that the 2001 press article merely provides information on the market entry of undertaking E, planned for 2002. Furthermore, the report of consultant F, to which the applicant refers, which discusses the strong growth of company E during 2004, is from 2005 and had therefore not yet been published on the date of the meeting.

131 Consequently, the applicant has not succeeded in demonstrating the public nature of the information it gave to Samsung, according to which, although it was concerned about price competition exerted on low-end products, it considered that it would be difficult for undertaking E to increase its market share in the short term. That information concerning a third party, company E, was commercially sensitive since it related to the latter's lack of production capacity. In addition, in so far as the applicant's opinions could reveal the strategy which it intended to adopt in the face of competition from company E, they were capable of having an influence on Samsung's conduct on the market.

132 Furthermore, it should be noted that the fact that the applicant was producing SL 66PE products was public information on 4 November 2004, in particular because of its press release of 2 September 2004 in which it announced the production of a new category of products, the '66P Enhanced' products. However, it must be stated that the fact that, as a result of that new production, the applicant intended to achieve a 25% increase in capacity in the first quarter of 2005 was information which was not apparent either from the press release of 2 September 2004 or from the documents to which the applicant refers.

133 It must therefore be held that the applicant and Samsung exchanged confidential information in relation to their current and future capacity levels, to a competing third party and to their future sales levels. That is commercially sensitive information, the exchange of which constitutes a restriction of competition by object. The fact that Samsung collected that information and distributed that report internally is an indication that that information was taken into consideration when that undertaking decided upon its commercial strategy.

134 The applicant's arguments do not call that finding into question.

135 First, the fact that, according to the applicant, it 'was well aware of the sensitivity of certain data' and that, furthermore, Samsung's employee, Mr K., indicated that it was 'hard to believe' the applicant's statements does not affect the existence and anticompetitive nature of the exchange of information. The fact that the applicant decided not to disclose further details as regards its plans to increase its production capacity in China does not alter the fact that it provided Samsung with that confidential information and, in so doing, gave indications as to its future capacity.

136 Second, in so far as the applicant's arguments dispute, in general, the reliability of the notes of the Samsung employee, Mr K., they must be rejected for the same reasons as those set out in paragraph 66 above. In addition, the Court must reject the applicant's argument that it is apparent from that document that the recollections of the Samsung employee, Mr K., are fallible, which would reduce the reliability of that item of evidence. The report in question was drawn up at the time of the meeting by

the Samsung employee, Mr K., who was present at the meeting. Consequently, that report is reliable and has high probative value.

137 Third, as regards the argument that some of the meetings that took place during the 2004 ‘Cartes’ trade fair were public, it must be held that that factor is irrelevant to the analysis of the contact between the applicant and Samsung. It is stated in the report of the Samsung employee, Mr K., drawn up at the time of or shortly after the meeting that the meeting was held in the restaurant of a hotel, at which two of the applicant’s employees, including Mr D., and two Samsung employees, Mr K. and Mr N., were present. Thus, it is apparent from the report that only four persons were present at the meeting held in a restaurant in the margins of the 2004 ‘Cartes’ trade fair. It is therefore wrong to assume, as the applicant does, that the information contained in the report was obtained at a public round table discussion.

138 Fourth, as regards the argument that Samsung already knew, as a customer of the applicant, certain information relating to the applicant’s current and future capacities, it must be stated that the applicant has not adduced evidence to show that Samsung had such information. Similarly, the applicant does not adduce evidence to show that Samsung was entitled to receive that information, since it is not apparent from the notes of the report of the meeting of the Samsung employee, Mr K., that the meeting took place in the context of the supplier-customer relationship between the applicant and Samsung.

139 Accordingly, the Commission was right to find that the contact between the applicant and Samsung on 4 November 2004 was anticompetitive.

Conclusion on whether the six contacts not examined in the original judgment took place and were anticompetitive

140 It is apparent from the above analysis of the six contacts not examined in the original judgment, namely the 3rd, 4th, 5th, 8th, 9th and 10th contacts, set out in the table in paragraph 34 above, that the Commission was entitled to conclude in the contested decision that the applicant participated in at least five of those six bilateral contacts, and that those five contacts were anticompetitive.

141 However, the Commission has not succeeded in proving to the requisite legal standard the existence of one of the alleged anticompetitive contacts, namely the ninth contact, between the applicant and Renesas around 10 September 2004.

142 Accordingly, it must be found, in the context of the exercise of the Court’s unlimited jurisdiction, that a total of only 10 anticompetitive bilateral contacts were established between the applicant, Renesas and Samsung between 24 September 2003 and 31 March 2005.

The level of the reduction in the fine imposed on the applicant

143 In the contested decision, for the purposes of calculating the basic amount of the fine, the Commission considered that it was necessary to take into account a multiplier for the gravity of the infringement at issue of 16% of the value of sales taken into account. That value was multiplied by a factor of 1.5 on account of the duration of the infringement, namely 18 months and 7 days in respect of the applicant. Lastly, an amount corresponding to 16% of the value of sales was added as an additional amount for the purposes of deterrence (recitals 405 to 420 of the contested decision).

144 The Commission then granted the applicant a 20% reduction in the amount of the fine on the basis that it was responsible for the infringement at issue only in so far as it participated in collusive arrangements with Samsung and Renesas, and not with Philips, and because it had not been shown that the applicant was aware of the cartel contacts between the other participants in the cartel (recitals 423 to 425 of the contested decision).

145 As a preliminary point, it should be noted that, in the judgment on appeal, the Court of Justice upheld the original judgment as regards the rejection of the applicant’s first five pleas in law in so far as they challenged the legality of the contested decision.

146 In the judgment on appeal, the Court is requested, following the referral of the case back to the Court, to analyse, in the exercise of its unlimited jurisdiction, the proportionality of the fine imposed on the applicant in the light of the latter's arguments challenging the amount of that fine and, where appropriate, the number of contacts in which the applicant participated during the infringement.

147 In that regard, as was recalled in paragraphs 26 and 27 above, in the exercise of its unlimited jurisdiction, the Court is bound to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement, irrespective of the analysis carried out by the Commission in the contested decision.

148 It is in the light of the foregoing considerations that it is appropriate to examine the two complaints raised by the applicant challenging the amount of the fine imposed on it, and which allege (i) infringement of the 2006 Guidelines and (ii) breach of the principles of equal treatment and proportionality.

The first complaint, relating to infringement of the 2006 Guidelines

149 In essence, the applicant challenges the application of a uniform gravity multiplier of 16%.

150 It should be recalled at the outset that the 2006 Guidelines set out rules of practice from which the Commission may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. However, they cannot bind the Courts of the European Union in the same way, in so far as they do not propose to apply a specific method of setting the amount of fines in the exercise of their unlimited jurisdiction, but consider case by case the situations before them, taking account of all the matters of fact and of law relating to those situations (judgment of 30 May 2013, *Quinn Barlo and Others* v *Commission*, C-70/12 P, not published, EU:C:2013:351, paragraph 53).

151 In this respect, it should be recalled that, under point 23 of the 2006 Guidelines, for the most harmful restrictions, the proportion of the value of sales taken into account will generally be set 'at the higher end of the scale', which is provided for in point 21 of those guidelines and ranges from 0 to 30%. Thus, it has been recognised that, in the case of the most harmful restrictions, this rate should, at the very least, be above 15% (judgment of 16 June 2011, *Ziegler* v *Commission*, T-199/08, EU:T:2011:285, paragraph 141).

152 Furthermore, it must be noted that the judgment on appeal made definitive the finding in the original judgment that the gravity multiplier of 16% could be lawfully applied by the Commission to all the undertakings participating in the infringement, including the applicant.

153 It follows from paragraph 210 of the judgment on appeal that, in accordance with the case-law and having regard to point 23 of the 2006 Guidelines, a gravity multiplier of 16% may be warranted, in the present case, in view of the very nature of the infringement at issue. In that regard, the Court of Justice validated the General Court's classification of the infringement at issue as one of the most harmful restrictions of competition for the purpose of that point 23 and its finding that the rate of 16% is one of the lowest rates on the scale of penalties prescribed for such infringements under those guidelines.

154 Furthermore, it should be recalled that, in paragraphs 175 to 178 of the judgment on appeal, the Court of Justice also upheld the General Court's finding that the applicant, on account solely of its bilateral contacts with Samsung and Renesas, participated in the infringement at issue, namely a single and continuous infringement, but that liability for that infringement as a whole could not be attributed to the applicant.

155 In addition, the Court has already held that the fact that one of the participants did not attend all the cartel meetings during the infringement period found in its case is irrelevant to the setting of the rate for gravity, or indeed to the additional amount applied for deterrence, where it has been established that it had participated continuously in the infringement (judgment of 15 July 2015, *Fapricela* v *Commission*, T-398/10, EU:T:2015:498, paragraph 273).

156 Thus, it should be recalled that, in the present case, the applicant participated in practices of exchanging pricing information and other commercially sensitive information which constitute a

serious infringement in themselves, especially since the infringement committed covered the whole of the EEA. Furthermore, the market for smart card chips is a highly concentrated market, featuring a small number of competitors, the applicant being the largest supplier on that market.

157 In addition, it should be borne in mind that the applicant had anticompetitive contacts with two of the three main competitors involved in an infringement, which is of not insignificant gravity in the light of the context of the infringement.

158 Accordingly, the first complaint, challenging the application of a gravity multiplier of 16% to all the cartel participants, must be rejected as unfounded.

The second complaint, alleging breach of the principles of equal treatment and proportionality

159 In essence, the applicant invokes the principles of equal treatment and proportionality and relies on the limited number of contacts in which it participated in order to complain that it has to bear the highest fine.

160 As a preliminary point, it should be borne in mind, as the Court of Justice observed in paragraph 199 of the judgment on appeal, that according to the case-law of the Court of Justice, the Commission may take into account the relative gravity of the participation of an undertaking in an infringement and the particular circumstances of the case when assessing the gravity of the infringement within the meaning of Article 23 of 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), or when adjusting the basic amount of the fine in the light of mitigating and aggravating circumstances (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 104 and 105).

161 Accordingly, in view of the finding in paragraph 158 above that the Commission was entitled to apply a gravity multiplier of 16% for all the undertakings participating in the infringement, it must be examined, for the purposes of assessing the proportionality of the fine, whether the applicant's individual participation in the infringement was adequately taken into account in the determination of the adjustments to the basic amount.

– *The complaint alleging breach of the principle of equal treatment*

162 At the outset, it is appropriate to recall the settled case-law according to which the principle of non-discrimination or equal treatment, which constitutes a fundamental principle of EU law, prohibits not only comparable situations from being treated differently but also different situations from being treated in the same way, unless such difference in treatment is objectively justified (see judgment of 16 June 2011, *Team Relocations and Others* v *Commission*, T-204/08 and T-212/08, EU:T:2011:286, paragraph 81 and the case-law cited).

163 Furthermore, it should be noted that the Court of Justice confirmed, in paragraph 209 of the judgment on appeal, the General Court's finding that the fact that the applicant was fined more heavily than the other undertakings participating in the infringement could be justified by the size of its turnover compared with that of the other undertakings participating in the cartel.

164 Furthermore, in the present case, it must be stated that, although the Commission applied a uniform gravity multiplier to all the undertakings which participated in the cartel, it also took account of the applicant's individual participation by granting it, unlike the other undertakings participating in the infringement, a reduction of 20% of the amount of the fine.

165 Consequently, the complaint alleging breach of the principle of equal treatment must be rejected as unfounded.

– *The complaint alleging breach of the principle of proportionality by reason of the amount of the fine imposed by the Commission*

166 The present complaint must be examined in particular in the light of the number of anticompetitive contacts in which the applicant participated as found by the Commission and validated by the Court.

167 It is necessary to recall at the outset the case-law cited by the Court of Justice in paragraph 205 of the judgment on appeal according to which each case must be analysed on the basis of the factual circumstances of the case at hand and that relevant factors other than the exact number of contacts may be decisive in the taking into account of an undertaking's individual participation for the purposes of calculating the amount of the fine (see, to that effect, judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 277).

168 Moreover, according to the case-law relating to the determination of the amount of fines, recalled in paragraph 196 of the judgment on appeal, it is necessary to take account of the duration of the infringement and of all the factors capable of affecting the assessment of its gravity, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the European Union (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 56 and the case-law cited).

169 It is also settled case-law that the factors making it possible to determine the amount of the fine include the number and intensity of the incidents of anticompetitive conduct (see, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 57 and the case-law cited).

170 However, as the Court of Justice recalls in paragraph 198 of the judgment on appeal, there is no binding or exhaustive list of criteria to be taken into account when assessing the gravity of an infringement (judgment of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 54; see, also, judgment of 13 June 2013, *Versalis* v *Commission*, C-511/11 P, EU:C:2013:386, paragraph 82 and the case-law cited).

171 Furthermore, the Court of Justice stated in paragraph 211 of the judgment on appeal that one of the circumstances which the General Court had to take into account in its examination of the amount of the fine was whether that amount was commensurate with the number of contacts. Thus, according to the Court of Justice, the General Court must assess, in particular, whether the limited number of contacts would warrant a reduction of the fine imposed on the applicant exceeding the 20% reduction granted to it on account of mitigating circumstances.

172 Lastly, as is apparent in particular from paragraph 221 of the judgment on appeal, the case was referred back to the Court for it to assess the proportionality of the amount of the fine imposed in relation to the number of contacts found against the applicant, if necessary by examining whether the Commission established the existence of the six contacts on which the Court has not adjudicated.

173 It is in the light of the case-law, cited in paragraphs 167 to 170 above, and in the light of the mandate given by the Court of Justice referred to in the two preceding paragraphs that the General Court makes the following assessment.

174 In the first place, in the present case, it should be noted that the number of anticompetitive contacts is one of the factors to be taken into consideration for the purposes of delimiting the applicant's individual participation in the infringement and calculating the amount of the fine to be imposed for such participation.

175 In that regard, as is apparent from paragraph 142 above, on the one hand, it should be borne in mind that the applicant must be considered to have participated in at least 10 anticompetitive contacts, between 24 September 2003 and 31 March 2005, with Renesas and Samsung. In view of the relatively short duration of the infringement found against the applicant, namely 18 months, it must be observed that the contacts occurred with a certain regularity.

176 On the other hand, 1 of the 11 anticompetitive contacts which the Commission found against the applicant in the contested decision should not be taken into account.

177 As the applicant submits, the number of contacts in which it participated appears to be limited in comparison with a total of 41 contacts in the context of the cartel. It is also lower than the number of anticompetitive contacts found against Samsung, namely 32 contacts, and Renesas, namely 31 contacts, but slightly higher than the number of anticompetitive contacts found against Philips, namely 8.

178 Accordingly, it must be concluded that the number of anticompetitive contacts in which it has been demonstrated that the applicant participated is limited in the context of the cartel and that that number is, in any event, lower than the number of contacts found against it by the Commission in the contested decision.

179 However, it is necessary to take account of other factors which qualify the scope of the relatively limited number of contacts in which the applicant participated.

180 Thus, it should be noted that the applicant met its competitors, Renesas and Samsung, very frequently over an 18-month period, sometimes with several contacts in the same month, especially during the fourth quarter of each year, when negotiations with customers were at their most intense. It must therefore be stated that, over a year and a half, the frequency of the contacts between the applicant and its competitors was particularly high.

181 Furthermore, it must be observed that, even though the applicant participated in only 10 anticompetitive contacts, of the 11 found by the Commission in the contested decision, that number of contacts is nevertheless considerable for a cartel of 18 months' duration, representing 1 contact approximately every 2 months.

182 Moreover, in a market as concentrated as that for smart card chips, in which prices were negotiated on an annual basis, it must be held that the applicant's participation in the cartel with two of the three other participants was rather of an intense nature, even though the applicant was not aware of the contacts between Philips and the other participants. Thus, on the basis of all the relevant circumstances of the present case, the applicant did not play a purely passive role in the cartel and its participation cannot be held to be sporadic for the purposes of the case-law (see, to that effect, judgment of 2 February 2012, *Denka Chemicals* v *Commission*, T-83/08, not published, EU:T:2012:48, paragraphs 254 and 255).

183 In the second place, as was stated in paragraphs 167 and 168 above, in determining the amount of the fines, it is necessary to take account of all the factors capable of affecting the assessment of the infringement.

184 Thus, in the present case, it is also necessary to take account of the nature of the infringement committed and the information exchanged, of the fact that the applicant had anticompetitive contacts with two of the three other undertakings participating in the infringement, of the territory covered and affected by the infringement, of the characteristics of the relevant market, as well as of the size of the applicant and of its position on the market for smart card chips.

185 First, it is apparent from the analysis carried out in paragraphs 36 to 142 above that the information exchanged during five of the six contacts not examined in the original judgment and whose existence must be regarded as established relates, inter alia, to pricing intentions, current and future capacities and to migration to new technologies. Although, admittedly, the scope and the impact of the information exchanged may have varied in intensity during the various contacts, it must be observed that, in such a concentrated market, the information exchanged by the applicant, taken within the whole network of anticompetitive contacts which took place between the cartel participants, may have contributed considerably to reducing uncertainty within the market and, therefore, to distorting normal competition.

186 Moreover, contrary to what the applicant claims, that information is of the same nature as that exchanged during the five other contacts found in the original judgment, the anticompetitive nature of which was not called into question by the Court of Justice in the judgment on appeal. Those contacts were classified as constituting a serious infringement.

187 Second, it should be borne in mind that the applicant cannot be held liable for the infringement as a whole and that it had contacts with only two of the three other cartel participants, but which together covered 59% of the market for smart card chips in 2003 and 2004. Even though the applicant was aware that it was exchanging information capable of restricting competition affecting two thirds of the market, it has not been demonstrated that it participated in contacts with Philips or that it was aware of the existence of contacts between Philips and Samsung and Renesas.

188 Third, it must be borne in mind that the applicant and the two participants with which it had contacts were active throughout the EEA. Accordingly, it must be held that the territory covered by the contacts in which the applicant participated is equivalent to that found in respect of the cartel as a whole. However, the duration of the contacts in which the applicant participated is 18 months, whereas the other participants in the cartel had contacts for 23 months.

189 Fourth, the applicant was, at the time of the infringement, one of the four largest undertakings on the smart card chip market. As is apparent from recital 10 of the contested decision, the applicant was the leading supplier of chips for credit cards, access cards and trusted computing solutions worldwide. Furthermore, as is apparent from recital 404 of the contested decision, the applicant achieved the highest turnover of the four undertakings for sales of the products concerned by the cartel during the duration of the cartel. That turnover was twice that of Renesas, more than three times that of Samsung and more than four times that of Philips. Owing to its size, it could therefore be regarded as the reference supplier on that market.

190 Thus, the applicant's situation is clearly different from that of the applicant in the case which gave rise to the judgment of 7 November 2019, *Campine and Campine Recycling* v *Commission* (T-240/17, not published, EU:T:2019:778, paragraph 408), whose secondary position on the market compared with the other cartel participants was taken into account by the Court when it decided to increase by up to 8% the percentage reduction of the fine on account of mitigating circumstances, whereas the Commission had initially decided to grant a reduction of only 5%.

191 It follows from the foregoing considerations that, when it applied a 20% reduction in the amount of the fine imposed on the applicant on account of mitigating circumstances, the Commission did not take sufficient account of the limited number of anticompetitive contacts in which the applicant participated. In addition, the Commission succeeded in demonstrating only 10 contacts out of a total of 11 anticompetitive contacts which it found against the applicant in the contested decision.

192 Accordingly, even though the applicant's participation in the cartel cannot be classified as secondary, it must be concluded that, in the light of the limited number of contacts in which the applicant participated, the 20% reduction in the amount of the fine on account of mitigating circumstances was not sufficient.

193 Consequently, the complaint alleging breach of the principle of proportionality must be upheld.

Conclusion on the level of the reduction in the fine imposed on the applicant

194 In the light of the foregoing considerations, it must be concluded that, for the purpose of determining the amount of the fine imposed on the applicant, it is necessary to take account of the applicant's participation in at least 10 anticompetitive contacts over an 18-month period, during which it exchanged information, in particular on current and future prices, sales, stock levels, as well as on its current and future production capacity with two of the three other cartel participants, representing a combined market share of 59%, while the applicant itself was the largest supplier in the market for smart card chips.

195 Those elements show that, when the Commission calculated the amount of the fine on the basis of a gravity multiplier of 16% of sales, a value which was multiplied by a factor of 1.5 on account of the duration of the infringement, namely 18 months and 7 days, and increased by an additional multiplier of 16% of the value of sales by way of the additional amount for deterrence, it took into account, in an appropriate manner, the gravity and the duration of the infringement found against the applicant.

196 However, having applied a reduction of only 20% in respect of mitigating circumstances, whereas the applicant participated in only 10 of the 41 contacts found in respect of the cartel as a whole, with two of the three other participants and without being aware of the bilateral discussions between those two participants with the fourth participant in the cartel, the Commission did not properly take into account the applicant's individual participation in the infringement.

197 Consequently, the Court considers it appropriate to grant the applicant's request and, in exercising the unlimited jurisdiction conferred on it by Article 31 of Regulation No 1/2003, to substitute its assessment for that of the Commission as regards the amount of the fine to be imposed on the applicant.

198 Thus, the Court considers that it is appropriate to apply an additional reduction of 5% to the fine imposed on the applicant, compared with the 20% reduction originally granted by the Commission in respect of mitigating circumstances.

199 Accordingly, the Court holds that the total amount of the fine imposed on the applicant must be set at EUR 76 871 600.

Costs

200 Pursuant to Article 219 of the Rules of Procedure, in decisions of the General Court given after its decision has been set aside and the case referred back to it, it is to decide on the costs relating to the proceedings instituted before it and to the proceedings on the appeal before the Court of Justice. Given that, in the judgment on appeal, the Court of Justice reserved the costs, it is for the General Court to decide also on the costs relating to the appeal proceedings.

201 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

202 In the light of the circumstances of the present case, the Court decides that each party must bear its own costs.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

1. **Sets the amount of the fine imposed on Infineon Technologies by subparagraph (a) of the first paragraph of Article 2 of Commission Decision C(2014) 6250 final of 3 September 2014 relating to proceedings under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39574 — Smart Card Chips) at EUR 76 871 600;**

2. **Orders Infineon Technologies and the European Commission to bear their own costs, including those incurred in the original proceedings before the General Court in Case T-758/14, those incurred in the appeal proceedings in Case C-99/17 P and those incurred in the proceedings referred back to the General Court.**

Tomljenović Marcoulli Kornezov

Delivered in open court in Luxembourg on 8 July 2020.

E. Coulon S. Papasavvas

Registrar President

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* Language of the case: English.