Reports of Cases

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

5 October 2020*

(Competition – Agreements, decisions and concerted practices – Administrative procedure – Decision ordering an inspection – Plea of illegality of Article 20 of Regulation (EC) No 1/2003 – Right to an effective remedy – Equality of arms – Obligation to state reasons – Right to the inviolability of the home – Sufficiently serious indicia – Proportionality)

In Case T-249/17,

Casino, Guichard-Perrachon, established in Saint-Étienne (France),

Achats Marchandises Casino SAS (AMC), formerly EMC Distribution, established in Vitry-sur-Seine (France),

Represented by D. Théophile, I Simic, O. de Juvigny, T. Reymond, A. Sunderland and G. Aubron, lawyers,

applicants,

v

European Commission, represented by B. Mongin, A. Dawes and I. Rogalski, acting as Agents, and by F. Ninane, lawyer,

defendant,

supported by

Council of the European Union, represented by S. Boelaert, S. Petrova and O. Segnana, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2017) 1054 final of 9 February 2017 ordering Casino, Guichard-Perrachon and all companies directly or indirectly controlled by it to submit to an inspection in accordance with Article 20(1) and (4) of Council Regulation (EC) No 1/2003 (Case AT.40466 – Tute 1),

THE GENERAL COURT (Ninth Chamber, Extended Composition),

* Language of the case: French.

Composed of S. Gervasoni (Rapporteur), President, L. Madise, R. da Silva Passos, K Kowalik-Bańczyk and C. Mac Eochaidh, Judges,

Registrar: M. Marescaux, Administrator,

having regard to the written procedure and further to the hearing on 29 January 2020,

gives the following

Judgment

I. Legal framework

1 Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), entitled 'The Commission's powers of inspection', provides:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles [101] and [102 TFEU], as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.'

II. Background to the dispute

2 Casino, Guichard-Perrachon, the first applicant ('Casino'), is the parent company of the Casino group, which is active, in particular, in France, mainly in the food and non-food distribution sector. Its subsidiary, Achats Marchandises Casino SAS (AMC), formerly EMC Distribution, the second applicant, is a referencing centre which negotiates purchasing conditions with suppliers to the Casino group's retail chains in France.

3 Having received information about exchanges of information between the first applicant and other undertakings or associations of undertakings, notably Intermarché, a company also active in the food and non-food distribution sector, the European Commission on 9 February 2017 adopted Decision C(2017) 1054 final ordering Casino, Guichard-Perrachon and all companies directly or indirectly controlled by it to submit to an inspection in accordance with Article 20(1) and (4) of Regulation No 1/2003 (Case AT.40466 – Tute 1) ('the contested decision').

4 The operative part of the contested decision reads as follows:

'Article 1

Casino …, and all companies directly or indirectly controlled by it, are required to submit to an inspection in relation to their possible participation in concerted practices contrary to Article 101 [TFEU] in the markets for the supply of fast-moving consumer goods, in the market for the sale of services to manufacturers of branded goods and in the markets for consumer sales of fast-moving consumer goods. Those concerted practices consist in:

(a) exchanges of information, since 2015, between undertakings and/or associations of undertakings, in particular ICDC …, and/or its members, in particular Casino and AgeCore and/or its members, in particular Intermarché, concerning discounts obtained by them in the markets for the supply of fast-moving consumer goods in the food products, hygiene products and cleaning products sectors and prices in the market for the sale of services to manufacturers of branded products in the food products, hygiene products and maintenance products sectors, in several Member States of the European Union, notably in France, and

(b) exchanges of information, since at least 2016, between Casino and Intermarché concerning their future business strategies, particularly in terms of product range, development of shops, e-commerce and advertising policy in the markets for the supply of fast-moving consumer goods and in the markets for consumer sales of fast-moving consumer goods, in France.

The inspection may take place in any of the undertaking's premises …

Casino shall grant the officials and other persons authorised by the Commission to conduct an inspection and the officials and other persons authorised by the Competition Authority of the Member State concerned to assist them or appointed by that Member State for that purpose access to all of its premises and means of transport during normal office hours. It shall make available for inspection the books and any other business document, irrespective of the medium on which they are stored, if the officials and other authorised persons so request and shall allow them to examine those books and documents in situ and to take or obtain copies or extracts from those books or documents in any form whatsoever. It shall permit seals to be placed on all the business premises or books or documents throughout the inspection period in so far as that is necessary for the purposes of the inspection. It shall give oral explanations immediately and in situ on the subject matter and the aim of the inspection if those officials or persons so request and shall authorise any representative or member of the staff to provide such explanations. It shall permit those explanations to be recorded in any form whatsoever.

Article 2

The inspection may commence on 20 February 2017 or shortly thereafter.

Article 3

Casino and all companies directly or indirectly controlled by it are the addressees of the present decision.

This decision shall be notified, just before the inspection, to the undertaking to which it is addressed, pursuant to Article 297(2) [TFEU].'

5 Having been informed of that inspection by the Commission, the French Competition Authority made application to the judges of liberty and detention of the tribunaux de grande instance (Regional Courts) of Créteil (France) and of Paris (France) for authorisation to carry out the visit and seizure operations at the applicants' premises. By orders of 17 February 2017, those judges of liberty and detention authorised the visits and seizures requested as a precautionary measure. As none of the measures taken during the inspection required the use of 'enforcement authorities' for the purposes of Article 20(6) to (8) of Regulation No 1/2003, those orders were not notified to the applicants.

6 The inspection commenced on 20 February 2017, when the Commission's inspectors, accompanied by representatives of the French Competition Authority, attended the Paris headquarters of the Casino group and the second applicant's premises and notified the contested decision to the applicants.

7 In the course of the inspection, the Commission, in particular, visited offices, collected material, in particular computer equipment (portable computers, mobile phones, tablets, storage devices), interviewed several individuals and copied the contents of the material collected.

8 The applicants each wrote to the Commission on 24 February 2017, setting out reservations as to the contested decision and the conduct of the inspection carried out on the basis thereof.

III. Procedure and forms of order sought

9 By application lodged at the Court Registry on 28 April 2017, the applicants brought the present action.

10 By document lodged at the Court Registry on 28 July 2017, the Council of the European Union sought leave to intervene in the present proceedings in support of the form of order sought by the Commission. By decision of 22 September 2017, the President of the Ninth Chamber granted leave to intervene. The Council lodged its statement in intervention and the main parties lodged their observations on that statement within the prescribed periods.

11 The applicants claim that the Court should:

– adopt a measure of organisation of procedure ordering the Commission to produce all of the documents and other information on the basis of which it considered on the date of the contested decision that it had sufficiently serious indicia to justify carrying out an inspection at the applicants' premises;

– annul the contested decision;

– order the Commission and the Council to pay the costs.

12 The Commission, supported by the Council, contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

13 On a proposal from the Ninth Chamber of the General Court, the Court decided, in application of Article 28 of the Rules of Procedure of the General Court, to refer the case to the Ninth Chamber, Extended Composition.

14 On a proposal from the Judge-Rapporteur, the Court (Ninth Chamber), in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, requested the Commission to produce a non-confidential version of the indicia of presumed infringements which it had in its possession on the date of the contested decision and asked the applicants to express their views on the indicia produced. The Commission and the applicants complied with those requests within the prescribed periods.

15 In response to the applicants' observations, the Commission requested the Court to adopt a measure of inquiry, as provided for in Article 91 of the Rules of Procedure, ordering it to produce the confidential version of the indicia referred to above, on condition that only the applicants' representatives would have access to that version, in restricted circumstances and against an undertaking of confidentiality specifying that they could not reveal the contents of the confidential version of those indicia to their clients.

16 The applicants' representatives objected to the conditions of access to the indicia proposed by the Commission, maintaining that such undertakings of confidentiality would not allow them to defend their clients fully. They requested the Court to order, in the context of the measure of inquiry at issue, access by at least one employee of each applicant to the documents concerned or production of a non-confidential version in which the redacted data would be limited to data the disclosure of which would enable the undertakings which the Commission had interviewed to be identified and data for which the Commission specifically justified confidentiality and provided a sufficiently precise summary. They also requested the Court to adopt a measure of organisation of procedure asking the Commission to produce evidence that would allow the date of creation and of any amendment of certain of the indicia communicated to be verified. Last, they asked the Court to hold an informal meeting before adopting the measure of inquiry sought, with a view to determining its extent and its terms.

17 By new measures of organisation of procedure, the Court, in the wake of the applicants' criticisms of the indicia produced, put a number of questions to the Commission and asked the applicants to express their views on certain of the Commission's answers. The Commission and the applicants complied with those requests within the prescribed periods.

18 On a proposal by the Judge-Rapporteur, the Court (Ninth Chamber, Extended Composition) decided to open the oral part of the procedure.

19 By document lodged at the Court Registry on 19 December 2019, the Commission submitted a 'supplementary response' to one of its earlier responses to the questions put by the Court. The Court placed that document on the file, without prejudice to its admissibility, and asked the applicants to submit their observations on the document, which they did within the prescribed period, disputing, in particular, the admissibility of the Commission's supplementary response.

20 The parties submitted oral argument and answered the questions put by the Court at the hearing on 29 January 2020.

IV. Law

21 The applicants rely, in essence, on three pleas in law in support of their action. The first plea alleges the illegality of Article 20 of Regulation No 1/2003; the second alleges breach of the obligation to state reasons; and the third alleges breach of the right to the inviolability of the home.

A. First plea: illegality of Article 20 of Regulation No 1/2003

22 The applicants claim that Article 20 of Regulation No 1/2003 is illegal, on the ground that it infringes Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'). In support of this plea, they raise a first complaint, alleging breach of the right to an effective remedy, and a second complaint, alleging breach of the principle of equality of arms and of the rights of the defence.

1. The admissibility of the plea of illegality

23 The Commission contends that the applicants' plea of illegality is inadmissible, on three grounds.

24 First, the Commission, supported by the Council, claims that the first plea is insufficiently precise, since, first, the applicants have not clearly identified which provision of Article 20 of Regulation No 1/2003 is illegal and, second, they have not explained precisely which complaints were directed against that article, which establishes the legal regime applicable to inspection decisions and not the legal regime applicable to the conduct of inspections.

25 Second, according to the Commission, also supported by the Council, the link connecting the contested decision and the act of general application at issue is missing. The applicants have not established how the fact that Article 20 of Regulation No 1/2003, in whole or in part, does not make provision for an appeal against the conduct of an inspection that would entail illegality of an inspection decision, which is a separate act from the acts adopted during the course of the inspection. The Commission further submits, in the rejoinder and following the Council, that the applicants' assertion in the reply that the plea of illegality is directed against Article 20 of Regulation No 1/2003 in its entirety merely confirms the inadmissibility of that plea, since the contested decision is based only on paragraphs 1 and 4 of Article 20. It also observes that no act of secondary law establishes specific judicial remedies, as the remedies are provided for solely in the Treaty.

26 Third, the Commission submits that, in the guise of challenging Article 20 of Regulation No 1/2003, in whole or in part, the applicants are in reality contesting the firmly settled case-law of the General Court and the Court of Justice on the remedies provided for in the Treaty, case-law which allows the conduct of an inspection to be contested only in certain limited situations.

27 As regards the first plea of inadmissibility, it should be borne in mind that, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, applicable to the procedure before the General Court pursuant to the first paragraph of Article 53 of that Statute, and Article 76(d) of the Rules of Procedure, each application is to contain the subject matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law. According to settled case-law, which applies also to pleas alleging illegality (see, to that effect, judgment of 14 July 2016, *Alesa* v *Commission*, T-99/14, not published,

EU:T:2016:413, paragraphs 87 to 91 and the case-law cited), that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to ensure legal certainty and the sound administration of justice, it is necessary, if an application is to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly in the text of the application itself (see judgment of 25 January 2018, *BSCA* v *Commission*, T-818/14, EU:T:2018:33, paragraphs 94 and 95 and the case-law cited).

28 In this case, the applicants have clearly and precisely explained the substance of their two complaints against the contested provision of Regulation No 1/2003, indicating the legal and textual basis, the case-law on which they relied and also the detailed supporting arguments, without there being any need to seek further information. Furthermore, it is apparent from the line of argument which it presented in the defence and in the rejoinder that the Commission was clearly in a position to understand the objections put forward by the applicants.

29 It should be further pointed out that compliance with the requirements for precision and clarity in the plea of illegality is not called into question by the fact, alleged by the Commission, that the provision which is claimed to be illegal (which determines the legal regime applicable to inspection decisions) does not establish the rules criticised by the plea of illegality (which relate to the conduct of inspections) (see, in that regard, paragraphs 35 to 43 below).

30 It should be observed, moreover, that the applicants clearly stated in their pleadings that they were claiming, by way of principal submission, that Article 20 of Regulation No 1/2003 is illegal in its entirety, and they cannot be criticised for not having specified the relevant paragraph(s) of that article. Since it follows from the actual words of Article 277 TFEU that the legality of any 'act of general application' may be challenged by means of a plea of illegality (see, for a plea raised against two regulations, judgment of 13 July 1966, *Italy* v *Council and Commission*, 32/65, EU:C:1966:42, and, for a plea raised against an article of the Rules applicable to other servants of the European Communities, judgment of 30 April 2009, *Aayhan and Others* v *Parliament*, F-65/07, EU:F:2009:43), a party submitting such a plea cannot be required to specify the paragraph of the general act alleged to be illegal on the basis of the formal requirements governing the submission of his plea, although he may be required to do so on the basis of other conditions governing the admissibility of a plea of illegality (see paragraphs 33 and 34 below).

31 The first plea of inadmissibility raised against the plea of illegality (see paragraph 24 above) must therefore be rejected.

32 As for the other two pleas of inadmissibility raised against the plea of illegality (see paragraphs 25 and 26 above), it should be observed, by way of a preliminary point, that they are directed solely against the first complaint put forward in support of the plea of illegality, alleging failure to respect the right to an effective remedy.

33 As regards the first complaint put forward against the plea of illegality, it should be recalled that, according to settled case-law, a plea of illegality raised indirectly under Article 277 TFEU, when the legality of another measure is being challenged in the main proceedings, is admissible only if there is a link between the contested measure and the provision forming the subject matter of the plea. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings. It follows that the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue

with which the action is concerned (see judgment of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 170 and the case-law cited). It also follows from that case-law that there must be a direct legal link between the individual decision being contested and the general measure in question. However, the existence of such a link may be inferred from the finding that the contested decision is essentially based on a provision of the act the legality of which is being contested, even if that act did not formally constitute the legal basis of the contested decision (see judgment of 20 November 2007, *Ianniello* v *Commission*, T-308/04, EU:T:2007:347, paragraph 33 and the case-law cited).

34 It follows that the plea of illegality raised in the present case is admissible only in so far as it concerns the provisions of Article 20 of Regulation No 1/2003 that expressly serve as the basis of the contested decision, namely paragraph 4 of that article (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 57 and 58), but also paragraph 1, which establishes the Commission's general power to carry out inspections ('the relevant provisions of Article 20 of Regulation No 1/2003'). In fact, the present inspection was ordered by a decision adopted on the basis of those provisions and is therefore not an inspection carried out with a simple authorisation without a prior decision (governed by paragraph 3 of Article 20) or an inspection carried out even though the undertaking concerned raises objections (governed by paragraphs 6 to 8 of Article 20).

35 Thus, in the present case, if the relevant provisions of Article 20 of Regulation No 1/2003 were to be declared illegal, the contested decision, which was adopted on the basis of those provisions, would lose all legal basis and would have to be annulled, irrespective of the ground on which those provisions were found to be illegal.

36 It follows that it cannot be inferred from the line of argument put forward in support of both the second and the third pleas of inadmissibility that the first complaint put forward in support of the plea of illegality is inadmissible.

37 In fact, by that line of argument, the Commission, supported by the Council, criticises in essence the absence of a link between the ground of illegality put forward, namely the absence of effective judicial supervision of the conduct of the inspections, and the contested decision, ordering an inspection; it claims, first, that the rules governing judicial supervision of the conduct of the inspection do not form the basis of the contested decision (second plea of inadmissibility) and, second, that such rules are the consequence of the interpretation of Article 263 TFEU established in the case-law and are not required to be included in Article 20 of Regulation No 1/2003, on which the contested decision is based (third plea of inadmissibility).

38 In any event, even on the presumption that the admissibility of a plea of illegality were subject to a link being established between the alleged ground of illegality and the contested decision, such a link could not be considered to be absent in the present case.

39 As the applicants pertinently maintain, it is not as such the acts subsequent to the inspection decision governed by Article 20 of Regulation No 1/2003, relating to the implementation of that decision and to the conduct of the inspection, that are alleged to be illegal. What are being criticised are the lacunae in the remedies permitting a review of those acts and existing from the very adoption of the inspection decision, lacunae which, in the applicants' submission, are attributable to the relevant provisions of Article 20 of Regulation No 1/2003.

40 In the same way as this Court held in the judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission* (T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 50 and 108), concerning the alleged need to obtain judicial authorisation before adopting an inspection decision, the applicants are asking the Court in the present case to identify a new formal requirement on which the legality of such a decision would be conditional, consisting in the guarantee of specific remedies immediately it is adopted that would permit judicial review of the measures adopted in application of that decision, and which should thus be included in the relevant provisions of Article 20 of Regulation No 1/2003.

41 What is not at issue at this stage is the separate question of the determination of the legal remedies that would make it possible to ensure effective judicial review of the conduct of the inspections and of their formal inclusion in Article 20 of Regulation No 1/2003: that question falls to be considered when the Court examines the merits of the plea of illegality. Examination of the admissibility of the plea of illegality does not entail determining the detailed procedures according to which and the type of provisions by which the judicial review of the conduct of the inspections should be established. It is when the compatibility of Article 20 of Regulation No 1/2003 with the right to an effective remedy is verified, and thus when the merits of the plea of illegality are examined, that that question will have to be addressed. It is noteworthy, in that regard, that the Commission refers, in support of its third plea of inadmissibility, to its argument relating to the merits of the plea of illegality and to the judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission* (T-446/05, EU:T:2010:165, paragraphs 123 to 152), in which the plea of illegality raised in that case was rejected as unfounded.

42 It follows, moreover, that the fact alleged by the Commission – which, incidentally, is inaccurate in part – that no act of secondary law provides for a specific remedy is also irrelevant. By way of illustration, Regulation No 1/2003 itself provides, in Article 31, that the Courts of the European Union are to have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment and that they may cancel, reduce or increase that fine or periodic penalty payment. Likewise, Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p 1), in the same way as other acts that have created EU organs or bodies, sets out the actions that may be brought before the Courts of the European Union against the decisions of the Boards of Appeal established within the European Union Intellectual Property Office (EUIPO). Admittedly, those remedies represent an extension of the remedies established in the Treaty and in that sense are not autonomous remedies not provided for in the Treaty, which, moreover, they could not be. However, in the present case, the applicants do not claim that such autonomous remedies have been created. It should be considered, in fact, that the applicants contest the absence in Article 20 of Regulation No 1/2003 of provisions conferring on measures relating to the conduct of an inspection the nature of acts amenable to appeal under the Treaty, as is provided for in Article 90a of the Staff Regulations of Officials of the European Union for investigative acts of the European Anti-Fraud Office (OLAF), and requiring a reference to that possible remedy in the inspection decision, in the same way that, under Article 20(4) of Regulation No 1/2003, the right to have the inspection decision itself reviewed by the Courts of the European Union must be indicated in that decision.

43 It follows that the plea of illegality is admissible in so far as it concerns the first complaint submitted in support thereof. The same applies to the second complaint put forward in support of the plea of illegality, alleging breach of the principle of equality of arms and of the rights of the defence, the admissibility of which, moreover, is not disputed (see paragraph 32 above). In fact, like the lacunae alleged to exist in the relevant provisions of Article 20 of Regulation No 1/2003

in terms of effective judicial protection in the context of the first complaint, the applicants criticise, by their second complaint, the fact that those provisions do not require the communication of the indicia that justified the inspection of the inspected undertakings, which in their submission would alone be capable of ensuring respect for the principle of equality of arms and the rights of defence of the undertakings concerned.

44 It follows from all of the foregoing that the plea of illegality put forward by the applicants must be declared admissible so far as it concerns the two complaints raised in support of that plea, but only in so far as it concerns the relevant provisions of Article 20 of Regulation No 1/2003.

2. The merits of the plea of illegality

(a) The first complaint: breach of the right to an effective remedy

45 The applicants claim that Article 20 of Regulation No 1/2003 breaches the right to an effective remedy. Relying on the case-law of the European Court of Human Rights ('the ECtHR') and that of the Courts of the European Union, they observe that, in so far as judicial review of the conduct of the inspections could be carried out only in the context of the action for annulment of the final decision adopted by the Commission in application of Article 101 TFEU, the possibility of challenging the conduct of those inspections is not certain and is not available within a reasonable time. The applicants infer that the system of remedies available against the conditions of the conduct of inspections ordered on the basis of Article 20 of Regulation No 1/2003 does not provide an 'appropriate remedy' to undertakings subject to inspections. The applicants were not given the opportunity to place themselves, in a timely manner, under the protection of an impartial and independent tribunal and were thus required to respond favourably to all requests made by the inspectors.

46 It should be recalled that, under Article 47 of the Charter, entitled, 'Right to an effective remedy and to a fair trial':

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …'

47 It follows, moreover, from the explanations relating to the Charter (OJ 2007 C 303, p. 17), which, according to Article 52(7) of the Charter, must be given due regard by the Courts of the Union (see judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 20 and the case-law cited), that Article 47 of the Charter corresponds to Article 6(1) and Article 13 of the ECHR.

48 As the Council pertinently observes, that correspondence between the provisions of the Charter and the provisions of the ECHR does not mean that the review of legality to be carried out in the present case must be carried out in the light of the provisions of the ECHR. It follows from the case-law, in particular from the judgment of 14 September 2017, *K.* (C-18/16, EU:C:2017:680, paragraph 32 and the case-law cited), cited by the Council, that while, as confirmed in Article 6(3) TEU, the fundamental rights recognised by the ECHR constitute general principles of EU law and while Article 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as

those laid down in that Convention, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law, so that the review of legality must be carried out solely in the light of the fundamental rights guaranteed by the Charter.

49 Nonetheless, it follows from both Article 52 of the Charter and the explanations on that article that the provisions of the ECHR and the case-law of the ECtHR relating to those provisions must be taken into account when the provisions of the Charter are interpreted and applied in a specific case (see, to that effect, judgments of 22 December 2010, *DEB*, C-279/09, EU:C:2010:811, paragraphs 35 and 37 and the case-law cited, and of 26 February 2013, *Melloni*, C-399/11, EU:C:2013:107, paragraph 50). In fact, Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR and the explanations on that article state that the meaning and scope of the rights guaranteed by the ECHR are to be determined not only by the words of the ECHR and the protocols thereto but also by the case-law of the ECtHR.

50 The following principles emerge from the case-law of the ECtHR on respect for the ECHR, in particular Articles 6 and 13, in relation to home visits and, in particular, from the judgments of the ECtHR of 21 February 2008, *Ravon and others v. France* (CE:ECHR:2008:0221JUD001849703, 'the judgment in *Ravon*'); of 21 December 2010, *Société Canal Plus and others v. France* (CE:ECHR:2010:1221JUD002940808, 'the judgment in *Canal Plus*'); of 21 December 2010, *Compagnie des gaz de pétrole Primagaz v. France* (CE:ECHR:2010:1221JUD002961308, 'the judgment in *Primagaz*'); and of 2 October 2014, *Delta Pekárny a.s. v. Czech Republic* (CE:ECHR:2014:1002JUD000009711, 'the judgment in *Delta Pekárny*'):

– there must be effective judicial review, in fact and in law, of the regularity of the decision or measures concerned (judgments in *Ravon*, paragraph 28, and *Delta Pekárny*, paragraph 87) ('the effectiveness condition');

– the available remedy or remedies must make it possible, where there is a finding of irregularity, either to prevent the operation from taking place or, where an irregular operation has already taken place, to provide the person concerned with appropriate redress (judgments in *Ravon*, paragraph 28, and *Delta Pekárny*, paragraph 87) ('the efficiency condition');

– the accessibility of the remedy concerned must be certain (judgments in *Canal Plus*, paragraph 40, and *Primagaz*, paragraph 28) ('the certainty condition');

– the judicial review must take place within a reasonable time (judgments in *Canal Plus*, paragraph 40, and *Primagaz*, paragraph 28) ('the "reasonable time" condition').

51 It also follows from that case-law that the conduct of an inspection operation must be capable of forming the subject matter of such effective judicial review and that the review must be effective in the particular circumstances of the case in question (judgment in *Delta Pekárny*, paragraph 87), which entails taking into account all the legal remedies available and carrying out a global analysis of those legal remedies (see, to that effect, judgments in *Ravon*, paragraphs 29 to 34; *Canal Plus*, paragraphs 40 to 44; and *Delta Pekárny*, paragraphs 89 to 93). Examination of the merits of the plea of illegality cannot therefore be limited to the analysis of the defects, of which the applicants complain, in Article 20 of Regulation No 1/2003, but must be based on a consideration of all the remedies available to an undertaking subject to such an inspection.

52 It must be observed, as a preliminary point, that, contrary to the Commission's and the Council's assertions, the case-law of the ECtHR referred to in paragraphs 50 and 51 above cannot be considered to be irrelevant in the present case.

53 Admittedly, the Commission did not have recourse in this case to the 'police' or to the 'equivalent enforcement authorities' of the national authorities on the basis of Article 20(6) to (8) of Regulation No 1/2003. That is shown, in particular, by the fact that the orders of the French courts that authorised those visits and seizures, requested by the Commission as a precautionary measure, were not notified to the applicants (see paragraphs 5 and 34 above). Nonetheless, as the applicants correctly maintain, they were required to submit to the inspection decision, which is binding on its addressees, which may lead to the imposition of a fine in the case of non-compliance (Article 23(1)(c) to (e) of Regulation No 1/2003) and which entails, in particular, access to all their premises and examination and copying of their business records (Article 20(2)(a) to (d) of Regulation No 1/2003), which is sufficient to characterise an intrusion into the private premises of the inspected undertakings that justifies the rights recognised by the case-law of the ECtHR referred to in paragraphs 50 and 51 above being guaranteed to the undertakings whose private premises were visited (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 65; ECtHR, 14 March 2013, *Bernh Larsen Holding AS and others v. Norway*, CE:ECHR:2013:0314JUD002411708, paragraph 106). It is therefore not decisive that the inspection was carried out in the present case without the prior intervention of a court authorising recourse to the police and it may even be considered that that absence of prior judicial intervention justifies *a fortiori* respect for the guarantees established by the case-law of the ECtHR at the stage of the *ex post facto* judicial review of the decision ordering the inspection (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 66, and the case-law of the ECtHR cited). It must be emphasised, moreover, that when the Courts of the European Union have been called upon to adjudicate on respect for the fundamental rights of inspected undertakings, they have always relied on the case-law of the ECtHR (judgments of 18 June 2015, *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:404, paragraphs 41 to 48; of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 109 to 114; and of 10 April 2018, *Alcogroup and Alcodis* v *Commission*, T-274/15, not published, EU:T:2018:179, paragraph 91).

54 It is therefore appropriate to ascertain whether the right to an effective remedy is respected by the system of legal remedies that allow the conduct of an inspection in a competition law matter to be challenged in the light of the case-law of the ECtHR referred to above.

55 As follows from the case-law of the ECtHR, and as stated in paragraph 51 above, that verification must be based on a global analysis of the remedies capable of resulting in a review of the measures adopted in the context of an inspection. It is therefore immaterial that, taken individually, each of those legal remedies does not satisfy the four conditions that must be met in order for the existence of an effective remedy to be accepted.

56 Six legal remedies were invoked by the parties. They are:

– the action against the inspection decision;

– the action against any act meeting the conditions of a challengeable act established in the case-law that is adopted by the Commission following the inspection decision and in the

course of the inspection operations, such as a decision rejecting a request for protection of documents on the basis of the confidentiality of communications between lawyers and clients (see judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraphs 46, 48 and 49 and the case-law cited);

– the action against the final decision closing the procedure initiated under Article 101 TFEU;

– the application for interim relief;

– the action to establish non-contractual liability;

– requests that may be addressed to the hearing officer.

57 It should be observed that, with the exception of requests addressed to the hearing officer, who cannot be characterised as a 'tribunal' within the meaning of the ECHR, on the ground, in particular, that he has only the power to make recommendations (Article 4(2)(a) of Decision 2011/695/EU of the President of the Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ 2011 L 275, p. 29)), and as the applicants submit, each of those remedies allows disputes relating to an inspection operation to be brought before a court.

58 First, it follows from the case-law, and it is not disputed by the applicants, that the way in which an inspection was conducted may be challenged in an action for annulment of the final decision closing the procedure initiated under Article 101 TFEU (judgment of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 132; see also judgment of 10 April 2018, *Alcogroup and Alcodis* v *Commission*, T-274/15, not published, EU:T:2018:179, paragraph 91 and the case-law cited). That review of the legality of final decisions is not subject, with the exception of the inadmissibility of pleas that ought to have been raised against the inspection decision (see, to that effect, judgment of 20 April 1999, *Limburgse Vinyl Maatschappij and Others* v *Commission*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraphs 408 to 415), to any restriction in terms of the pleas that may be raised and thus of the subject matter of the review. In particular, it permits verification of compliance by the Commission with all the limits placed on it during the conduct of an inspection (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 79 to 82), and it has been considered to ensure the existence of effective judicial review of the inspection measures, as required by the ECtHR (judgment of 10 April 2018, *Alcogroup and Alcodis* v *Commission*, T-274/15, not published, EU:T:2018:179, paragraph 91).

59 Second, it also follows from the case-law, and is demonstrated by the present action, that an inspection decision may form the subject matter of an action for annulment (judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 97 and 111). That review is provided for, moreover, by Article 20 of Regulation No 1/2003 itself (paragraphs 4 and 8), which requires that a reference to that remedy be made in the inspection decision. On the one hand, the review of legality of the inspection decision, which examines, in particular, whether the Commission is in possession of sufficiently serious indicia to suspect an infringement of the competition rules, may, in the event of a finding of illegality, result in all the measures taken in application of the decision being themselves considered to be vitiated with illegality, in particular on the ground that they are unnecessary

(see, to that effect, judgment of 20 June 2018, *České dráhy* v *Commission*, T-621/16, not published, EU:T:2018:367, paragraph 40 and the case-law cited). On the other hand, if an inspection decision is adopted following other inspections and if the information obtained in the course of the earlier inspections formed the basis of that inspection decision, the review of the legality of that decision may examine, in particular, whether the measures taken in application of the earlier inspection decisions conform to the scope of the inspection defined in those decisions (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 138 to 160) and result in its annulment in the event of a finding of non-conformity (judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:404, paragraphs 56 to 67 and 71; see also, to that effect, judgment of 10 April 2018, *Alcogroup and Alcodis* v Commission, T-274/15, not published, EU:T:2018:179, paragraph 63).

60 Third, even though the parties have not mentioned it, it should also be observed that, like any decision imposing a penalty under Regulation No 1/2003, a Commission decision penalising an obstruction of the inspection on the basis of Article 23(1)(c) to (e) of Regulation No 1/2003 may be the subject of an action for annulment. The party bringing such an action may thus rely, in support of that action, on the illegality of the penalty, on the ground that the measure adopted in the course of the inspection with which the undertaking subject to the inspection did not comply, such as a request to produce a confidential document or a request for an explanation addressed to a member of its staff, is itself illegal (see, to that effect, judgment of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 126).

61 Fourth, it is clear from the judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (T-125/03 and T-253/03, EU:T:2007:287, paragraphs 46, 48 and 49 and the case-law cited), that a decision explicitly or implicitly rejecting a request for the protection of documents on the basis of confidentiality between lawyers and clients made during an inspection is a challengeable act. That remedy was made available precisely because the Courts of the European Union considered that the opportunity which the undertaking has to bring an action against a decision establishing that the competition rules have been infringed does not provide it with an adequate degree of protection of its rights, since (i) it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed and (ii) if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences that would result from improper disclosure of documents protected under legal professional privilege (see judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 47 and the case-law cited).

62 Likewise, contrary to the applicants' contention, and although the Courts of the European Union have not thus far declared such an action admissible, it may be considered that the General Court has accepted the possibility that an action may be brought in the same circumstances by the inspected undertaking against a decision rejecting the request for protection of the members of its staff on the basis of their private life. After referring to the judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (T-125/03 and T-253/03, EU:T:2007:287), and the case-law cited in that judgment, the General Court, while referring to the possibility of a 'decision withholding … protection [based on private life]', found that such a decision had not been adopted in that particular case. In order to do so, it relied on the fact that the applicants had neither claimed at the time of the adoption of the decision to take copies of data that documents belonging to them were eligible for protection similar to that conferred on the confidentiality of communications between lawyers and their clients, nor identified the

specific documents or parts of documents concerned (judgment of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraphs 129 and 130). It may further be observed that the applicants do not call into question as such the existence of the remedy at issue, but rather its restrictive and binding nature for the undertakings concerned, in that the latter must react immediately while the inspection is in progress and before any copy has been made by the Commission (see paragraph 72 below).

63 It should be considered, in fact, that neither the provisions of the Treaties nor the wording of Article 20 of Regulation No 1/2003 preclude an undertaking from bringing an action for annulment of such acts carried out in the course of an inspection, provided that they satisfy the conditions laid down in the fourth paragraph of Article 264 TFEU.

64 Fifth, although, in accordance with Article 278 TFEU, the range of remedies referred to above are not, in principle, suspensory, it is possible, under that provision, to obtain a stay of implementation of the acts contested in those actions. In particular, such an application for a stay of implementation may lead to the suspension of the inspection operations, it being understood, however, that, in so far as the inspection is in principle notified to and brought to the knowledge of the inspected undertaking on the date on which the inspection begins, only recourse to the procedure provided for in Article 157(2) of the Rules of Procedure allows, if the conditions for the grant of a provisional stay of execution are satisfied, such a result to be obtained (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 98). The President of the General Court may, on the basis of that provision, grant the application for suspension before hearing the Commission and thus order suspension only a few days after the application has been lodged and before the inspection has been completed.

65 It should further be pointed out that an application for interim relief may also be submitted at the same time as the action brought against a decision rejecting an application for protection on the basis of the confidentiality of communications between lawyers and their clients, as may be seen from the orders of 27 September 2004, *Commission* v *Akzo and Akcros* (C-7/04 P(R), EU:C:2004:566), and of 30 October 2003, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (T-125/03 R and T-253/03 R, EU:T:2003:287). It may be considered that, in that order of the President of the Court of Justice, the latter, while setting aside the order of the President of the General Court ordering the relief applied for, did not preclude that, in the absence of an undertaking by the Commission not to allow third parties to have access to the documents in question until judgment is given on the main application, a stay of application of the decision rejecting the request for protection of the confidentiality of communications between the companies concerned and their lawyers and the retention of the confidential data concerned at the Court Registry pending a decision on the main action might be ordered (see, to that effect, order of 27 September 2004, *Commission* v *Akzo and Akcros*, C-7/04 P(R), EU:C:2004:566, paragraph 42 and paragraphs 1 and 2 of the operative part; see also, to that effect, order of 17 September 2015, *Alcogroup and Alcodis* v *Commission*, C-386/15 P(R), EU:C:2015:623, paragraph 24). Contrary to the applicants' assertion, it cannot therefore be considered that an application for interim measures offers no possible redress against any irregularities committed by the Commission in the course of an inspection independently of the decision ordering the inspection.

66 Sixth, even where no challengeable act is adopted at the time of the inspection operations, if the inspected undertaking considers that the Commission has acted illegally during the inspection and those illegalities caused it harm of such a kind as to render the Union liable, it is open to it to

bring an action in non-contractual liability against the Commission. That possibility exists even before the adoption of a decision closing the infringement procedure and even where the inspection does not lead to a final decision that can form the subject matter of an action for annulment. A remedy of that kind is not part of the system for the review of the validity of acts of the European Union which have legal effects binding on, and capable of affecting the interests of, the applicant, but it is available where a party has suffered harm on account of unlawful conduct on the part of an institution, even if that conduct did not take the form of a challengeable act (see, to that effect, judgments of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 133; of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 99; and of 10 April 2018, *Alcogroup and Alcodis* v *Commission*, T-274/15, not published, EU:T:2018:179, paragraph 92).

67 In addition, it may be considered that the system for the review of the conduct of inspection operations consisting in all the legal remedies described above satisfies the four conditions set out in paragraph 50 above.

68 As regards, first, the effectiveness condition, it should be observed, and, moreover, it is not disputed by the applicants, that the remedies referred to above give rise to an in-depth review of the law and of the facts (see, as regards in particular the inspection decisions, judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:404, paragraphs 33 and 34, and, as regards more generally Commission decisions relating to the procedures for the application of Articles 101 and 102 TFEU, judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 62).

69 It should be emphasised, moreover, that although each of those legal remedies, taken individually, does not make it possible to undertake a review of the merits of all the measures taken at the time of the inspection, their combined exercise, which raises no problem of admissibility, permits such a review, as is apparent from the list, in paragraphs 57 to 66 above, of the various measures taken during the inspections and of the various rights of the inspected undertakings that may be reviewed in the examination of the various actions available. In particular, the applicants cannot properly maintain that no legal remedy covers a situation in which the inspectors take copies of documents outside the scope of the inspection. Where, as the applicants allege, the inspection does not result in a decision making a finding of infringement and imposing a penalty, but in the initiation of a new investigation and the adoption of a new inspection decision, the inspected undertakings could bring an action for annulment of that decision, challenging the legality of the indicia on which it is based as having been obtained unlawfully during the previous inspection (see paragraph 59 above).

70 It follows that the allegations which the applicants base on judgments of the ECtHR in which it was found that there had been a violation of the right to an effective remedy on the ground that one of the remedies referred to above was not available are irrelevant. In particular, the findings of the ECtHR in its judgment in *Delta Pekárny* (paragraphs 82 to 94) cannot be applied by analogy in the present case, since the Czech legislation at issue had not established a specific remedy enabling the inspection decisions to be challenged. In fact, the only opportunity for the inspected undertakings to raise questions concerning the legality of the inspection was an action that addressed the substantive findings made by the competition authority and, in that context, issues such as the necessity, the duration and the scope of the inspection, and its proportionality,

could not be examined (see, to that effect, Opinion of Advocate General Wahl in *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:92, point 37), whereas it could have been examined in an action brought against the inspection decision.

71 Likewise, unlike the circumstances that gave rise to the judgment of the ECtHR of 2 April 2015, *Vinci Construction and GTM Génie Civil et Services v. France* (CE:ECHR:2015:0402JUD006362910), it follows from the case-law of the Courts of the European Union that it is possible to request an effective review of respect for the confidentiality of communications between lawyers and their clients in the inspection operations (see paragraph 61 above). That review extends, in particular, to whether the documents at issue are actually covered by that confidentiality (see, to that effect, judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraphs 117 to 135, 138 to 140 and 165 to 179).

72 In addition, it must be considered that the fact that the undertaking to which an inspection decision is addressed is required to take certain steps to preserve its rights and its access to remedies ensuring compliance therewith, in particular the step consisting in submitting requests for protection to the Commission (see paragraphs 61 and 62 above) does not constitute a breach of the right to an effective remedy. That is *a fortiori* the case because the Commission is required, before taking copies, to allow the undertaking a brief time to consult its lawyers for the purpose of submitting such requests, where appropriate (see, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 89).

73 As regards, second, the efficiency condition, it may be stated that the remedies referred to above permit a review that is both preventive, when it takes the form of an action for interim relief, which prevents the inspection operations from being completed (see paragraph 64 above), and curative and subsequent to the inspection operations being carried out, when it takes the form of the other legal remedies. It should be emphasised, in that regard, that the case-law of the ECtHR does not require both an *a priori* and an *ex post* review, since it envisages them as alternatives (see paragraph 50 above). Thus, even if, as the applicants claim in the present case, the action for interim relief did not have the requisite efficiency, the fact remains that in any event the actions that may be brought *ex post facto* provide the person concerned with appropriate redress.

74 Thus, where the inspection decision is annulled, the Commission is prevented from using for the purpose of proceedings in respect of an infringement of the competition rules any documents or evidence which it might have obtained in the course of that inspection (judgments of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 49, and of 12 December 2012, *Almamet* v *Commission*, T-410/09, not published, EU:T:2012:676, paragraph 31). In particular, such annulment inevitably entails the annulment of the new inspection decision adopted solely on the basis of the documents seized during the first unlawful inspection (see, to that effect, judgment of 20 June 2018, *České dráhy* v *Commission*, T-621/16, not published, EU:T:2018:367, paragraphs 39 and 40).

75 Likewise, in an action against the Commission's final decision, the consequence of the finding that there has been an irregularity in the conduct of an investigation is that the Commission will be prevented from using the evidence thus obtained for the purpose of infringement proceedings (see judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission*, C-583/13 P,

EU:C:2015:404, paragraph 45 and the case-law cited), which may result in the annulment of the decision finding and penalising the infringement where the evidence in question is decisive for the purposes of that finding and that penalty.

76 Furthermore, even where a decision finding and penalising an infringement has not been adopted, it should be borne in mind that the remedy consisting in an application for annulment of certain measures adopted in the course of the inspection (see paragraphs 61 and 62 above) and the remedy consisting in a claim for damages (see paragraph 66 above) are still available. Those two remedies make it possible to obtain, respectively, the removal from the legal order of the inspection measures that have been annulled and compensation for the damage sustained as a consequence of those measures, before and independently of the closure of any subsequent infringement proceedings. It should be made clear, in that regard, that, in so far as the assessment of the remedies and of the appropriateness of the redress which they permit must be a global assessment (see paragraph 51 above) and in so far as other legal remedies prevent the Commission from using the unlawfully copied documents, it is immaterial that the claim for damages does not prevent it from doing so. Contrary to the applicants' assertion, it cannot be inferred, in particular, from the judgment in *Ravon* that the ECtHR would require, in order to establish the efficiency of the judicial review of the inspection operations, that the remedies at issue result in a decision prohibiting the use of the documents and testimony obtained. In that judgment, the ECtHR merely applied the method involving a global assessment of the available remedies and held that the claim for damages did not suffice to compensate for the inadequacy of the other remedies, in particular the actions for annulment provided for in the French legislation at issue (judgment in *Ravon*, paragraph 33), which did not present the efficiency of actions for annulment available before the Courts of the European Union.

77 As regards, third, the certainty condition, it is disputed by the applicants mainly on the ground that there is no certainty that the acts that might be challenged by the various legal remedies referred to above would be adopted. In particular, the Commission would not necessarily adopt a decision finding an infringement and penalising the person responsible following an inspection. However, the certainty condition must be interpreted not as requiring that all the legal remedies theoretically possible be initiated in all situations and irrespective of the measures adopted following the inspection, but as requiring that those appropriate for challenging the measures producing negative effects for the inspected undertaking at the time when those effects are produced be initiated. Therefore, if such negative effects do not consist in a decision finding or penalising an infringement, the fact that no action is available against that decision cannot be regarded as constituting failure to meet the requirement of a certain action against the measures adopted during an inspection.

78 A different interpretation cannot be inferred from the judgment in *Canal Plus* (see paragraph 50 above). Contrary to the applicants' contention, the ECtHR did not hold in that judgment that the accessibility of the remedy against the decision authorising the inspection was rendered uncertain because of the uncertainties attending the adoption of a substantive decision by the competition authority. It merely found, in the particular circumstances of the transitional system put in place by the French legislature, that the action allowed under that system against the order authorising the visit to private premises was subject to the existence of an action pending against the substantive decision, which created a conditionality that rendered accessibility to that action uncertain (see, to that effect, Opinion of Advocate General Wahl in *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:92, point 48). It may be observed, moreover, that such conditionality does not exist in the system of remedies applicable to Commission inspections. In

fact, the initiation of an action against an inspection decision is not conditional on the initiation of an action against the decision closing the procedure under Article 101 TFEU, nor could it be, in the light of the time limit laid down in Article 263 TFEU.

79 As regards, fourth, the 'reasonable time' condition, it should be observed that the applicants do not base their assertion of failure to comply with that condition on the duration of the proceedings before the Courts of the European Union and, moreover, they accept the existence of time limits for bringing actions. They criticise only the significant time that may elapse between the inspection and the final decision closing the procedure initiated under Article 101 TFEU.

80 However, it cannot be inferred from such a period, which may, admittedly, reach several years, that the remedies that allow the conduct of the inspections to be challenged before the Courts of the European Union do not ensure effective judicial protection. In fact, the applicants criticise only the period between the adoption of the inspection measures and the date on which they may be challenged in an action against the final decision adopted under Article 101 TFEU, which is only one of the remedies that enable those measures to be challenged. Furthermore, and above all, the period during which the inspection measures at issue remain applicable must be seen in relation to the fact that, until that final decision is taken, the Commission does not take a definitive view on the existence of an infringement and the penalty to be imposed on the inspected undertaking. If, on the other hand, other harmful consequences should arise for the inspected undertaking during that period, such as harmful conduct on the part of the Commission or the adoption of a new inspection decision on the basis of the information obtained, it would be open to that undertaking to initiate judicial proceedings immediately, without awaiting the outcome of the infringement proceedings, for damages or for annulment of the new inspection decision.

81 It follows from all of the foregoing that the first complaint raised in support of the plea of illegality of Article 20 of Regulation No 1/2003 must be rejected as unfounded.

(b) The second complaint: breach of the principle of equality of arms and of the rights of the defence

82 The applicants maintain that Article 20 of Regulation No 1/2003 constitutes a breach of the principle of equality of arms and of the rights of the defence. In their submission, it follows from those principles that an accused person must have a right of access to the case file. By not allowing the parties to have access to the documents in the Commission's possession that support its decision to carry out an inspection, the legal framework of the inspection defined by Article 20 of Regulation No 1/2003 places the applicants in a situation of manifest imbalance by comparison with the Commission and makes it impossible for them to prepare their defence.

83 According to settled case-law, the principle of equality of arms, which is a corollary of the very concept of a fair trial and aims to ensure a balance between the parties to the proceedings, implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. The aim of that principle is to ensure a procedural balance between the parties to judicial proceedings, guaranteeing the equality of rights and obligations of those parties as regards, inter alia, the rules that govern the bringing of evidence and the adversarial hearing before the court (see judgment of 28 July 2016, *Ordre des barreaux francophones et germanophone and Others*, C-543/14, EU:C:2016:605, paragraphs 40 and 41 and the case-law cited).

84 Although the applicants cite that case-law and rely only on Articles 47 and 48 of the Charter and on Article 6 of the ECHR, which govern the rights of litigants before a court, in support of their assertion that there has been a breach of the principle of equality of arms and of the rights of the defence, the case-law to which they refer elsewhere (see paragraph 94 below) shows that they are referring generally to the rights of the inspected undertaking to defend itself both before the courts and before the Commission.

85 However, it follows from settled case-law concerning the evidence that must be communicated to the inspected undertaking in order to ensure the protection of its rights of defence vis-à-vis the Commission that the Commission is not required to inform the undertaking concerned, in the inspection decision or during the inspection, of the indicia that justified that inspection (see, to that effect, judgments of 17 October 1989, *Dow Chemical Ibérica and Others* v *Commission*, 97/87 to 99/87, EU:C:1989:380, paragraphs 45, 50 and 51; of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 48; of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 69; of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 37; of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 81; and of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraphs 45 and 46).

86 That solution deriving from the case-law is based not on a principle of confidentiality of the indicia in question, but on the desire, which was also taken into consideration by the legislature in the drafting of Article 20 of Regulation No 1/2003, to maintain the efficiency of the Commission's investigations at a stage where they are merely beginning.

87 In effect, the administrative procedure under Regulation No 1/2003, which takes place before the Commission, is divided into two distinct and successive stages, each having its own internal logic, namely a preliminary investigation stage and an *inter partes* stage. The preliminary investigation stage, during which the Commission uses the investigative powers provided for in Regulation No 1/2003 and which covers the period up to notification of the statement of objections, is intended to enable the Commission to gather all the relevant information tending to prove or disprove the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and on how it is to proceed. By contrast, the *inter partes* stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the alleged infringement (see judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 77 and the case-law cited).

88 The starting point for the preliminary investigation stage is the date on which the Commission, in exercise of the powers conferred on it by the EU legislature, takes measures which involve the allegation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 114, and of 15 July 2015, *SLM and Ori Martin* v *Commission*, T-389/10 and T-419/10, EU:T:2015:513, paragraph 337). Furthermore, it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the statement of objections, of all the essential evidence on which the Commission relies at that stage of the procedure, and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, it is only after notification of the statement of objections that the undertaking concerned is able to rely in full on its rights of defence. If those rights were extended to the period preceding the notification of the statement of objections, the efficiency of the

Commission's investigation would be compromised, since the undertaking concerned would already be able, at the preliminary investigation stage, to identify the information known to the Commission, hence the information that could still be concealed from it (see judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 78 and the case-law cited).

89 However, the measures of inquiry adopted by the Commission during the preliminary investigation stage, in particular, the investigation measures and the requests for information, suggest, by their very nature, that an infringement has been committed and may have major repercussions on the situation of the undertakings under suspicion. Consequently, it is necessary to prevent the rights of the defence from being irremediably compromised during that stage of the administrative procedure since the measures of inquiry taken may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable (see judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 79 and the case-law cited).

90 In that respect, it must be recalled that the obligation under Article 20(4) of Regulation No 1/2003 to specify the subject matter and purpose of the inspection constitutes a fundamental guarantee of the rights of defence of the undertakings concerned and, consequently, the scope of the duty to state the reasons for inspection decisions may not be limited by reference to considerations relating to the efficiency of the investigation. While it is indeed the case that the Commission is not required, under Article 20 of Regulation No 1/2003 and the case-law, to communicate to the addressee of such a decision all the information at its disposal concerning the presumed infringements, or to delimit precisely the relevant market, or to set out the exact legal nature of the infringements, or to indicate the period during which those infringements were committed, it is obliged to state, as precisely as possible, the presumed facts that it intends to investigate, that is to say, what it is looking for and the matters to which the inspection must relate (see judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 80 and the case-law cited).

91 Having regard to all of those factors, it has consistently been held that the Commission cannot be required to indicate, at the preliminary investigation stage, apart from the presumptions of an infringement which it intends to verify, the indicia, that is to say, the material that leads it to envisage the hypothesis of an infringement of Article 101 TFEU. Such an obligation would upset the balance which the case-law establishes between maintaining the efficiency of the investigation and maintaining the rights of defence of the undertaking concerned (see judgment of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 45 and the case-law cited; see also paragraph 85 above).

92 It follows that Article 20(4) of Regulation No 1/2003 cannot be declared illegal on the ground that, because it makes no provision for the indicia that justified the inspection to be communicated to the inspected undertaking, it breaches the principle of equality of arms and the rights of defence of the undertaking concerned.

93 None of the arguments put forward by the applicants can alter that conclusion.

94 As regards, first, the case-law of the Courts of the European Union, it should be observed that the applicants do not refer to the abovementioned case-law, nor *a fortiori* do they explicitly dispute it, but cite only a single judgment of the General Court in support of their claim that the latter Court considers that the principle of equality of arms implies that the undertakings concerned have a

right of access to the case file. Admittedly, it is apparent from that judgment that the general principle of equality of arms presupposes that in a competition case the undertaking concerned has knowledge of the file used in the proceedings which is the same as that of the Commission (judgment of 29 June 1995, *ICI* v *Commission*, T-36/91, EU:T:1995:118, paragraphs 93 and 111). However, as the Commission pertinently observes, the General Court was referring to the *inter partes* stage of the procedure and, in particular, to the documents that ought to have been communicated to the applicant undertaking with the statement of objections (see, with respect to the distinction between the preliminary investigation stage and the administrative *inter partes* stage, paragraphs 87 and 88 above).

95 As regards, second, the case-law of the ECtHR, the reference to which might be understood, in the light of the foregoing, as expressing the desire that the case-law of the Courts of the European Union should develop along similar lines or for a finding that the relevant provisions of Article 20 of Regulation No 1/2003 are illegal, it must be considered that that case-law is not capable of justifying such a development, or such a finding, even disregarding the fact that the judgments of the ECtHR were delivered in respect of the rights of natural persons in criminal matters, as the Commission and the Council emphasised. In fact, all the breaches of the principle of equality of arms found in the judgments of the ECtHR were found on the ground that the accused were convicted without ever having had access to all the evidence relating to the charges upheld against them (ECtHR, 18 March 1997, *Foucher v. France*, CE:ECHR:1997:0318JUD002220993; 25 March 1999, *Pélissier and Sassi v. France*, CE:ECHR:1999:0325JUD002544494; 26 July 2011, *Huseyn and others v. Azerbaidjan*, CE:ECHR:2011:0726JUD003548505; and 20 September 2011, *OAO Neftyanaya Kompaniya Yukos v. Russia*, CE:ECHR:2011:0920JUD001490204), from which it cannot be inferred that a right of access to such evidence exists during the investigation stage in addition to that already recognised during the subsequent *inter partes* stage. As for the judgment of the ECtHR in which it was held that the principle of equality of arms applies to all stages of the procedure, and in particular during the investigation (ECtHR, 30 March 1989, *Lamy v. Belgium*, CE:ECHR:1989:0330JUD001044483), to which the applicants referred only at the hearing, it was decided in that way because a decision on the applicant's detention had been adopted during the investigation stage. The ECtHR found in that case, moreover, that there had been a violation of Article 5(4) of the ECHR, on the judicial detention of detained persons, without expressing a view on whether there had been a violation of Article 6 of the ECHR.

96 As regards, third, the French legislation, to which the applicants referred at the hearing, it cannot as such prevail in the application of the rules of EU law (see, to that effect, judgment of 17 January 1984, *VBVB and VBBB* v *Commission*, 43/82 and 63/82, EU:C:1984:9, paragraph 40). It may be added, in any event, that according to Article L. 450-4 of the French Commercial Code, the order of the French judge of liberties and detention, who authorises the visits and seizures carried out by the Competition Authority on the basis of information and indicia capable of justifying such visits and seizures submitted by that authority, is notified to the undertaking concerned only at the time of the visit. It can thus be the subject of *inter partes* argument, which may deal, inter alia, with the sufficiently serious nature of the indicia produced, only at the stage when an appeal is lodged against that order before the First President of the cour d'appel (Court of Appeal).

97 As regards, fourth, the fears expressed by the applicants of difficulties in protecting themselves against the risks of arbitrary and disproportionate intervention by the Commission, it should be stated specifically that it is possible for the General Court to request the Commission, by means of measures of organisation of procedure, to produce the indicia that justified its decision to

carry out an inspection (for the adoption of such a measure of organisation of procedure in the present case, see paragraph 14 above). Such access to the indicia that justified the inspection decision is permitted at the judicial stage since at that stage, and in so far as the inspection is by definition complete, the requirement to preserve the efficiency of the Commission's investigations is less pressing. In fact, it is no longer necessary, once all the inspection operations have been carried out, to prevent a risk of disclosure of the information that is relevant for the investigation, which in principle has already been obtained during the inspection (see paragraph 88 above). It may be added that communication of the indicia at the judicial stage is, moreover, consistent with the principle of equality of arms before the court, as the inspected undertaking has at that stage information that enables it to dispute the assertion that the Commission has sufficiently serious indicia to justify the inspection (see, to that effect, Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, points 85 and 86), and, furthermore, does not justify such access being granted at the time when the inspection decision is adopted.

98 For all of those reasons, the second complaint put forward in support of the plea of illegality must therefore be rejected and, accordingly, the plea of illegality of the relevant provisions of Article 20 of Regulation No 1/2003 must be rejected in its entirety.

B. The second and third pleas: breach of the obligation to state reasons and breach of the right to the inviolability of the home

99 The Commission claims, by way of a preliminary point, that the applicants raise a number of complaints relating to the conduct of the inspection at issue that would be inadmissible in an action brought against an inspection decision, and infers that the application is inadmissible.

100 It is settled case-law that an undertaking may not rely on the illegality of the manner in which inspection procedures were carried out in support of a claim for annulment of the act on the basis of which the Commission carried out that inspection (judgments of 20 April 1999, *Limburgse Vinyl Maatschappij and Others* v *Commission*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 413; of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 55; and of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 22).

101 The fact that an undertaking cannot plead the illegality of the inspection procedures as a ground for annulment of an inspection decision merely reflects the general principle that the legality of a measure must be assessed in the light of the circumstances of law and of fact existing at the time when the decision was adopted, so that the validity of a decision cannot be affected by acts subsequent to its adoption (order of 30 October 2003, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 R and T-253/03 R, EU:T:2003:287, paragraphs 68 and 69; see also, to that effect, judgment of 17 October 2019, *Alcogroup and Alcodis* v *Commission*, C-403/18 P, EU:C:2019:870, paragraphs 45 and 46 and the case-law cited).

102 It follows that if, as the Commission claims, the complaints in question had to be rejected, they would have to be rejected on the ground that they were inoperative and not on the ground that they were inadmissible.

103 In answer to a question put by the Court at the hearing, the Commission stated, as noted in the minutes of the hearing, that it left it to the Court's discretion to decide whether the complaints in question were inadmissible or inoperative and, moreover, that its plea of inadmissibility did not relate as such to the second and third pleas, alleging, respectively, breach of the obligation to state reasons and breach of the right to the inviolability of the home.

104 It follows that the application cannot be declared inadmissible on the ground alleged by the Commission; nor, *a fortiori*, should it be declared inadmissible in its entirety.

105 It is therefore appropriate to examine the applicants' second and third pleas, without taking into account, for the purpose of examining their merits, the complaints relied on in support of those pleas that are based on the conduct of the inspection at issue, which must be rejected as inoperative.

1. Breach of the obligation to state reasons

106 The applicants claim that the contested decision is insufficiently reasoned, since it does not specify, or even begin to explain, the information held by the Commission that would have justified carrying out the inspection. In particular, the contested decision does not make it possible to identify either the type, or the nature, or the origin, still less the content, of the information in the Commission's possession, and thus deprives the applicants of a fundamental guarantee of their rights of defence. The applicants further submit that such a complete absence of information about the documents in the Commission's possession cannot be offset by a mere description of the presumptions of an infringement that the Commission believed it could gather from the content of those documents.

107 It must be borne in mind that, according to settled case-law, the statement of reasons required under Article 296 TFEU for measures of the institutions of the European Union must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirement to state reasons must, moreover, be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to specify all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 25 June 2014, *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraphs 31 and 32 and the case-law cited).

108 It is therefore necessary to take account in the present case of the legal context in which inspections by the Commission take place. Articles 4 and 20 of Regulation No 1/2003 confer inspection powers on the Commission which are designed to enable it to perform its task of protecting the internal market from distortions of competition and to penalise any infringements of the competition rules on that market (judgment of 25 June 2014, *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraph 33; see also, to that effect, judgment of 22 October 2002, *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 42 and the case-law cited).

109 Thus, as regards, more particularly, inspection decisions taken by the Commission, Article 20(4) of Regulation No 1/2003 provides that they are to indicate the date on which the inspection is to begin, the penalties provided for in Articles 23 and 24 of that regulation and the right to have the inspection decision reviewed by the Court of Justice, and also the subject matter and the purpose of the inspection.

110 It is apparent from the case-law that, in order to meet those requirements, the Commission must state as precisely as possible the presumed facts which it intends to investigate, namely what it is looking for and the matters to which the inspection must relate. More specifically, the inspection decision must contain a description of the features of the suspected infringement, indicating the market thought to be affected, the nature of the suspected restrictions of competition and the sectors covered by the alleged infringement to which the investigation relates, and explanations of the way in which the undertaking is supposed to be involved in the infringement (see judgments of 8 March 2007, *France Télécom* v *Commission*, T-339/04, EU:T:2007:80, paragraphs 58 and 59 and the case-law cited, and of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 75 and 77 and the case-law cited).

111 That obligation to state specific reasons constitutes, as the Court of Justice has made clear, a fundamental requirement in order to show not only that the proposed intervention within the undertakings concerned is justified, but also to enable the undertakings concerned to understand the scope of their duty to cooperate while at the same time maintaining the rights of the defence. Indeed, it is important to enable the undertakings covered by inspection decisions imposing obligations on them, which entail interferences with their private life and failure to comply with which can expose them to heavy fines, to grasp the reasons for those decisions without excessive interpretative effort, so that they can exercise their rights efficiently and in good time (see, regarding decisions requesting information, Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, point 42). It follows, moreover, that the scope of the obligation to state reasons for inspection decisions, as set out in the preceding paragraph, cannot in principle be restricted on the basis of considerations concerning the effectiveness of the investigation (judgments of 17 October 1989, *Dow Benelux* v *Commission*, 85/87, EU:C:1989:379, paragraph 8, and of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 42).

112 Nonetheless, inspections take place by definition at a preliminary stage, at which the Commission does not have precise information allowing it to characterise the conduct in question as an infringement and implying the power to search for various items of information that are not yet known or fully identified (see, to that effect, judgments of 25 June 2014, *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraph 37, and of 26 October 2010, *CNOP and CCG* v *Commission*, T-23/09, EU:T:2010:452, paragraphs 40 and 41 and the case-law cited). Thus, in order to safeguard the effectiveness of inspections and for reasons to do with their very nature, it has been accepted that the Commission was not required to communicate to the addressee of such a decision all the information at its disposal concerning the presumed infringements, or to delimit precisely the relevant market, or to indicate the period during which those infringements are alleged to have been committed (see judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 80 and the case-law cited; Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, points 48 and 49).

113 It should be further borne in mind that the Commission is not required to indicate in the inspection decision the indicia that justified the inspection (see paragraphs 85 and 91 above).

114 It follows, first, that the Commission's obligation to state reasons does not extend to all the information at its disposal concerning the presumed infringements and, second, that, among the information that justified carrying out the inspection, the only information that must be supplied in the inspection decision is that showing that the Commission has serious indicia of an infringement, but without disclosing the indicia in question. It is settled case-law, moreover, that the Commission is required to disclose in detail in the decision ordering an inspection that it had in its file information and indicia providing reasonable grounds for suspecting the infringement of which the undertaking subject to inspection is suspected (see judgment of 8 March 2007, *France Télécom* v *Commission*, T-339/04, EU:T:2007:80, paragraph 60 and the case-law cited; judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 172).

115 It therefore falls to be ascertained in the present case whether the Commission complied with that obligation in the contested decision.

116 It is clear from recital 8 of the contested decision and from the information relating to the suspected infringements set out in that recital, as described in recitals 4 and 5 as consisting in practices involving the exchange of information relating in particular to discounts and future business strategies, that the Commission disclosed in detail that it considered that it had in its possession serious indicia that led it to suspect the concerted practices at issue.

117 That is clear from – in addition to the information relating to the subject matter of the suspected exchanges of information, set out in recitals 4 and 5 of the contested decision – the information provided in recital 8 of the contested decision, introduced by the words 'According to the information in the Commission's possession' and relating to the methods employed in the exchanges, the persons involved (status and approximate number) and the documents at issue (approximate number and the place where and form in which they were kept).

118 It must be made clear that the foregoing considerations are limited to examination of the sufficiency of the statement of reasons in the contested decision and respond only to the question whether the Commission stated in its decision the information required by the case-law, namely that showing that it considered that it had serious indicia of the existence of the suspected concerted practices. Conversely, that context does not cover the question whether the Commission was correct to consider that it had such sufficiently serious indicia in its possession, which will be addressed when the Court examines the plea alleging breach of the right to the inviolability of the home.

119 It should be added that the applicants' claim that they are at risk of being the victims of competitors or of ill-intentioned trading partners cannot call into question the abovementioned finding that the Commission complied with its obligation to state reasons. Such a risk may be countered by the verification of the sufficiently serious nature of the indicia in the Commission's possession that will be carried out when the Court examines the plea alleging breach of the right to the inviolability of the home.

120 The plea alleging breach of the obligation to state reasons must therefore be rejected.

2. Breach of the right to the inviolability of the home

121 The applicants maintain that the fundamental right to the inviolability of the home, as enshrined in Article 7 of the Charter and Article 8 of the ECHR, was breached by the Commission in the present case. In their submission, it follows from the case-law that that right is to apply to the Commission's inspection decisions, which, the applicants reiterate, are not based on the cooperation of the undertakings to which they apply. It also follows from the case-law that the right to the inviolability of the home requires that the content and the scope of a document authorising visits to private premises be subject to certain limits so that the interference with that right which it authorises will not be potentially unlimited and therefore disproportionate. Since the contested decision was adopted independently of any *ex ante* judicial supervision, the fundamental right to the inviolability of the home means that the Commission's powers of inspection must be subject to even stricter limits, which were not imposed or observed in the present case.

122 It should be borne in mind that the fundamental right to the inviolability of the home is a general principle of EU law which is now expressed in Article 7 of the Charter, which corresponds to Article 8 of the ECHR (see judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:404, paragraph 19 and the case-law cited).

123 According to Article 7 of the Charter, everyone has the right to respect for his or her private and family life, home and communications. That requirement for protection against interference by the public authorities in the sphere of a person's private activities relates to both natural persons and legal persons (see judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 83 and the case-law cited).

124 Article 52(1) of the Charter provides, moreover, that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. Furthermore, subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

125 In addition, although it is apparent from the case-law of the ECtHR that the protection provided for in Article 8 of the ECHR may extend to certain commercial premises, the fact remains that that court has held that interference by a public authority could go further for professional or commercial premises or activities than in other cases (see judgment of 18 June 2015, *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:404, paragraph 20 and the case-law of the ECtHR cited). The ECtHR has nonetheless consistently held that an acceptable level of protection against interferences with rights under Article 8 of the ECHR entailed a legal framework and strict limits (see judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 73 and the case-law of the ECtHR cited).

126 As regards, more particularly, the powers of inspection conferred on the Commission by Article 20(4) of Regulation No 1/2003, which are at issue in the present case, it has been held that the exercise of such powers constituted a clear interference with the right of the inspected undertaking to respect for its sphere of private activities, its private premises and its correspondence (judgments of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraph 65, and of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 169).

127 It is therefore appropriate to ascertain whether the contested decision meets the conditions required by Article 7 of the Charter.

128 The applicants claim, in that respect, that the contested decision is disproportionate and also arbitrary, in that the Commission did not have in its possession sufficiently serious indicia to justify the inspection on which it decided.

(a) Observance of the principle of proportionality

129 It should be borne in mind that, according to recital 24 of Regulation No 1/2003, the Commission should be empowered to carry out such inspections 'as [are] necessary' to detect any agreement, decision or concerted practice prohibited by Article 101 TFEU. It follows, according to the case-law, that it is for the Commission to decide whether an inspection measure is necessary in order for it to detect an infringement of the competition rules (judgment of 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraph 17; see also, concerning a decision requesting information, judgment of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 66 and the case-law cited).

130 The fact remains that that assessment is subject to review by the Court and, in particular, to compliance with the rules governing the principle of proportionality. According to settled case-law, the principle of proportionality requires that acts of EU institutions do not exceed the limits of what is appropriate and necessary to attain the end in view; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (judgments of 8 March 2007, *France Télécom* v *Commission*, T-339/04, EU:T:2007:80, paragraph 117, and of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraph 22).

131 The applicants claim, in essence, that there has been a disproportionate interference with their sphere of private activities, having regard to the companies and the premises subject to the inspection, the duration of the inspection at issue and the date chosen for the inspection.

(1) The companies and the premises subject to the inspection

132 The applicants take issue with the Commission for not having identified individually in the contested decision either the persons whom it had in mind or the premises which its officials were authorised to visit. Thus, contrary to its own practice, the Commission authorised itself in the present case to carry out an inspection at several hundred separate legal persons making up the Casino group and to visit several thousand premises, most of which have no connection with the subject matter of the contested decision. According to the case-law, however, the premises that might be visited and the persons indicated by the authorities must be precisely identified in order to limit the powers of interference and to protect private individuals against arbitrary interference by the public authorities with the fundamental right to the inviolability of the home. The applicants further submit, in that regard, that the definition of the subject matter of the inspection and, more generally, the reasoning on which the contested decision is based, however precise they may be, cannot make up for the failure to place limits on the Commission's powers as regards the identification of the persons and the premises that may be inspected. They maintain, moreover, that the concept of undertaking cannot constitute a barrier to respect for the fundamental rights associated with the concept of a person, whether natural or legal.

133 It is clear from the contested decision that neither the companies nor the premises inspected are mentioned by name. It is thus indicated in the second paragraph of Article 1 of the contested decision that 'the inspection may take place in any of the undertaking's premises'; that is followed by the words 'and in particular', which are themselves followed by two addresses. It is also stated in the first paragraph of Article 1 and the first paragraph of Article 3 of the contested decision that 'Casino … and all companies directly or indirectly controlled by it' are the addressees of the inspection decision.

134 It should be observed in that regard that, contrary to the applicants' contention, the decisions that were contested in the cases that gave rise to the judgments of 14 November 2012, *Nexans France and Nexans* v *Commission* (T-135/09, EU:T:2012:596), and of 6 September 2013, *Deutsche Bahn and Others v Commission* (T-289/11, T-290/11 and T-521/11, EU:T:2013:404), contain similar indications.

135 In fact, the very wide scope of the inspection to which such indications lead has not been considered in the case-law to constitute, as such, an excessive interference in the undertakings' sphere of private activities.

136 It follows from a consistent line of decisions beginning with the judgment of 21 September 1989, *Hoechst* v *Commission* (46/87 and 227/88, EU:C:1989:337, paragraph 26), that both the purpose of Council Regulation No 17 of 6 February 1962, First Regulation applying Articles [101] and [102 TFEU] (OJ, English Special Edition 1959-1962, p. 87), and Regulation No 1/2003, which succeeded it, and the lists set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003 of the powers conferred on the Commission's officials show that inspections may have a very wide scope. In that regard, the right to enter any premises, land and means of transport of undertakings is of particular importance since it allows the Commission to obtain evidence of infringements of the competition rules in the places where it is normally kept, that is to say, in the undertakings' business premises (judgment of 12 July 2007, *CB* v *Commission*, T-266/03, not published, EU:T:2007:223, paragraph 71, and order of 16 June 2010, *Biocaps* v *Commission*, T-24/09, not published, EU:T:2010:238, paragraph 32).

137 It also follows from that case-law that, although Regulations No 17 and No 1/2003 thus confer wide investigative powers on the Commission, the exercise of those powers is subject to conditions serving to ensure that the rights of the undertakings concerned are respected (judgment of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 28; see also, to that effect, judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission*, T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 74 to 99).

138 In particular, it should be noted that the Commission is required to specify the subject matter and the purpose of the investigation. That obligation is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence (see, concerning Regulation No 17, judgment of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 29).

139 It should be pointed out, moreover, that the conditions required for the exercise of the Commission's powers of inspection vary according to the procedure which it has chosen, the attitude of the undertakings concerned and the intervention of the national authorities (see, concerning Regulation No 17, judgment of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 30).

140 Article 20 of Regulation No 1/2003 deals in the first place with inspections carried out with the cooperation of the undertakings concerned, either voluntarily, where there is a written authorisation, or by virtue of an obligation arising under a decision ordering an inspection. In the latter case, which is the situation here, the Commission's officials have, in particular, the power to have shown to them the documents they request, to enter such premises as they choose and to have shown to them the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking (see, concerning Regulation No 17, judgment of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 31).

141 The situation is completely different if the undertakings concerned oppose the Commission's inspection. In that case, the Commission's officials may, on the basis of Article 20(6) of Regulation No 1/2003 and without the cooperation of the undertakings, search for any information necessary for the inspection with the assistance of the national authorities, which are required to afford them the assistance necessary for the performance of their task. Although such assistance is required only if the undertaking expresses its opposition, it may also be requested as a precautionary measure, on the basis of Article 20(7) of Regulation No 1/2003, in order to overcome any opposition on the part of the undertaking (see, concerning Regulation No 17, judgment of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 32).

142 The complaint raised by the applicants therefore makes it necessary to answer the question whether the Commission was required in the present case, on the basis of the guarantees designed to protect them against disproportionate interference, to state more precisely the companies and the premises subject to the inspection.

143 That question must be answered in the negative, for the following reasons.

144 First of all, the information set out in the contested decision, taken as a whole, makes it possible to determine the companies and the premises subject to the inspection. Because the subject matter and the purpose of the inspection, and in particular of the markets for the goods and services concerned, are specified, and because it is stated that Casino and its subsidiaries, and also their premises, are concerned, it may readily be inferred from the contested decision that Casino and its subsidiaries active in the sectors concerned by the suspected infringement – namely the markets for the supply of fast-moving consumer goods (food products, hygiene products and cleaning products), the markets for consumer sales of those goods and the market for the sale of services to manufacturers of branded products in the fast-moving consumer goods sector – are subject to the inspection, and that the inspection may be carried out at any of their premises. When the Commission's officials entered the premises of the companies in question after having notified them of the contested decision, the companies were in a position to ascertain the purpose and the scope of the interference with their premises, to understand the scope of their duty to cooperate and to put forward their observations. More precise specifications as to the scope of the inspection were therefore not essential for the protection of the applicants' rights.

145 Furthermore, the applicants' complaints that, because of the failure to specify the companies and premises concerned, the scope covered by the inspection was too wide must therefore be rejected. It may also be observed, in that regard, that the Commission referred in the contested decision to the basic subject of competition law, namely the undertaking, most often consisting of a parent company and its subsidiary or subsidiaries, to which the infringements and, in particular, the infringements suspected in the present case may be imputed, thus justifying the reference in the contested decision to both the parent company Casino and its subsidiaries.

146 Next, the lack of precision in the designation of the companies and premises referred to contributes to the successful conduct of the Commission's inspections, since it gives the latter the necessary scope to gather the maximum amount of evidence possible and allows it to preserve a surprise effect that is essential to prevent the risk that the evidence will be destroyed or concealed. Thus, if the Commission were not in a position to determine at the stage of adopting the inspection decision, which occurs significantly before identification of an infringement and the participants in that infringement, the companies in the group that may have taken part in it, and if it discovered when carrying out its inspection at the premises of one of the companies concerned that one of the companies with which it is associated might also have played a role in the infringement, it would be able to carry out an inspection at that other company's premises on the basis of the same inspection decision, that is to say, both rapidly and ensuring a surprise effect, owing to that time lag, from which the second company to be inspected might infer that it would not be covered by the inspection (see, for a reminder of the importance of the rapid implementation of inspection decisions in order to minimise the risk of leaks, Opinion of Advocate General Wahl in *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:92, point 62).

147 Last, it must be observed that the orders of 17 February 2017 of the judges of freedom and detention of the tribunaux de grande instance (Regional Courts), Créteil and Paris (see paragraph 5 above) authorising the impugned visits and seizures as a precautionary measure, in case the inspection met with opposition, specify expressly and exhaustively the premises at which those visits and seizures could be carried out. It follows that, in accordance with the case-law of the Courts of the European Union referred to in paragraph 141 above, and also with the case-law of the ECtHR and the German and French courts and the French legislation which the applicants invoke, where the interference entailed by the inspection is greater, in point of fact because it is carried out in spite of being opposed by the inspected companies, and recourse is had to the police on the basis of Article 20(6) to (8) of Regulation No 1/2003, an additional guarantee consisting in the designation of the premises visited is recognised. In fact, in the present case, as the applicants did not oppose the inspection to the point of compelling the Commission to use the orders referred to above and the means of constraint which they confer on it, that additional guarantee is unnecessary. Contrary to the applicants' contention, such a solution does not contravene the 'principle' that the protection of the right to the inviolability of the home means that the powers of inspection must be delimited more strictly because they are implemented without prior judicial authorisation. In fact, as is apparent from the case-law of the ECtHR on which the applicants rely in that respect (ECtHR, 10 November 2015, *Slavov and others v. Bulgaria*, CE:ECHR:2015:1110JUD005850010, paragraphs 144 and 146, and 16 February 2016, *Govedarski v. Bulgaria*, CE:ECHR:2016:0216JUD003495712, paragraphs 81 to 83), such delimitation relates to the effectiveness of the review carried out *ex post facto* by the Court and does not as such mean that that review gives rise to the grant of additional guarantees (see also, to that effect, paragraph 53 above).

148 The present complaint, relating to the persons and the premises inspected, must therefore be rejected as unfounded, without there being any need to rule on its admissibility, which is disputed by the Commission.

(2) The duration of the inspection

149 The applicants take issue with the Commission on the ground that, contrary to the case-law and to its own practice, it failed to set a time limit for its interference with the fundamental right to the inviolability of the home which it authorised. In their submission, the contested decision states only the date from which the inspection could begin and sets no end date, or any maximum duration; thus, the inspection had not been completed on the date on which the present action was brought, as, moreover, the Commission reminded the applicants. Nor do the applicants accept that the failure to place a temporal limit on the Commission's powers could be validly justified by the effectiveness of the inspections, relying, in particular, on a number of instances of national laws which limit in time the administration's powers of inspection.

150 It should be observed that, like the inspection decision at issue in the judgment of 6 September 2013, *Deutsche Bahn and Others* v *Commission* (T-289/11, T-290/11 and T-521/11, EU:T:2013:404, paragraphs 4, 14 and 21), which, contrary to the applicants' contention, contains a similar provision, the contested decision provides, in Article 2, that 'the inspection may commence on 20 February 2017 or shortly thereafter', without specifying the date on which the inspection must have ended.

151 It should be borne in mind that such an indication is consistent with Article 20(4) of Regulation No 1/2003, which requires only that the inspection decision 'appoint the date on which it is to begin' (see paragraph 109 above).

152 It should further be observed that this Court has held that the absence of any specific date by which the inspection had to be completed did not mean that the inspection could go on indefinitely, since the Commission is, in that regard, required to observe a reasonable time limit in accordance with Article 41(1) of the Charter (judgment of 12 July 2018, *Nexans France and Nexans* v *Commission*, T-449/14, under appeal, EU:T:2018:456, paragraph 69).

153 There is thus a temporal framework, delimited by the starting date of the inspection stated in the inspection decision and by the reasonable time limit, which sufficiently guarantees that there will be no disproportionate interference with the undertakings' sphere of private activities.

154 Such a temporal delimitation also makes it possible to guarantee in full the effectiveness of the Commission's investigative powers. In fact, as the limit of the reasonable time is assessed *ex post facto* and by reference to the circumstances of the case, it makes it possible to take into account the fact that the duration of the inspection cannot be known in advance, since it depends on the volume of information collected on site and of any obstructive behaviour on the part of the undertaking concerned.

155 It may indeed be accepted that, as the applicants submit, the fixing in advance of the duration of an inspection does not, as such, undermine the effectiveness of the inspections. Nonetheless, for the purposes of ensuring such effectiveness in the light of the circumstance referred to in the preceding paragraph, that pre-determined duration would probably be longer than the actual duration of the inspection in the present case – less than five days – which would not be consistent with a guarantee against disproportionate interferences.

156 It may be added that the case-law of the ECtHR and of a number of national courts, and the national legislation cited by the applicants, cannot call those considerations into question. That case-law and that legislation all relate to visits or seizures carried out under force, involving a greater interference than the inspection decided on in the present case, where the Commission's officials did not find it necessary to make use of Article 20(6) to (8) of Regulation No 1/2003 and of the national means of enforcement to which that provision allows them to have recourse (see paragraph 53 above). It is thus remarkable that the orders of the judges of freedoms and detention referred to in paragraph 147 above, which were adopted in the present case as a precautionary measure, to be used in the event that the inspection should be opposed, but which were not used in the present case in the absence of such opposition (Article 20(7) of Regulation No 1/2003), all set an end date for the visit and seizure operations.

157 The complaint relating to the duration of the inspection must therefore be rejected.

(3) The date of the inspection

158 The applicants maintain that the start date of the inspection stated in the contested decision breaches the principle of proportionality, since it immediately precedes the date on which the first applicant was to conclude the negotiation of its annual agreements with its suppliers, that is to say, 1 March, and it deprived several of its management responsible for those negotiations of their working tools at the time when the final negotiations were being held.

159 It must be considered that the applicants do not establish the disproportionate and intolerable disadvantages which they allege. They cannot rely in that regard on mere assertions that are not supported by any real evidence (see, to that effect, judgment of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 103).

160 In fact, the applicants establish only that a number of purchasing officers were deprived of their business telephones and computers for one and a half days at the most. Even if those individuals played a significant role in the negotiations in question, the period during which they were deprived of some of their working tools is very short by reference to the normal duration of negotiations of that type, on average five months (from 1 October until 1 March of the following year). Furthermore, it is not alleged, let alone established, that those individuals were unable to conduct those negotiations during that period and during the entire inspection period, in particular by means of direct contacts *in situ*, the possibility of which is demonstrated by the fact that the applicants acknowledged at the hearing that their negotiating partners were present at the applicants' premises at the time of the inspection. It follows that there was, at most, an inconvenience in the conduct of the negotiations concerned. That is particularly so since, in the type of negotiations in question, the last hours before the deadline are the most important and the inspection at issue ended in the present case two working days before the deadline of 1 March, plus a weekend, which is also generally used in attempting to reach an agreement.

161 In addition, the only allegedly less onerous alternative proposed by the applicants, namely that the inspection should have commenced after the deadline for the conclusion of the agreements with suppliers, cannot be considered to be less onerous.

162 In fact, although undoubtedly less onerous for the applicants, that postponement of the inspection does not constitute a genuine alternative to the inspection date stated in the contested decision. As the Commission explained in its written pleadings, the date chosen in the present case was chosen deliberately, in order to have access to the largest possible number of employees and

management involved in the suspected infringements, whose presence would be ensured both by the end of the school holidays and especially by the imminence of the final deadline of 1 March for the conclusion of the abovementioned trade agreements.

163 It follows that the complaint relating to the date of the inspection chosen must be rejected as also must, consequently, all the complaints that criticise the disproportionate nature of the contested decision.

(b) The Commission's possession of sufficiently serious indicia

164 It should be borne in mind that the Commission is under no obligation to indicate, at the preliminary investigation stage, apart from the suspicions of an infringement which it proposes to verify, the indicia, that is to say, the material that leads it to consider that there may have been an infringement of Article 101 TFEU, since such an obligation would upset the balance which the legislature and the Courts of the European Union have sought to establish between preserving the efficiency of the investigation and preserving the rights of defence of the undertaking concerned (see paragraphs 85 and 86 above).

165 It cannot be inferred, however, that the Commission does not have to be in possession of information leading it to consider that there may have been an infringement of Article 101 TFEU before it adopts an inspection decision. With a view to observing the right of the inspected undertakings to the inviolability of their private premises, an inspection decision must be directed at gathering the necessary documentary evidence to check the actual existence and scope of given factual and legal situations concerning which the Commission already possesses certain information, constituting sufficiently serious indicia for it to suspect an infringement of the competition rules (see, to that effect, judgment of 25 November 2014, *Orange* v *Commission*, T-402/13, EU:T:2014:991, paragraphs 82 to 84 and the case-law cited).

166 It is therefore for the Courts of the European, in order to be satisfied that the inspection decision is not arbitrary, that is to say, that it was not adopted in the absence of any circumstance of fact and of law capable of justifying an inspection, to ascertain whether the Commission had sufficiently serious indicia to suspect an infringement of the competition rules by the undertaking concerned (see, to that effect, judgments of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 43, and of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 48).

167 In the present case, the applicants maintain that certain differences between the content of the contested decision and the subject matter of the inspection actually carried out permit the inference that at the time when the contested decision was adopted the Commission did not have sufficiently serious indicia to suspect that at least some of the infringements set out therein had been committed. It is their contention that the requirement for protection against arbitrary interference by the public authorities with the sphere of private activities prohibits the Commission from ordering an inspection if it did not have serious indicia to suspect an infringement of the competition rules and it is for the Court to satisfy itself that the Commission did in fact possess such indicia.

168 It is therefore necessary to determine the indicia in the Commission's possession and on the basis of which it ordered the inspection at issue, before assessing whether those indicia were sufficiently serious for it to suspect that the infringements at issue had been committed and to justify in law the adoption of the contested decision.

(1) The determination of the indicia in the Commission's possession

169 It should be noted that, in answer to the measures of organisation of procedure adopted by the Court on 3 December 2018 and on 13 May and 25 September 2019, with a view to ascertaining whether the Commission had sufficiently serious indicia to adopt the contested decision, the Commission produced the following documents on 10 January, 5 June and 18 October 2019:

– minutes of interviews which it held in 2016 and 2017 with 13 suppliers of the fast-moving consumer goods concerned which regularly entered into agreements with Casino and Intermarché (Annexes Q.1 to Q.13 to the Commission's response of 10 January 2019; 'the minutes');

– exchanges of emails aiming to establish the dates of the interviews concerned and including the Commission's questionnaire that served as the basis for the interviews (Annexes R.1 to R.14 to the Commission's response of 5 June 2019);

– an email dated 22 November 2016 from the managing director of a suppliers' association, setting out the movements and the relationships between large retail chains within, in particular, retailers' associations, which are 'likely to reduce the prevailing level of uncertainty … between certain distributors' (Annex Q.14 to the Commission's response of 10 January 2019, as supplemented by its responses of 5 June and 18 October 2019; 'the letter from the managing director of association N'), together with a number of annexes, namely a schematic presentation of the participants and the course of the 'Intermarché convention' held on 21 September 2016 ('the Intermarché convention' or 'the convention') (Annex Q.15 to the Commission's response of 10 January 2019), a table setting out transfers of retail chains between international alliances, together with a number of tables indicating, for each international alliance, the potential sources of information that might result from transfers of personnel, transfers of retail chains or local agreements between retail chains which were members of different alliances (Annex Q.16 to the Commission's response of 10 January 2019), a newspaper article from October 2016 reporting the words of a director of a retailer (Annex Q.17 to the Commission's response of 10 January 2019) and a table setting out staff movements between retail chains (Annex Q.18 to the Commission's response of 10 January 2019);

– a number of tables setting out the relevant passages from documents annexed to the Commission's response of 10 January 2019 with a view to providing an analytical presentation of the indicia relating to each of the suspected infringements, namely:

  – the exchanges between ICDC (Casino) and AgeCore (Intermarché) concerning rebates on the supply markets and the selling prices of services to manufacturers of branded products at European level, in particular in France ('the first infringement') (Article 1(a) of the contested decision; Table 1 annexed to the Commission's response of 5 June 2019); and

  – the exchanges between Casino and Intermarché concerning future business strategies in France ('the second infringement') (Article 1(b) of the contested decision; Table 2 annexed to the Commission's response of 5 June 2019).

170 The Commission also lodged, on 19 December 2019, a 'supplementary response' to the question put by the Court on 13 May 2019 (see paragraph 19 above). That response consisted of (i) an internal note of the Commission's Directorate-General for Competition of 16 December 2016 mentioning the abovementioned interviews with the suppliers and the suspicions of infringements inferred from those interviews, which in the Commission's submission show that it had sufficiently serious indicia to suspect those infringements on the date of the contested decision, and (ii) various documents intended to establish the date of finalisation of the minutes. The applicants maintain that that supplementary response, which was produced by the Commission without justification after the written part of the procedure had been closed, is out of time and therefore inadmissible.

171 It should be borne in mind that, according to Article 85(1) and (3) of the Rules of Procedure, evidence is to be submitted in the first exchange of pleadings, while the main parties may still, exceptionally, produce evidence before the oral part of the procedure is closed, provided that the delay in the submission of such evidence is justified.

172 Admittedly, such justification for the late submission of evidence after the first exchange of pleadings cannot be required where the evidence is produced in response to a measure of organisation of procedure within the period prescribed for that response (see, to that effect, judgments of 16 October 2018, *OY* v *Commission*, T-605/16, not published, EU:T:2018:687, paragraphs 31, 34 and 35, and of 24 October 2018, *Epsilon International* v *Commission*, T-477/16, not published, EU:T:2018:714, paragraph 57).

173 However, where the evidence produced is not submitted in response to the Court's request (see, to that effect, judgments of 10 April 2018, *Alcogroup and Alcodis* v *Commission*, T-274/15, not published, EU:T:2018:179, paragraphs 49, 50, 54 and 55, and of 7 February 2019, *RK* v *Council*, T-11/17, EU:T:2019:65, paragraph 54), or is submitted after the expiry of the period for response prescribed in the measure of organisation of procedure (judgment of 9 April 2019, *Close and Cegelec* v *Parliament*, T-259/15, not published, under appeal, EU:T:2019:229, paragraph 34), the obligation to justify the delay is once again applicable.

174 In the present case, although it must be considered, as the Commission asserts, that its supplementary response of 19 December 2019 was intended to supplement its response of 5 June 2019 and not that of 10 January 2019, which already responded to a request from the Court asking it to produce the indicia that had justified the adoption of the contested decision, it should be observed that that supplementary response was lodged more than six months after expiry of the period prescribed by the Court in its measure of organisation of procedure of 13 May 2019, which expired on 5 June 2019.

175 It follows that the Commission was required to justify the late production of the documents annexed to its supplementary response of 19 December 2019 and that the need for such justification in the present case cannot be called into question by the case-law cited by the Commission at the hearing.

176 In the judgments cited, the material in question was either documents produced within the period prescribed in the measure of organisation of procedure, which were therefore not produced out of time (judgments of 24 October 2018, *Epsilon International* v *Commission*, T-477/16, not published, EU:T:2018:714, paragraphs 35 and 57; of 5 March 2019, *Pethke* v *EUIPO*, T-169/17, not published, under appeal, EU:T:2019:135, paragraphs 26, 36 and 40; and of 28 March 2019, *Pometon* v *Commission*, T-433/16, under appeal, EU:T:2019:201, paragraphs 27, 28 and 328), or

documents lodged spontaneously with due justification for their being lodged out of time (judgment of 24 October 2018, *Epsilon International* v *Commission*, T-477/16, not published, EU:T:2018:714, paragraphs 32 and 58).

177 Yet in the present case the Commission provided no justification for being out of time in lodging its supplementary response of 19 December 2019, but merely apologised to the Court in that document for any inconvenience which its submission might cause. Furthermore, even on the assumption that the justification put forward at the hearing in answer to a question from the Court – namely, that the delay in lodging the document was attributable to an internal dysfunction within the Commission – were to be taken into account, such justification could not properly render the supplementary response in question admissible. Such an allegation, referring to purely internal problems, does not correspond to exceptional circumstances that might allow evidence to be produced after the second exchange of pleadings (see, to that effect, judgment of 22 June 2017, *Biogena Naturprodukte* v *EUIPO (ZUM wohl)*, T-236/16, EU:T:2017:416, paragraph 19), nor is it demonstrated by evidence adduced by the Commission (see, to that effect, judgment of 11 September 2019, *HX* v *Council*, C-540/18 P, not published, EU:C:2019:707, paragraphs 66 and 67). In addition, the date of the main document produced on 19 December 2019, namely the Commission's internal note of 16 December 2016 (see paragraph 170 above), indicates that the Commission was in possession of that document even before the proceedings were brought and that it was in a position to produce it before the close of the written part of the procedure, within the time limits set for the lodging of its pleadings, and *a fortiori* in response to the subsequent measures of organisation of procedure. Furthermore, although the applicants were given the opportunity by the Court to present their observations on the Commission's supplementary response of 19 December 2019, and in particular on its admissibility, in writing and at the hearing, in accordance with the *inter partes* nature of the procedure, that cannot relieve the Commission of its obligation to submit the evidence in support of the legality of the contested decision in the conditions set out in the Rules of Procedure.

178 It may further be added that, even though the Commission did not rely on them, the documents annexed to the supplementary response of 19 December 2019 cannot be characterised as counterevidence not referred to by the limitation rule in Article 85(3) of the Rules of Procedure (orders of 21 March 2019, *Troszczynski* v *Parliament*, C-462/18 P, not published, EU:C:2019:239, paragraph 39, and of 21 May 2019, *Le Pen* v *Parliament*, C-525/18 P, not published, EU:C:2019:435, paragraph 48). The Court gave the Commission the opportunity, by its measures of organisation of procedure of 13 May and 25 September 2019, to respond to the applicants' objections to the Commission's assertion that it was in possession of indicia that justified the inspection at issue, which the Commission could therefore have done in its responses of 5 June and 18 October 2019, *a fortiori* because the main document produced on 19 December 2019 dated from 16 December 2016 (see paragraph 177 above).

179 The Commission's supplementary response of 19 December 2019 must therefore be rejected as inadmissible.

180 It follows that, for the purpose of assessing the sufficiently serious nature of the indicia that justified the adoption of the contested decision, only the indicia set out in paragraph 169 above will be taken into account.

(2) The assessment of the sufficiently serious nature of the indicia in the Commission's possession

181 Asked to submit their observations on the indicia produced by the Commission at the Court's request, the applicants claimed that the documents in question were vitiated by serious formal irregularities, relating in particular to the failure to record the interviews that had given rise to the minutes produced and the failure to establish the dates of those minutes. They dispute, in that regard, the case-law on which the Commission relies in support of its assertion that the relevant date for the assessment of whether it was in possession of indicia of the suspected infringements is the date of the interviews with the various suppliers and not the date on which it drew up the minutes of those interviews. The applicants maintain, moreover, that the indicia produced, relating to the Intermarché convention held by Intermarché for its suppliers, did not justify an inspection relating to alleged national information exchanges relating to future business strategies and that the contested decision should therefore be annulled at least in so far as it concerns the second presumed infringement. They further maintain that the Commission's adoption, on 13 May 2019, of a new decision authorising an inspection of their premises, relating specifically to those national information exchanges, shows that the Commission did not have sufficiently serious indicia to suspect the existence of those exchanges.

182 It should be made clear, as a preliminary point, that the assessment of the sufficiently serious nature of the indicia in the Commission's possession must have regard to the fact that the inspection decision forms part of the preliminary investigation stage, which is intended to enable the Commission to gather all the relevant evidence confirming the existence or non-existence of an infringement of the competition rules and to adopt an initial position on the approach to be taken and the subsequent procedure to be followed.

183 The Commission cannot therefore be required at that stage, before it adopts an inspection decision, to be in possession of evidence showing the existence of an infringement. Such a level of proof is required at the stage at which it issues a statement of objections to an undertaking suspected of having infringed the competition rules, and for Commission decisions in which it finds that there has been an infringement and imposes fines. Conversely, in order to adopt an inspection decision under Article 20 of Regulation No 1/2003 it is sufficient that the Commission have material and actual serious indicia that lead it to suspect the existence of an infringement (judgments of 29 February 2016, *EGL and Others* v *Commission*, T-251/12, not published, EU:T:2016:114, paragraph 149, and of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 66). It is necessary to distinguish, on the one hand, proof of an infringement and, on the other, indicia of such a kind as to give rise to a reasonable suspicion leading to presumptions of an infringement (see, by analogy, judgment of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 43) or, according to other terminology also used in the case-law, capable of creating an initial suspicion of anti-competitive conduct (see, to that effect, judgment of 29 February 2016, *EGL and Others* v *Commission*, T-251/12, not published, EU:T:2016:114, paragraphs 153 and 155).

184 Consequently, it is necessary to ascertain in the present case whether, at the time of adopting the contested decision, the Commission had such serious indicia capable of creating a suspicion of an infringement. The Court is not required to examine in that context whether the Commission was in possession of evidence capable of establishing the existence of the infringements concerned.

185 That distinction has consequences for the requirements relating to the form, the author and the content of the indicia that justify the inspection decisions, none of which, in the applicants' contention, was met in the present case.

(i) The form of the indicia that justified the contested decision

186 It follows from the distinction between proof of an infringement and indicia forming the basis of an inspection decision that such indicia cannot be subject to the same degree of formality as that relating in particular to compliance with the rules laid down by Regulation No 1/2003 and by the case-law based on that regulation concerning the Commission's investigative powers. If the same formalism were required for the gathering of indicia before an inspection and the gathering of proof of an infringement, that would mean that the Commission would have to comply with the rules governing its investigative powers, even though no investigation within the meaning of Chapter V of Regulation No 1/2003 has yet been formally initiated and although the Commission has not yet made use of the investigative powers conferred on it in particular by Articles 18 to 20 of Regulation No 1/2003, that is to say, it has not adopted a measure implying an accusation of having committed an infringement, notably an inspection decision.

187 That definition of the starting point of an investigation and of the preliminary inquiry stage emerged from a consistent line of decisions referred to in paragraph 88 above and recently confirmed again (judgment of 12 July 2018, *The Goldman Sachs Group* v *Commission*, T-419/14, under appeal, EU:T:2018:445, paragraph 241), but already established by judgments of the Court of Justice (judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 182, and of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2006:592, paragraph 38), and of the General Court (judgment of 16 June 2011, *Heineken Nederland and Heineken* v *Commission*, T-240/07, EU:T:2011:284, paragraph 288), some of which found support in the case-law of the ECtHR.

188 Factors that have been considered capable, in principle, of constituting indicia validly justifying an inspection include an accusation made in a written complaint (see, to that effect, judgment of 20 June 2018, *České dráhy* v *Commission*, T-325/16, EU:T:2018:368, paragraph 95), which may lead to the initiation of an investigation by the Commission even though it does not comply with the requirements for complaints pursuant to Article 7(2) of Regulation No 1/2003 (paragraph 4 of the Commission Notice on the handling of complaints by the Commission under Articles [101] and [102 TFEU] (OJ 2004 C 101, p. 65)), and likewise an oral accusation in the context of an application for clemency (see, to that effect, judgment of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 74).

189 Likewise, in the present case, contrary to the applicants' contention, the Commission was not required to comply with the requirements laid down in Article 19 of Regulation No 1/2003 and Article 3 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), as interpreted in the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), and was therefore not required to record the interviews with suppliers that gave rise to the minutes according to the procedures laid down in those provisions (see the first indent of paragraph 169 above).

190 It should be borne in mind that, under Article 19(1) of Regulation No 1/2003, which appears in Chapter V of that regulation and is entitled 'Investigative powers', 'in order to carry out the duties assigned to it by this Regulation, the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation'.

191 Article 3 of Regulation No 773/2004 states:

> '1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.
>
> 2. The interview may be conducted by any means including by telephone or electronic means.
>
> 3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time limit within which the person interviewed may communicate to it any correction to be made to the statement.'

192 It follows from those provisions and from the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, paragraphs 84 to 91), that the Commission is under an obligation to record, in whatever form it may choose, any interview conducted by it, on the basis of Article 19 of Regulation No 1/2003, for the purpose of gathering information relating to the subject matter of an investigation by it, without there being any need to distinguish between formal interviews and the informal interviews to which that obligation does not apply.

193 However, it must be pointed out that that obligation does not apply in the case of interviews carried out before an investigation is initiated by the Commission, the initiation of which may be marked by the adoption of an inspection decision.

194 In fact, as is apparent from the actual wording of Article 19 of Regulation No 1/2003, the interviews concerned are those held for the purpose of 'collecting information relating to the subject matter of an investigation', which by definition must have been initiated and the subject matter of which must have been fixed before those interviews are carried out (see also, to that effect, the Antitrust Manual of Procedures of the Commission's Directorate-General for Competition, Chapter 8, paragraphs 4, 5 and 22).

195 Likewise, in the case that gave rise to the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), the interview in respect of which the Court of Justice considered that the requirement to record interviews applied, under Article 19 of Regulation No 1/2003 and Article 3 of Regulation No 773/2004, had taken place after the initiation of an investigation marked by the adoption of inspection decisions (judgment of 12 June 2014, *Intel* v *Commission*, T-286/09, EU:T:2014:547, paragraphs 4 to 6). It cannot therefore be inferred that that requirement to record interviews also applies to interviews that precede the initiation of an investigation.

196 That limitation of the requirement to record interviews to those carried out in the course of an investigation is also apparent from the Opinion of Advocate General Wahl in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, points 232 and 233). Advocate General Wahl considered that it did not follow from the fact that Article 19 of Regulation No 1/2003, read in conjunction with Article 3 of Regulation No 773/2004, required that information gathered in interviews that relate to the subject matter of an investigation be recorded that the Commission could never contact third parties informally. He relied, in that respect, on the clear wording of Article 19 of Regulation No 1/2003 itself to support his conclusion that only exchanges relating

to the subject matter of an investigation fell within the scope of that provision and that where exchanges between the Commission and third parties did not relate to the subject matter of a particular investigation no obligation to record such exchanges existed.

197 If the position were otherwise, the detection of infringements by the Commission and the implementation of its investigative powers for that purpose would be seriously jeopardised. The Commission thus emphasised at the hearing the potential deterrent effects that a formal interview, as provided for in Article 3 of Regulation No 773/2004, could have on witnesses' inclination to provide information and report infringements, it being understood that such information represents a significant part of the indicia that lead to the adoption of measures of investigation, such as inspections.

198 In the present case, the interviews with suppliers took place before an investigation under Regulation No 1/2003 was initiated. Having regard to the questionnaire on the basis of which the interviews were carried out, in which suppliers were asked about their relationships with the distributors' alliances and, quite openly, about their knowledge of possible impacts that those alliances had on competition, it cannot be considered that those interviews entailed, vis-à-vis the applicants and *a fortiori* the suppliers, any accusation of having committed an infringement. That is confirmed, moreover, by Annex Q.12 to the Commission's response of 10 January 2019, cited by the applicants at the hearing, since it mentions the possibility that a 'formal investigation' will be initiated following the interviews and that the means of investigation provided for to that effect by the EU legislation, that is to say, in this instance, the adoption of an inspection decision marking the initiation in the present case of that investigation, will be used. It follows that the indicia resulting from those interviews cannot be rejected as vitiated by a formal irregularity on the ground of non-compliance with the requirement to record interviews laid down in Article 19 of Regulation No 1/2003 and Article 3 of Regulation No 773/2004. There is thus no need to rule on the Commission's assertion that the minutes constitute recordings that comply with those provisions.

199 It also follows that the applicants' argument that the Commission did not possess the indicia resulting from its interviews with the 13 suppliers on the date on which it adopted the contested decision, as it did not establish the date of the minutes of those interviews, cannot succeed.

200 As is apparent from the foregoing, and as the Commission pertinently observes, the relevant date that must be taken into account for the purpose of determining whether the Commission was in possession of indicia on the date of the contested decision is the date of the interviews with the suppliers that were the subject matter of the minutes. It was on that date that the information that was subsequently re-transcribed in the minutes was communicated to the Commission and that the Commission could be considered to be in possession of it. Although the minutes subsequently drawn up make it possible to determine the content of the interviews with the suppliers and should be taken into account on that basis, they are not the documents that enable the date on which the Commission came into possession of the indicia resulting from the interviews to be established. In other words, the interviews with the suppliers did not become 'indicia' in the Commission's possession from the time when they were the subject matter of minutes issued by the Commission, but were 'indicia' in the Commission's possession immediately they took place.

201 In that regard, it is appropriate to refer here, as the Commission does, to the case-law, admittedly relating to the specific context of leniency proceedings, but the scope of which goes beyond that context, given the general nature of the concept interpreted, that of 'possession' of evidence, and

the logical, reasonable and practical interpretation of that concept which it applied. According to that case-law, the possession of evidence by the Commission is equivalent to knowledge of its content (judgments of 9 June 2016, *Repsol Lubricantes y Especialidades and Others* v *Commission*, C-617/13 P, EU:C:2016:416, paragraph 72, and of 23 May 2019, *Recylex and Others* v *Commission*, T-222/17, under appeal, EU:T:2019:356, paragraph 87 (not published); see also, to that effect, judgment of 27 November 2014, *Alstom Grid* v *Commission*, T-521/09, EU:T:2014:1000, paragraphs 77 to 83). Thus, in the present case and by analogy, the Commission's interviews with the 13 suppliers may be considered to entail knowledge of the information communicated during those interviews and possession of that information on the date of the interviews.

202 If the position were otherwise, that would amount to considering that the indicia that justify inspections could not be solely in oral form, whereas a formal requirement to transcribe them not only is not required at that stage by the relevant provisions (see paragraphs 193 to 198 above), but, in addition, could undermine the efficiency of the Commission's investigation by requiring the Commission to follow the procedure for recording statements laid down in Article 3 of Regulation No 773/2004 (informing the person interviewed before the recording is made, preliminary information, putting a recording procedure in place, providing a copy of the recording for approval, setting a time limit for approval of the recording) and thus delay the date of the inspection, when it is of the utmost importance that inspection decisions be adopted quickly after the communication of information concerning potential infringements in order to minimise the risk of leaks and the risk that proof will be concealed (see, to that effect, Opinion of Advocate General Wahl in *Deutsche Bahn and Others* v *Commission*, C-583/13 P, EU:C:2015:92, points 61 and 62).

203 It may therefore be concluded that the Commission was correct to rely on the dates of its interviews with the 13 suppliers in order to establish that it was in possession of the indicia that emerged from those interviews on the date of the contested decision.

204 In addition, contrary to the applicants' contention, the evidence produced by the Commission in the annexes to its response of 5 June 2019 (Annexes R.1 to R.13) do in fact establish that its interviews with 13 suppliers took place before 9 February 2017, the date on which it adopted the contested decision.

205 First of all, those annexes show that appointments were made by email for interviews held on dates before 9 February 2017, between 4 October 2016 and 8 February 2017.

206 It is immaterial that, in the case of two of the suppliers questioned, the last exchange with the Commission took place on the day before it adopted the contested decision. The relevant date is the date of the exchanges, which, since they took place on 8 February 2017, precede the date of adoption of the contested decision, 9 February 2017.

207 In any event, even if the date on which the minutes were drawn up were to be taken into account, it cannot be inferred from the date of that last exchange, as the applicants infer, that the Commission necessarily drafted all the minutes after 9 February 2017. First, only two suppliers – and thus only two minutes out of 13 – are affected. Second, the Commission stated that it had drawn up the minutes in order to meet what it considered to be a requirement to record the suppliers' statements pursuant to Article 3 of Regulation No 773/2004 (see paragraph 198 above), which supports its assertion that the minutes were drawn up as and when the exchanges took place, that is, from the beginning of those exchanges, most of which date from late in 2016. The

two minutes in question were thus drawn up, at least in part, on the date of the contested decision and could reasonably be regarded as containing on that date the essential part of the data found in the finalised versions, since it is apparent from those minutes that the last exchange, on 8 February 2017, followed on from other exchanges and that its purpose was to obtain some final details. It is necessary to bear in mind, in that regard, the requirement to act rapidly that guides the adoption of inspection decisions in order to minimise the risks of leaks following accusations (see paragraph 202 above).

208 It may also be added that, even if the assertion and the supporting documents supplied by the Commission in its supplementary response of 19 December 2019 in order to establish that the minutes were finalised – and not drawn up – between the date of the last interview and 21 February 2017 were to be taken into account, the fact that they were finalised after the date of the contested decision could not call the preceding considerations into question. In fact, it may be inferred from the Commission's internal note of 16 December 2016 annexed to that supplementary response, consisting in a very detailed analysis of the information gathered during the interviews, that the Commission had before that date drawn up minutes that were already largely complete, albeit not finalised.

209 Next, the evidence produced in the present case in order to establish the date on which the interviews were scheduled is sufficient to show that the interviews did in fact take place with the 13 suppliers on the scheduled dates. In that regard, the applicants'– wholly unsubstantiated – assertion that that evidence does not even show that the Commission's officials had communicated with persons outside the Commission cannot be upheld. That assertion is clearly contradicted by the dates stated in the electronic diaries of the Commission officials concerned (which are reproduced in the final part of Annexes R.1 to R.13 to the Commission's response of 5 June 2019), which correspond to the dates stated in the emails exchanged between the Commission and external contacts with a view to fixing those dates (which are reproduced in the initial part of Annexes R.1 to R.13), contacts whose status as suppliers is clear from the questionnaire annexed to those emails, entitled 'Questions on retail buying alliances to manufacturers of goods supplying retailers'.

210 Last, and for the same reasons, in particular the obvious links between the abovementioned questionnaire and the information set out in the minutes, it may be considered, contrary to the applicants' assertion, that the exchanges fixed in the emails are indeed those that formed the basis of the minutes. The minutes all follow a plan containing, in essence, the same subdivisions (in particular, alliances with which the supplier has concluded agreements and counterparties, exchanges of information, transfers of staff), which shows that at least a part of the answers to the questionnaire (essentially, Part I, consisting of questions 1 to 10, and Part III of the questionnaire, containing questions 15 to 18) are reproduced.

211 It thus follows from all of the foregoing that on the date of the contested decision the Commission was in possession of the indicia analysed in the minutes and that the minutes may be taken into account in the analysis of whether the Commission possessed sufficiently serious indicia, without there being any need to precisely determine the dates on which the minutes were created and finalised.

212 It follows that all of the formal criticisms calling into question the indicia presented by the Commission must be rejected.

(ii) The authors of the indicia that justified the contested decision

213 It should be borne in mind that, according to settled case-law relating to the assessment of proof of an infringement, the only relevant criterion for the purpose of assessing such evidence is its credibility, given that the credibility and, therefore, the probative value of a document depend on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliability of its contents and that, in particular, great importance must be attached to the fact that a document has been drawn up in close connection with the events or by a direct witness of those events (see judgments of 27 June 2012, *Coats Holdings* v *Commission*, T-439/07, EU:T:2012:320, paragraph 45 and the case-law cited, and of 8 September 2016, *Goldfish and Others* v *Commission*, T-54/14, EU:T:2016:455, paragraph 95 and the case-law cited).

214 The application of those criteria for the assessment of proof of an infringement to the indicia that justify an inspection cannot have the effect that any indicia that do not originate in the inspected undertakings are precluded from being considered sufficiently serious. That would prevent statements made by or documents prepared by third parties from being characterised as sufficiently serious indicia and would thus deprive the Commission of the essential part of its opportunities to carry out inspections.

215 Although proof of infringements is most frequently direct proof that originates in the undertakings committing those infringements, the indicia on the basis of which infringements may be suspected generally originate with parties not participating in the infringements, whether these parties are competing undertakings or victims of the unlawful actions or public or private entities having no connection with those actions, such as experts or competition authorities.

216 Thus, in the present case, contrary to the applicants' contention, the fact that the minutes were drawn up by the Commission, which will decide whether the applicants will face proceedings and sanctions, does not as such suffice for the minutes to be denied any probative value in the assessment of whether the Commission was in possession of sufficiently serious indicia.

217 In fact, it must be borne in mind that the minutes are intended to put in concrete form, and thus to establish, the information communicated to the Commission by the suppliers (see paragraph 200 above). That information, which alone constitutes the actual indicia that formed the basis of the contested decision, does not come from the Commission but from the suppliers which have direct commercial relationships with the applicants. It should be emphasised, in that regard, that the suppliers have business relationships with the applicants and may thus suffer directly as a result of the applicants' suspected unlawful conduct. They may thus have an interest in the applicants being penalised. However, precisely because of their business relationships with the applicants, they, unlike mere competitors of the participants in the infringement, have direct knowledge of the effects attributable, where appropriate, to what may be that unlawful conduct. To that extent, the prudence which, according to the case-law, must be exercised when interpreting the accusations made by undertakings against other undertakings where the former have an interest in sanctions being imposed on the latter (see, to that effect, judgment of 12 July 2011, *Mitsubishi Electric* v *Commission*, T-133/07, EU:T:2011:345, paragraph 88) is not wholly applicable to the statements of the suppliers, in particular where, as in the present case, the suppliers mention specific facts based on their business relationships with the presumed authors of the infringement.

218 As regards, moreover, the probative value of the minutes drawn up by the Commission, it must be observed that it is not called into question by the sole argument put forward by the applicants in order to contest it, based on the standardised presentation of certain passages in the minutes, which in their submission shows that the Commission did not faithfully reproduce the statements of the various suppliers. As the applicants submit, the passages relating to the date of and the participants in the Intermarché convention, and to the consequences of that participation, namely the fact that the participants were aware of certain of Intermarché's business objectives, are indeed identical in four of the minutes (Annexes Q.4, Q.5, Q.7 and Q.8 to the Commission's response of 10 January 2019). However, the identity of those passages, in that it applies to only four minutes out of the 13 communicated and relates to data that may have been communicated in answer to the Commission's questionnaire and be described in the same way, does not permit the inference that the statements obtained were distorted. That is *a fortiori* the case because the identical passages in question are supplemented in each of the four minutes by different data relating to the Intermarché convention.

219 It should also be borne in mind, in that regard, that under the Treaties the Commission is the institution responsible for ensuring compliance, in complete impartiality, with EU competition law and that the fact that it is also responsible for both investigating and imposing penalties for infringements of the competition rules does not in itself constitute a breach of the requirement to act impartially (see, to that effect, judgment of 27 June 2012, *Bolloré* v *Commission*, T-372/10, EU:T:2012:325, paragraph 66 and the case-law cited). It cannot therefore be presumed, without supporting proof or even the germ of proof, that when investigating the present case the Commission distorted the suppliers' statements in order to obtain indicia of the unlawful nature of the distributors' practices.

220 It follows from the foregoing that all of the arguments that infer from the status of the authors of the indicia communicated that the Commission did not have sufficiently serious indicia to carry out the inspection at issue must be rejected.

(iii) The content of the indicia that justified the contested decision

221 It follows from the distinction between proof of an infringement and indicia forming the basis of an inspection decision that, unless the powers conferred on the Commission by Article 20 of Regulation No 1/2003 are to be wholly deprived of their purpose, such indicia do not need to demonstrate the existence and the content of an infringement and those participating in it (see, to that effect and by analogy, judgment of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 59).

222 Accordingly, the fact that the material taken into consideration may be open to different interpretations does not preclude it from constituting sufficiently serious indicia, provided that the interpretation favoured by the Commission is plausible (see, by analogy, concerning a decision requesting information, judgment of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 59). When assessing such plausibility, it is necessary to bear in mind that the Commission's power of inspection implies the ability to seek various items of information which are not yet known or fully identified (see judgment of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 62 and the case-law cited).

223 It should also be borne in mind that the various indicia on the basis of which an infringement may be suspected must be assessed not in isolation but as a whole and that they may reinforce each other (see judgments of 27 November 2014, *Alstom Grid* v *Commission*, T-521/09, EU:T:2014:1000, paragraph 54 and the case-law cited, and of 29 February 2016, *EGL and Others* v *Commission*, T-251/12, not published, EU:T:2016:114, paragraph 150 and the case-law cited).

224 In particular, in the case of the infringements suspected in the present case, namely concerted practices (see, in particular, recital 6 of the contested decision), it is settled case-law that, as is clear from the very words of Article 101(1) TFEU, a concerted practice implies, in addition to collusion between the undertakings, conduct on the market pursuant to those collusive practices and a relationship of cause and effect between them (judgments of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 118, and of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 1865). Those three components must therefore be present.

225 As regards proof of those three components, it should be recalled that the concept of 'concerted practices' was introduced into the Treaties in order to allow competition law to be applied to collusion not taking the form of a formal agreement of intention and thus more difficult to identify and prove. As the Courts of the European Union have emphasised on many occasions, if Article 101 TFEU distinguishes the concept of 'concerted practice' from that of 'agreement between undertakings', it does so with the aim of bringing within the prohibitions in that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition (judgments of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraph 64, and of 5 April 2006, *Degussa* v *Commission*, T-279/02, EU:T:2006:103, paragraph 132).

226 Likewise, and more generally, it must be borne in mind that the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known. It is therefore normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 55 to 57, and of 25 January 2007, *Sumitomo Metal Industries and Nippon Steel* v *Commission*, C-403/04 P and C-405/04 P, EU:C:2007:52, paragraph 51; see also, to that effect, judgment of 27 June 2012, *Coats Holdings* v *Commission*, T-439/07, EU:T:2012:320, paragraph 42).

227 It follows that the Courts of the European Union have accepted, in certain situations, that the Commission's burden of proving the three components of a concerted practice should be alleviated.

228 Thus, parallel conduct on the market may, on certain conditions, be regarded as furnishing proof of concertation, in this instance if concertation constitutes the only plausible explanation for such conduct (judgments of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, EU:C:1993:120, paragraph 71, and of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraph 143).

229 Likewise, subject to proof to the contrary, which it is for the parties concerned to adduce, there must be a presumption that the undertakings participating in collusion and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (judgments of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 121, and of 8 October 2008, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, T-69/04, EU:T:2008:415, paragraph 118). In other words, proof that the first two components of a concerted practice exist means, in certain cases, that the existence of the third component may be presumed.

230 That specific evidentiary regime applicable to concerted practices has consequences for the conditions that must be satisfied in order for it to be considered that sufficiently serious indicia on the basis of which such practices may be suspected are present. In particular, given the distinction that must necessarily be drawn between proof of a concerted practice and indicia justifying inspections for the purposes of gathering such proof, the threshold for recognising that the Commission possesses sufficiently serious indicia must necessarily be lower than the threshold at which the existence of a concerted practice may be found.

231 It is therefore in the light of those considerations that the arguments which the applicants base on the content of the information in the Commission's possession in order to infer that the Commission did not possess sufficiently serious indicia to adopt the contested decision must be addressed.

– *The absence of sufficiently serious indicia relating to the suspicion of the first infringement*

232 It should be recalled, as a preliminary point, that the first infringement is characterised as follows in Article 1(a) of the contested decision:

'… exchanges of information, since 2015, between undertakings and/or associations of undertakings, in particular ICDC …, and/or its members, in particular Casino and AgeCore and/or its members, in particular Intermarché, concerning discounts obtained by them in the markets for the supply of fast-moving consumer goods in the food products, hygiene products and cleaning products sectors and prices in the market for the sale of services to manufacturers of branded products in the food products, hygiene products and cleaning products sectors, in several Member States of the European Union, notably in France, …'

233 The applicants did not dispute, as regards the substance, that the Commission possessed sufficiently serious indicia relating to the first infringement, either in their written pleadings or in their answers to the questions from the Court asking them to express their views on the indicia produced by the Commission. They put forward, for the first time at the hearing, two complaints not previously relied on. First, they allege that combining the market for the sale of services and the market for supply together in Table 1 annexed to the Commission's response of 5 June 2019, when those two markets were referred to separately in Article 1(a) of the contested decision, shows, in accordance with the case-law established in the judgment of 14 November 2012, *Nexans France and Nexans* v *Commission* (T-135/09, EU:T:2012:596), that the Commission did

not possess sufficiently serious indicia relating to the first infringement. Second, the initiation of the formal procedure in relation to only some aspects of the second infringement shows that the Commission did not possess sufficiently serious indicia relating to the first infringement.

234 As for the first complaint put forward by the applicants at the hearing, it must be rejected as inadmissible, because it was raised out of time. Contrary to the requirement set out in Article 84(2) of the Rules of Procedure, the applicants did not formulate the first complaint as soon as Table 1 annexed to the Commission's response of 5 June 2019 came to their knowledge, since, in spite of being asked by the Court to express their views on that response before 4 July 2019, they raised the first complaint only at the hearing on 29 January 2020.

235 It may be added, in any event, that the first complaint must fail on its merits. It does indeed follow from Table 1 annexed to the Commission's response of 5 June 2019 that the Commission did not draw a distinction between the market for the supply of fast-moving consumer goods and the market for the sale of services to manufacturers, which were nonetheless mentioned separately in the contested decision, explaining in that table that 'discounts [on the supply market] may thus be regarded as selling prices of services to manufacturers of branded products in the food products, hygiene products and cleaning products sectors'. However, that merely indicates that, in accordance with the case-law, and in particular with the judgment of 14 November 2012, *Nexans France and Nexans* v *Commission* (T-135/09, EU:T:2012:596, paragraph 62), the Commission had at that stage not yet determined the form taken by the amount that benefited distributors to the detriment of suppliers and on which it suspected the distributors of having agreed, which it acknowledges, moreover, when it states in its response of 5 June 2019 that it uses, in the annexes to that response, only the word 'discount', 'without prejudice to whether a thorough investigation would conclude that the discounts in question were applied to the supply markets or to selling prices of services to manufacturers'. It should be recalled that, according to that judgment, the Commission's power of inspection implies the power to search for various items of information which are not already known or fully identified (see also paragraph 222 above).

236 Contrary to the applicants' contention, on the other hand, it cannot be inferred from the judgment of 14 November 2012, *Nexans France and Nexans* v *Commission* (T-135/09, EU:T:2012:596, paragraphs 60 to 94), that where the Commission found indicia of a price advantage in favour of the inspected undertakings, it would be required to specify those indicia by distinguishing according to the two markets to which that advantage applied, especially since it is apparent from settled case-law relating to the obligation to state reasons that the Commission is not required to delimit the relevant market precisely (see paragraph 112 above). In that judgment, the Court did not criticise the Commission for having failed to distinguish sufficiently the two markets concerned by the indicia in its possession, but criticised it because the scope of its inspection went beyond the framework of the only market in respect of which it possessed indicia. In the present case, the applicants submit no evidence that the Commission exceeded the relevant boundaries, since, contrary to the assertions made at the hearing, the suppliers' statements do not relate solely to ICDC, which is active only in the market for the sale of services to manufacturers (see paragraph 248 below).

237 As for the second complaint put forward by the applicants at the hearing, it may be considered admissible under Article 84(2) of the Rules of Procedure, since it is based on the decision to initiate the formal procedure, adopted by the Commission on 4 November 2019, or after the abovementioned deadline of 4 July 2019 for a response, and since it was submitted during that oral part of the procedure. That complaint must nonetheless be rejected as unfounded.

238 Even irrespective of the fact that the decision to initiate the formal procedure was taken after the contested decision had been adopted and is thus incapable of calling its legality into question, it cannot be inferred from the scope of that decision that the Commission was not in possession of sufficiently serious indicia relating to the first infringement.

239 It does admittedly follow from Decision C(2019) 7997 of 4 November 2019 initiating the procedure in Case AT.40466 concerning suspicions of infringement other than those relating to the first infringement that the Commission did not consider that it was in possession of sufficient evidence to initiate the procedure with respect to that infringement. However, by their very nature, the indicia that justify an inspection make it possible only to suspect an infringement, which might ultimately not be established, which explains, moreover, why not all inspections are followed by a decision initiating the procedure, or *a fortiori* by a decision finding an infringement. Thus, the existence of indicia of an infringement does not necessarily mean the existence of proof of the suspected infringement, or the existence of sufficient evidence to initiate the procedure. It cannot therefore be inferred from the fact that the inspection at issue did not permit such evidence to be gathered that the Commission did not have sufficiently serious indicia before the inspection.

240 It should be added that the Commission communicated to the Court a number of indicia which were in its possession when it adopted the contested decision, relating to parallel conduct between ICDC (Casino) and AgeCore (Intermarché), characterised in this instance by the concomitant nature and the convergence of their requests to suppliers for discounts.

241 The information in question constitutes sufficiently serious indicia of such concomitance and convergence.

242 In fact, among the 13 suppliers questioned, 10 of which state that they maintain commercial relationships with both ICDC and AgeCore, eight described in detail identical requests for discounts from ICDC (Casino) and AgeCore (Intermarché) (namely undertakings A, B, C, D, E, G, H and J; Annexes Q.1 to Q.5, Q.7, Q.8 and Q.10 to the Commission's response of 10 January 2019), one states that AgeCore was aligned with its competitors without mentioning them by name (undertaking I; Annex Q.9), and two suppliers state generally that they had received similar requests for discounts from different alliances of distributors (undertakings L and M; Annexes Q.12 and Q.13).

243 Nor did the Commission merely communicate indicia relating to that first component of a concerted practice – parallel conduct on the market – which may, moreover, under certain conditions, give rise to a presumption that the second component of a concerted practice, collusion (see paragraph 228 above), is present. It stated that it also had in its possession indicia relating to the existence of such collusion, consisting in this instance in exchanges of information, which, when taken together, may also be considered to be sufficiently serious.

244 It is true that the suppliers that refer expressly to exchanges between distributors concerning discounts are less numerous and their statements in that respect are in most cases vague and speculative. Three suppliers expressly mention the sharing or exchanges of information (undertakings C, E and H; Annexes Q.3, Q.5 and Q.8 to the Commission's response of 10 January 2019) and a number of others mention that one alliance was aware of the discounts obtained by the others (in particular, undertakings B, D, G and I; Annexes Q.2, Q.4, Q.7 and

Q.9). In addition, one of the suppliers mentions a possible explanation of the concomitant requests for discounts, that is that the distributors may be bluffing in their negotiations in order to secure more advantageous trading conditions (Undertaking L; Annex Q.12).

245 Nonetheless, first of all, it must be observed that none of the suppliers states that it considers it unlikely that the concomitance and convergence of the requests for discounts are the result of exchanges of information. The only suppliers to suggest a reason other than the existence of exchanges of information either remained silent or stated that they did not have any information relating to exchanges of information between distributors (namely, undertakings A, F, J, K and M; Annexes Q.1, Q.6, Q.10, Q.11 and Q.13 to the Commission's response of 10 January 2019), but did not explicitly preclude the existence of such exchanges.

246 Next, it should be emphasised that the supplier that mentioned the possibility that the distributors were bluffing not only qualified the likelihood of that theory, stating that it 'believe[d] that the information referred to [relating to knowledge of the conditions obtained by the other alliances] was nonetheless accurate', but also stated that it did not participate in the negotiations going beyond the national framework, those mainly at issue in the first suspected infringement, which limits the reliability of its statement. It follows that the indicia in the Commission's possession did not allow it to consider that the concomitant and convergent requests for discounts could be plausibly explained by anything other than an underlying collusion (see paragraph 228 above).

247 Last, the suppliers' statements relating to exchanges between distributors concerning discounts are supported by information that mentions the channels through which those exchanges may pass.

248 Thus, a number of suppliers and the letter from the director of the association N refer to movements between alliances of distributors, transfers of retail chains and movements of staff between distributors and between alliances, which they present as potential sources of knowledge, in particular of the discounts obtained by the various distributors (in particular Annex Q.2, page 4, Annex Q.7, page 4 and Annex Q.8, page 5, and also Annexes Q.14, Q.16 and Q.18 to the Commission's response of 10 January 2019). They refer in particular to the alliance set up in France by Casino and Intermarché, in the form of the joint subsidiary Intermarché Casino Achats (INCA), and mention a link between the fact of being part of the same alliance at national level and the fact that Casino and Intermarché are aware of the discounts obtained by each of them from their respective suppliers (in particular Annex Q.4, page 4, and Annex Q.7, pages 4 and 6).

249 By the multiplicity of channels of communication thus revealed, the details given of those channels and the concordance of the information communicated, when their authors did not prima facie have the same means and sources of information, it may be considered that the Commission had in its possession sufficiently serious indicia allowing it to suspect the exchanges at issue. It must be borne in mind that while the suppliers may be direct witnesses of anti-competitive conduct on the market (see paragraph 217 above), they cannot be direct witnesses with respect to the underlying clandestine collusion. In those circumstances, the multiplicity, precision and concordance of the information communicated relating to the exchanges of information at issue compensates, in the global assessment carried out for the purpose of verifying the existence of sufficiently serious indicia, for what is often the speculative nature of that information.

250 Consequently, regard also being had to the fact that those indicia relating to the suspected exchanges of information supplement those relating to conduct on the market, it must be considered that the Commission possessed sufficiently serious indicia to suspect the first infringement.

– *The absence of sufficiently serious indicia relating to the suspicion of the second infringement*

251 It will be recalled that the second infringement is described as follows in Article 1(b) of the contested decision:

'exchanges of information, since at least 2016, between Casino and Intermarché concerning their future business strategies, particular in terms of product range, development of shops, e-commerce and advertising policy in the markets for the supply of fast-moving consumer goods and in the markets for consumer sales of fast-moving consumer goods, in France.'

252 It must be observed at the outset, as the applicants maintain and as the Commission accepts, that the Commission founded its suspicions relating to the second infringement on one main indicium, based on the conduct of the Intermarché convention.

253 It is apparent from the case file that the Intermarché convention was held on 21 September 2016 at Intermarché's headquarters and that Intermarché's board of directors, together with the senior management of its retail chains, received its main suppliers there in order to present its ambitions and its commercial priorities.

254 It is common ground that representatives of a large number of Intermarché's suppliers participated in that convention, as also did representatives of INCA, the joint subsidiary of Intermarché and Casino, in particular A, who, moreover, was a director within the Casino group, and a representative of AgeCore, B, the managing director of that association of undertakings. It is also common ground that the topics addressed at that convention, presented by Intermarché's management team, concerned the undertaking's objectives and plans for development in terms of market share, increasing its network of shops, digital transformation and expansion of on-line trade, innovations designed to speed up the placing of new products on the shelves, an increase in its 'drive-through' points of sale and the implementation of new promotional initiatives.

255 The applicants maintain that the information thus presented reveals no exchange of sensitive and confidential commercial information on the basis of which collusion between competitors, prohibited by Article 101 TFEU, might be suspected and they infer that the Commission did not possess sufficiently serious indicia to presume the existence of the second infringement.

256 As regards, first, the possibility of presuming the existence of exchanges, and thus of collusion, on the basis of statements made by a single distributor, in this instance Intermarché, it should be borne in mind that, according to settled case-law, the criteria of coordination and cooperation on which the concept of a concerted practice may be defined must be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the internal market. While that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or stated conduct of their competitors, it does strictly preclude any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the conduct which that operator concerned has itself decided to

adopt or envisages adopting on the market (judgments of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 32 and 33, and of 24 October 1991, *Rhône-Poulenc* v *Commission*, T-1/89, EU:T:1991:56, paragraph 121).

257 It follows that the fact that only one of the participants in the meetings between competing undertakings discloses his intentions does not suffice to preclude the existence of collusion. According to what is also settled case-law, while the concept of concerted practice does in fact imply the existence of contacts between competitors characterised by reciprocity, that condition is satisfied where the disclosure, by one competitor to another, of his intentions or his future conduct on the market has been sought or at least received by the second. The latter, as a result of having received such information, which he must necessarily take into account, directly or indirectly, eliminates in advance the uncertainty about the future conduct of the former, whereas every economic operator must determine independently the commercial policy which he intends to pursue on the market. The receipt by an undertaking of information coming from a competitor relating to the latter's future conduct on the market therefore constitutes a concerted practice prohibited by Article 101(1) TFEU (see, to that effect, judgments of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 1849; of 12 July 2001, *Tate & Lyle and Others* v *Commission*, T-202/98, T-204/98 and T-207/98, EU:T:2001:185, paragraph 54; and of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraphs 231 to 234).

258 However, it cannot be considered that the mere presence of a director from the Casino group during Intermarché's presentation of its commercial priorities is sufficient, in the present case, to suspect the receipt of the information communicated, as required by the case-law for the purpose of establishing reciprocity and inferring from such reciprocity the existence of a concerted practice between Casino and Intermarché.

259 In fact, first, as the applicants pertinently submitted, without the Commission contesting it, A attended the Intermarché convention not as a representative of Casino, but in his capacity as joint managing director of INCA, whose presence was justified by the fact that INCA was negotiating on behalf of Intermarché the conditions of supply with its main suppliers. Second, A was subject to strict obligations of confidentiality vis-à-vis Casino, which, too, are not in themselves contested, and it cannot be presumed that such obligations would not be respected.

260 That reason for A's presence at the Intermarché convention, and the obligations placed on him, are not as such, and without other supporting evidence, which the Commission has not supplied in the present case, apt to give rise to a reasonable suspicion that Casino received the information communicated by Intermarché that would justify pursuing the investigations in order to determine whether Casino had sought or at least received the disclosures by Intermarché. The Commission merely relies on a single minute reporting discussions between A and Intermarché's representative in INCA during the convention (Annex Q.5, pages 7 and 8, to the Commission's response of 10 January 2019), which were separate discussions not corresponding to the receipt of statements made in public and the content of which was not necessarily connected with the content of those statements, having regard to the duties carried out by those two persons within INCA, which justify exchanges between them relating to other topics. It should be observed, in that regard, that, contrary to the Commission's assertion, when it states, in the introduction to Table 2 annexed to its response of 5 June 2019, that it has received information that INCA might

serve as a vehicle for the exchange of information relating to the second infringement, the extracts from the minutes set out in that table merely mention that A was present at the Intermarché convention, from which it cannot be inferred that INCA plays a specific role in that context.

261 As regards, second, the data communicated during the Intermarché convention, it should be borne in mind that whether an exchange of information can be characterised as an infringement depends, inter alia, on the nature of the information exchanged (see, to that effect, judgments of 28 May 1998, *Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraphs 88 to 90, and of 23 November 2006, *Asnef-Equifax and Administración del Estado*, C-238/05, EU:C:2006:734, paragraph 54).

262 In the present case, it should be observed, as the applicants maintain, that the minutes referring to the Intermarché convention (Annexes Q.4, Q.5, Q.7, Q.9 and, providing more detail, Annex Q.8 of the Commission's response of 10 January 2019) indicate generally the elements of commercial policy relating to product range, e-commerce or promotional practices, which were referred to at that convention. Such general references may also be found in the annex to the letter from the director of the N association (Annex Q.15). They are also reproduced in an article published in the specialist press, communicated by the applicants.

263 It is in fact apparent from the case file, and it is not disputed by the Commission, that the Intermarché convention was held in public, in the presence of more than 400 suppliers, as well as journalists, and that it was the subject of a detailed report in the specialist press. Furthermore, the Commission was informed of its public nature, as evidenced by the minutes of the interviews with the suppliers, one of which stated that the press was present at the Intermarché convention (Annex Q.2, page 7). The Commission also stated, in answer to a question put by the Court, that it was not informed of any presentations made at the Intermarché convention when no journalists were present.

264 It is settled case-law that a system for the exchange of public information cannot, as such, infringe the Treaty competition rules (see judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 1154 and the case-law cited).

265 Likewise, according to paragraph 92 of the Guidelines on the applicability of Article 101 [TFEU] to horizontal cooperation agreements (OJ 2011 C 11, p. 1) ('the Guidelines on horizontal cooperation agreements'), whereby the Commission imposed a limit on the exercise of its discretion and from which it cannot depart under pain of being found, where appropriate, to have acted unlawfully (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 211), 'genuinely public information' is information that is generally equally accessible to all competitors and customers. That paragraph of the Guidelines on horizontal cooperation agreements states that, 'for information to be genuinely public, obtaining it should not be more costly for customers and companies unaffiliated to the exchange system than for the companies exchanging the information' and that 'for this reason, competitors would normally not choose to exchange data that they can collect from the market at equal ease, and hence in practice exchanges of genuinely public data are unlikely'. In addition, it follows from paragraph 63 of the Guidelines on horizontal cooperation agreements, dealing specifically with unilateral public announcements, cited by the applicants at the hearing, that 'a unilateral announcement that is also genuinely public, for example through a newspaper … generally does not constitute a concerted practice within the meaning of Article 101 [TFEU]'.

266 In the present case, it is clear from the circumstances in which the Intermarché convention took place that the information communicated there by Intermarché is genuinely public data within the meaning of the Guidelines on horizontal cooperation agreements. Owing to the presence of journalists and the detailed account which they reported in the specialist press just a few days after the Intermarché convention was held, the information provided by Intermarché at that convention was made available not only to A, the director of the competing Casino group, but also just as readily to all of Intermarché's other competitors.

267 In addition, it is apparent from the article in the specialist press describing the proceedings at the Intermarché convention, the content of which has not been disputed by the Commission, that the information presented at that event was very general and intended to promote, with the undertaking's suppliers, the development and innovation policy of Intermarché's management team. The Commission has not explained precisely how such information might escape being classified as public data. While it is true that an objective of opening 200 shops was announced at that event, that information alone, owing to its general nature, cannot in itself give rise to a suspicion of a concerted practice between competitors, prohibited by Article 101 TFEU. The public nature of the information disclosed at the Intermarché convention therefore precluded its being considered to be the subject of unlawful exchanges of information and, likewise, precludes the Intermarché convention being characterised as a sufficiently serious indicium of the infringement in question.

268 That is *a fortiori* the case here because the Commission itself presented the indicia of the suspected infringement in the contested decision as attesting to secret exchanges between a limited number of persons and by means of documents that were themselves secret (see paragraph 117 above). As the applicants pertinently observed, according to recital 8 of the contested decision, 'the presumed concerted practices took place in the utmost secrecy, knowledge of their existence and their implementation being confined to the senior management and to a limited number of trustworthy members of staff in each undertaking', and 'the documents relating to the presumed concerted practices would be limited to a strict minimum and kept in places and in a form that facilitated their concealment, their possession or their destruction'. However, indicia consisting in public statements, such as those made at the Intermarché convention, cannot as such give rise to a suspicion of exchanges relating to the same information and kept in the utmost secrecy.

269 Those considerations are not called into question by the statement, in paragraph 63 of the Guidelines on horizontal cooperation agreements, that 'the possibility of finding a concerted practice cannot be excluded' on the basis of a 'unilateral announcement that is also genuinely public'. In addition to the fact that such public announcements do not correspond to the present presumption of secret unlawful exchanges, it should be observed that the Commission did not assert, nor *a fortiori* did it explain in the contested decision, or during these proceedings, that the second infringement would correspond to that hypothesis of a concerted practice based on unilateral statements made in public.

270 It follows that the Commission could not properly infer from the assessment of all of the characteristics of the Intermarché convention a suspicion of exchanges of commercial data between competitors, prohibited by Article 101 TFEU. It also follows that that convention cannot constitute a sufficiently serious indicium on which the second infringement might be suspected.

271 In any event, the taking into account of the Commission's internal note of 16 December 2016, annexed to its supplementary response of 19 December 2019, and likewise the production of the confidential version of the minutes communicated in their non-confidential form by the Commission, by means of a measure of inquiry, cannot alter that conclusion. First, that internal note discloses no data other than those found in the minutes. Second, it is apparent from the non-confidential version of those minutes that the redacted data are intended only to prevent the identification of entities or persons, dates and figures, so that the taking into account of those data does not make it possible to establish the link between the public statements made at the Intermarché convention and the suspected secret exchanges. It follows, moreover, that it is not appropriate to order the abovementioned measure of investigation, which the Commission had asked the Court to order.

272 Nor can the concomitant requests relating to an 'innovation bonus' which Casino and Intermarché presented to their suppliers constitute a sufficiently serious indicium on which to suspect the second infringement. In fact, none of the indicia communicated permits that bonus or those 'innovation discounts' to be clearly distinguished from the rebates and selling prices of services to suppliers at issue in the first infringement. In the light of the explanations provided in the minutes (Annex Q.6, page 3, and Annex Q.7, page 5, and also footnote 7, to the Commission's response of 10 January 2019), those discounts consist either in a rebate requested of suppliers or in remuneration for referencing services provided to the suppliers by the distributors, even if they are specifically linked to innovative products and applicable in France, which is also concerned by the first infringement. Likewise, in Table 2, drawn up by the Commission for the purpose of presenting in analytical form the indicia corresponding to the second infringement (see the first indent of paragraph 169 above), the Commission isolated the indicia relating to 'innovation rebates' from those relating to the product range, the development of shops, e-commerce and promotional policy, which alone are mentioned in the contested decision. It may also be mentioned that only two of the 13 suppliers questioned (Annexes Q.6 and Q.7) mention concomitant requests for innovation discounts.

273 It must therefore be concluded, even when the material relating to the Intermarché convention and the 'innovation bonus' are considered together, that the Commission was not in possession of sufficiently serious indicia to suspect the existence of the second infringement and to justify Article 1(b) of the contested decision, without there being any need to rule on the applicants' arguments relating to the new inspection decision relating, in particular, to aspects of the second infringement, which was notified to them in the course of the present proceedings (Commission Decision C(2019) 3761 of 13 May 2019 ordering Casino, Guichard-Perrachon SA and all companies directly or indirectly controlled by it to submit to an inspection in accordance with Article 20(1) and (4) of Council Regulation No 1/2003 (AT.40466 – Tute 1)).

274 The plea alleging breach of the right to the inviolability of the applicants' private premises must therefore be upheld in so far as it relates to the second infringement.

275 It follows from all of the foregoing that the contested decision must be annulled in that it orders the applicants, in Article 1(b), to submit to an inspection concerning their possible participation in the second infringement and that the action must be dismissed as to the remainder.

Costs

276 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. As the contested decision has been annulled in part, the applicants and the Commission must be ordered to bear their own costs. The Council, which has intervened in support of the Commission, shall bear its own costs, in application of Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(b) of Commission Decision C(2017) 1054 final of 9 February 2017 ordering Casino, Guichard-Perrachon and all companies directly or indirectly controlled by it to submit to an inspection in accordance with Article 20(1) and (4) of Council Regulation (EC) No 1/2003 (Case AT.40466 – Tute 1);**

2. **Dismisses the remainder of the action;**

3. **Orders Casino, Guichard-Perrachon and Achats Marchandises Casino SAS (AMC), the European Commission and the Council of the European Union to bear their own costs.**

Gervasoni Madise da Silva Passos

Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 5 October 2020.

[Signatures]

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