Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

12 July 2018 *

(Competition — Agreements, decisions and concerted practices — European market for power cables — Decision finding an infringement of Article 101 TFEU — Single and continuous infringement — Proof of the infringement — Duration of participation — Public distancing — Calculation of the fine — Gravity of the infringement — Unlimited jurisdiction)

In Case T-441/14,

Brugg Kabel AG, established in Brugg (Switzerland),

Kabelwerke Brugg AG Holding, established in Brugg,

represented by A. Rinne, A. Boos and M. Lichtenegger, lawyers,

applicants,

v

European Commission, represented by H. Leupold, H. van Vliet and C. Vollrath, acting as Agents, and by A. Israel, lawyer,

defendant,

APPLICATION under Article 263 TFEU for, primarily, annulment of Commission Decision C(2014) 2139 final of 2 April 2014 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case AT.39610 — Power cables), in so far as it concerns the applicants, and, in the alternative, a reduction of the amount of the fine imposed on them,

THE GENERAL COURT (Eighth Chamber),

composed of A.M. Collins, President, M. Kancheva (Rapporteur) and R. Barents, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written part of the procedure and further to the hearing on 1 June 2017,

gives the following

* Language of the case: German.

Judgment

I. Background to the dispute

A. Applicants and relevant sector

1 The applicants, Kabelwerke Brugg AG Holding and its wholly owned subsidiary Brugg Kabel AG, are Swiss companies active in the underground power cable production and supply sector.

2 Submarine power cables are used under water and underground power cables are used under the ground for the transmission and distribution of electrical power. They are classified in three categories: low voltage, medium voltage and high and extra high voltage. High voltage and extra high voltage power cables are, in the majority of cases, sold as part of projects. Such projects consist of a combination of the power cable and the necessary additional equipment, installation and services. High voltage and extra high voltage power cables are sold throughout the world to large national grid operators and other electricity companies, principally through competitive public tender procedures.

B. Administrative procedure

3 By letter of 17 October 2008, the Swedish company ABB AB provided the Commission of the European Communities with a series of statements and documents concerning restrictive commercial practices in the underground and submarine power cable production and supply sector. Those statements and documents were produced in support of an application for immunity submitted in accordance with the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the Leniency Notice').

4 From 28 January to 3 February 2009, further to the statements made by ABB, the Commission carried out inspections at the premises of Prysmian and Prysmian Cavi e Sistemi Energia and at the premises of other European companies concerned, namely Nexans SA and Nexans France SAS.

5 On 2 February 2009, the Japanese companies Sumitomo Electric Industries Ltd, Hitachi Cable Ltd and J-Power Systems Corp. submitted a joint request for immunity from a fine in accordance with paragraph 14 of the Leniency Notice or, in the alternative, a reduction of the amount of the fine, in accordance with paragraph 27 of that notice. They then sent the Commission other oral statements and other documents.

6 During the investigation the Commission sent a number of requests for information, in accordance with Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) and paragraph 12 of the Leniency Notice, to undertakings in the underground and submarine power cable production and supply sector.

7 On 30 June 2011, the Commission initiated a proceeding and adopted a statement of objections against the following legal entities: Nexans France, Nexans, Pirelli & C. SpA, Prysmian Cavi e Sistemi Energia, Prysmian, The Goldman Sachs Group, Inc., Sumitomo Electric Industries, Hitachi Cable, J-Power Systems, Furukawa Electric Co. Ltd, Fujikura Ltd, Viscas Corp., SWCC Showa Holdings Co. Ltd, Mitsubishi Cable Industries Ltd, Exsym Corp., ABB, ABB Ltd, nkt cables GmbH, NKT Holding A/S, Silec Cable SAS, Grupo General Cable Sistemas, SA, Safran SA, General Cable Corp., LS Cable & System Ltd, Taihan Electric Wire Co. Ltd and the applicants.

8 Between 11 and 18 June 2012, all the addressees of the statement of objections, apart from Furukawa Electric, participated in an administrative hearing before the Commission.

9 By judgments of 14 November 2012, *Nexans France and Nexans* v *Commission* (T-135/09, EU:T:2012:596), and of 14 November 2012, *Prysmian and Prysmian Cavi e Sistemi Energia* v *Commission* (T-140/09, not published, EU:T:2012:597), the General Court annulled in part the decisions ordering inspections addressed to Nexans and Nexans France and to Prysmian and Prysmian Cavi e Sistemi Energia, in so far as they concerned electric cables other than high voltage underwater and underground electric cables and the material associated with those other cables, and dismissed the action as to the remainder. On 24 January 2013, Nexans and Nexans France lodged an appeal against the first of those judgments. By judgment of 25 June 2014, *Nexans and Nexans France* v *Commission* (C-37/13 P, EU:C:2014:2030), the Court of Justice dismissed that appeal.

10 On 2 April 2014, the Commission adopted Decision C(2014) 2139 final relating to a proceeding under Article 101 [TFEU] and Article 53 [EEA] (Case AT.39610 — Power cables) ('the contested decision').

C. Contested decision

1. Infringement at issue

11 Article 1 of the contested decision states that a number of undertakings participated, during various periods, in a single and continuous infringement of Article 101 TFEU in the '(extra) high voltage underground and/or submarine power cables sector'. In essence, the Commission found that from February 1999 to the end of January 2009 the main European, Japanese and South Korean submarine and power cable producers participated in a network of multilateral and bilateral meetings and established contacts designed to restrict competition for (extra) high voltage underground and submarine power cable projects on specific territories, by allocating markets and customers and thus distorting the normal competitive process (recitals 10 to 13 and 66 of the contested decision).

12 In the contested decision, the Commission considered that the cartel had two main configurations which formed a composite whole. More precisely, according to the Commission, the cartel had two parts:

– the 'A/R cartel configuration', which consisted of the European undertakings, generally called 'R members', the Japanese undertakings, designated as 'A members', and, last, the South Korean undertakings, designated as 'K members'. That configuration made it possible to achieve the objective of allocating territories and customers between European, Japanese and South Korean producers. That allocation was made according to a 'home territory' agreement under which the Japanese and South Korean producers refrained from competing for projects taking place on the European producers' 'home territory', while the European producers undertook to remain outside the Japanese and South Korean markets. In addition there was the allocation of projects in the 'export territories', namely the rest of the world, with the exception, in particular, of the United States, which, during a certain period, observed a '60/40 quota', meaning that 60% of the projects were reserved for the European producers and the remaining 40% for the Asian producers;

– the 'European cartel configuration', which entailed the allocation of territories and customers by the European producers for projects to be carried out on the European 'home territory' or allocated to European producers (see Section 3.3 of the contested decision and, in particular, recitals 73 and 74 of that decision).

13 The Commission found that the participants in the cartel had put in place obligations to communicate data in order to enable the allocation agreements to be monitored (recitals 94 to 106 and 111 to 115 of the contested decision).

14 Taking account of the roles played by the various participants in the cartel in implementing the cartel, the Commission classified them in three groups. First of all, it defined the core group of the cartel, to which the European undertakings Nexans France, the subsidiary undertakings of Pirelli & C., formerly Pirelli SpA, which had successively participated in the cartel ('Pirelli'), and Prysmian Cavi e Sistemi Energia, and the Japanese undertakings Furukawa Electric, Fujikura and their joint venture J-Power Systems belonged (recitals 545 to 561 of the contested decision). Next, it distinguished a group of undertakings which were not part of the core group but which nonetheless could not be regarded as fringe players in the cartel and classified in that group ABB, Exsym, Brugg Kabel and the entity made up of Sagem SA, Safran and Silec Cable (recitals 562 to 575 of the contested decision). Last, it considered that Mitsubishi Cable Industries, SWCC Showa Holdings, LS Cable & System, Taihan Electric Wire and nkt cables were fringe players in the cartel (recitals 576 to 594 of the contested decision).

2. Liability of the applicants

15 Brugg Kabel was held liable because of its direct participation in the infringement between 14 December 2001 and 16 November 2006. Kabelwerke Brugg was found to be liable for the infringement as the parent company of Brugg Kabel during the same period (recitals 859 to 861 of the contested decision).

3. Fine imposed

16 Article 2(b) of the contested decision imposes a fine of EUR 8 490 000 'jointly and severally' on the applicants.

17 For the purposes of calculating the fines, the Commission applied Article 23(2)(a) of Regulation No 1/2003 and the methodology set out in the Guidelines on the method of setting fines imposed pursuant to [that article] (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

18 In the first place, as regards the basic amount of the fines, after determining the value of the relevant sales, in accordance with point 18 of the 2006 Guidelines (recitals 963 to 994 of the contested decision), the Commission set the proportion of that value of sales reflecting the gravity of the infringement, in accordance with points 22 and 23 of those guidelines. In that regard, it considered that by its nature the infringement constituted one of the most harmful restrictions of competition, which justified a rate for gravity of 15%. Likewise, it applied an increase of 2% of the gravity percentage for all the addressees of the contested decision because of the combined market share and the almost worldwide geographic scope of the cartel, which covered in particular the entire European Economic Area (EEA). Furthermore, it considered, in particular, that the conduct of the European undertakings was more harmful to competition than that of the other undertakings, in that, in addition to their participation in the 'A/R cartel configuration', the European undertakings had allocated the power cable projects among them in the context of the 'European cartel configuration'. For that reason, it set the proportion of the value of sales to be taken into consideration for the gravity of the infringement at 19% for the European undertakings and 17% for the other undertakings (recitals 997 to 1010 of the contested decision).

19 As regards the multiplier to reflect the duration of the infringement, the Commission applied, so far as the applicants were concerned, a weighting of 4.91 for the period 14 December 2001 until 16 November 2006. It also included in the basic amount of the fine an additional amount, namely the entry fee, corresponding to 19% of the value of sales. The amount thus determined came to EUR 8 937 000 (recitals 1011 to 1016 of the contested decision).

20 In the second place, as regards the adjustments of the basic amount of the fines, the Commission did not find any aggravating circumstances that might affect the basic amount of the find established with respect to each of the cartel participants, with the exception of ABB. As regards the mitigating circumstances, on the other hand, it decided to reflect in the amount of the fines the role played by different undertakings in implementing the cartel. Thus, it reduced by 10% the basic amount of the fine to be imposed on the fringe players in the cartel and by 5% the basic amount of the fine to be imposed in the case of the undertakings whose involvement in the cartel was medium. In addition, it granted an additional reduction of 1% to Mitsubishi Cable Industries and SWCC Showa Holdings for the period preceding the formation of Exsym and to LS Cable & System and Taihan Electric Wire for their lack of awareness of and liability for certain parts of the single and continuous infringement. On the other hand, no reduction of the basic amount of the fine was granted to the undertakings in the core group of the cartel (recitals 1017 to 1020 and 1033 of the contested decision). Furthermore, in application of the 2006 Guidelines, the Commission granted an additional reduction of 3% of the amount of the fine imposed on Mitsubishi Cable Industries on account of its effective cooperation outside the scope of the Leniency Notice (recital 1041 of the contested decision).

21 In addition, the Commission decided to granted immunity from a fine to ABB and to reduce the amount of the fine imposed on J-Power Systems, Sumitomo Electric Industries and Hitachi Cable by 45% in order to take account of their cooperation in the context of the Leniency Notice.

II. Procedure and forms of order sought by the parties

22 By application lodged at the Court Registry on 16 June 2014, the applicants brought the present action.

23 On 28 September 2016, in the context of the measures of organisation of procedure provided for in Article 89(3)(a) and (d) of its Rules of Procedure, the Court put a number of questions to the Commission and invited it to produce certain documents, in particular the non-confidential versions of the replies of the other addressees of the statement of objections.

24 As the composition of the Chambers of the General Court had been altered, in application of Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Eighth Chamber (new composition), to which the present case was therefore assigned.

25 By letter of 31 October 2016, the Commission answered the questions put by the Court and produced the documents requested, with the exception of the non-confidential versions of the replies to the statement of objections of Nexans France, Nexans, The Goldman Sachs Group, Sumitomo Electric Industries, Hitachi Cable, J-Power Systems, Furukawa Electric, Fujikura, Mitsubishi Cable Industries, Exsym, nkt cables, NKT Holding, Silec Cable, Grupo General Cable Sistemas, Safran, General Cable, LS Cable & System, ABB, Pirelli & C., Prysmian, Prysmian Cavi e Sistemi Energia, SWCC Showa Holdings, Taihan Electric Wire and Viscas. The Commission explained that, in spite of its request to that effect, those companies had not yet prepared non-confidential versions of their replies to the statement of objections.

26 On a proposal from the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral part of the procedure. The parties submitted legal argument and answered the question put by the Court at the hearing on 1 June 2017.

27 The applicants claim that the Court should:

– annul Article 1(2), Article 2(b) and Article 3 of the contested decision, in that those provisions order them ‘jointly and severally’ to pay a fine of EUR 8 490 000 owing to their liability for the commission of a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement between 14 December 2001 and 16 November 2006;

– annul the contested decision in part, in that it also finds them liable, owing to their alleged participation in the various agreements and concerted practices constituting the single and continuous infringement, for individual infringements of Article 101 TFEU and Article 53 of the EEA Agreement;

– in the alternative, reduce the amount of the fine imposed on them by Article 2(b) of the contested decision;

– order the Commission to pay the costs.

28 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

III. Law

29 In their action, the applicant put forward claims for the partial annulment of the contested decision and claims seeking a reduction of the amount of the fine imposed on them.

A. The claims for annulment

30 In support of the claims for annulment, the applicants rely on six pleas in law. The first plea alleges breaches of the rights of the defence and of the right to a fair hearing. The second plea alleges that the Commission lacked jurisdiction to penalise an infringement committed in third States and having no impact in the EEA. The third plea alleges an error of assessment and breaches of the obligation to state reasons and of the right to the presumption of innocence enshrined in Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') and of Article 48(1) of the Charter of Fundamental Rights of the European Union ('the Charter') in conjunction with Article 6(2) and (3) TEU, owing to the wrongful attribution to the applicants of liability for their alleged participation in a single and continuous infringement. The fourth plea alleges breach of the duty of investigation, owing to errors of fact and the distortion of evidence relating to the applicants' alleged participation in the infringement, and breach of the obligation to state reasons. The fifth plea alleges breach of 'substantive law' owing to the wrongful application of Article 101 TFEU and Article 53 of the EEA Agreement. The sixth plea alleges infringement of Article 23(2) and (3) of Regulation No 1/2003 and breach of the principles of equal treatment and proportionality, an error in the reasoning, a number of errors of assessment and misuse of powers as regards the calculation of the amount of the fine imposed on the applicants.

1. First plea: breach of the rights of the defence and of the right to a fair hearing

31 The first plea consists of two parts. The first part alleges breach of the right to a fair hearing, owing to the Commission's refusal to transmit the requests for information and the statement of objections to the applicants in German. The second part alleges breach of the rights of the defence owing to the Commission's refusal to grant the applicants access to the other undertakings' replies to the statement of objections, containing potentially exculpatory information.

(a) The notification of the requests for information and the statement of objections in English

32 The applicants maintain that the Commission breached their right to a fair hearing and their rights of defence by notifying the requests for information and the statement of objections to them exclusively in English, although Brugg Kabel had on several occasions asked to communicate in German.

33 The applicants claim that, under the right to a fair hearing, the principle of respect for the rights of the defence and Article 6(3)(a) of the ECHR, when the Commission addresses a company whose registered office is on the territory of a State which is not part of the EEA it is required to use the official language of that State, when that language is among the official languages of the European Union and when, moreover, that language is one of the working languages of the Commission. Consequently, as stated in the Commission document entitled 'Antitrust Manual of Procedures', in the case of a company, such as Brugg Kabel, whose registered office is in the Canton of Aargau (Switzerland), where the official language is German, the Commission was required to use that language or to obtain a waiver from that company, at the latest before the statement of objections.

34 In the present case, after the Commission initially addressed Brugg Kabel in English, an official in the Directorate-General for Competition informed the representatives of that company, during a telephone conversation on 23 October 2009, that the Commission could not give a favourable response to their request to be sent a German version of its request for information of 20 October 2009, on the ground that its registered office was not in a Member State of the European Union. The applicants maintain that it was only after that refusal that the representatives of Brugg Kabel requested only a partial translation of that request for information, as is apparent from the email sent to the Commission on 27 October 2009. Contrary to the Commission's assertion, Brugg Kabel therefore did not wait until the hearing before the hearing officer to request that the Commission should address it in German. Furthermore, Brugg Kabel's desire to use German as the language of the case is clear from the fact that it answered all the requests for information, and also the statement of objections, in that language.

35 The Commission's refusal to notify the requests for information and the statement of objections to Brugg Kabel in German meant that time had to be spent in translating from English to German, resulting in a reduction of the time normally devoted to its defence. The applicants maintain in that regard that, contrary to the Commission's assertion, the knowledge of English within Brugg Kabel did not meet the requirements of Article 6(3)(a) of the ECHR. On the contrary, both the daily work and the meetings of the directors and the meetings of the management controllers were regularly conducted in German. Likewise, German was the language in which the company's internal correspondence and internal documents such as the annual reports or the management handbook were drafted before being translated into English by an external service provider. Last, it is irrelevant that the impugned contacts between Brugg Kabel and the other power cable producers essentially took place in English, since they involved the purely technical explanation of a collaborator in the business language of power cable producers, whereas the statement of objections contained complex accusations which Brugg Kabel had to be able to understand perfectly in order to be able to study them from a technical and legal aspect.

36 Furthermore, the applicants claim that the Commission also breached their rights of defence before the Court by using English and French citations in the defence without providing a translation, as required by Article 35(3) of the Rules of Procedure of the General Court of 2 May 1991. In the applicants' submission, it was not possible to remedy that translation deficiency at the stage of the rejoinder, as such regularisation was not acceptable since they had already put forward the complaint alleging failure to respect the language of the case in the application. It follows that all the passages in the defence that contain such citations must be disregarded as inadmissible.

37 The Commission disputes the applicants' arguments.

38 In that regard, it should be borne in mind that, although the ECHR 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, Article 6(3) TEU provides that fundamental rights recognised by that convention are to constitute general principles of the Union's law and Article 52(3) of the Charter requires rights contained in the Charter to be given the same meaning and scope as those laid down in the ECHR (see, to that effect, judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 32 and the case-law cited).

39 It should also be borne in mind that, in accordance with Article 6(3)(a) of the ECHR, everyone charged with a criminal offence is to have the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

40 It should further be borne in mind that, in accordance with the case-law, the Commission cannot be described as a 'tribunal' within the meaning of Article 6 of the ECHR (see judgment of 10 March 1992, *Shell* v *Commission*, T-11/89, EU:T:1992:33, paragraph 39 and the case-law cited). Furthermore, the obligation to comply with Article 6 of the ECHR does not preclude a 'penalty' from being imposed by an administrative authority which does not itself satisfy the requirements laid down in Article 6(1) of the ECHR, provided that the decision of that authority is amenable to subsequent review by a judicial body with unlimited jurisdiction (see, to that effect, judgment of 18 July 2013, *Schindler Holding and Others* v *Commission*, C-501/11 P, EU:C:2013:522, paragraph 35). It follows that the applicants cannot rely in that regard on an infringement of Article 6 of the ECHR by the Commission.

41 However, it should also be borne in mind that, in accordance with the case-law, observance of the rights of the defence, of which Article 41 of the Charter forms a consubstantial element of the right to good administration, must be observed in all circumstances, particularly in all proceedings in which sanctions may be imposed, even if the proceedings in question are administrative proceedings. In that respect, it requires that the undertakings and associations of undertakings concerned be placed in a position, at the stage of the administrative procedure, to make known their views on, in particular, the truth and relevance of the facts, objections and circumstances alleged by the Commission (see judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T-343/06, EU:T:2012:478, paragraphs 82 and 88 and the case-law cited).

42 It also follows from the case-law that the rights of defence of the undertakings concerned by an administrative procedure that may lead to the imposition of penalties must also be observed by the Commission in the course of preliminary investigation procedures, since it is important to prevent those rights from being irremediably impaired during such procedures, including, in particular, inspections, which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings in respect of which they may be liable (judgment of 14 November 2012, *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 41).

43 It is in the light of the principles set out in paragraphs 38 to 42 above that the Court must ascertain whether the communication of the requests for information and notification of the statement of objections to the applicants in English constituted a breach of their rights of defence.

44 First, as regards the fact that the requests for information were communicated in English, it should be observed that, as recalled in paragraph 42 above, the Commission's obligation to observe the rights of the defence in investigations preceding the opening of the proceedings in the strict sense in cartel matters aims to prevent rights from being irremediably impaired during those investigations. It is for that reason that respect for the rights of the defence must be observed by the Commission, in particular, during the inspections, as they may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings in respect of which they may be liable.

45 It must be considered that such logic is also applicable to the requests for information which the Commission sends to the undertakings concerned during the preliminary investigation, as the replies to those requests may be used by the Commission, as in the present case, to provide evidence of the unlawful nature of the conduct engaged in by those undertakings.

46 However, it must be stated that, although the requests for information of 7 April 2009, 20 October 2009, 31 March 2010 and 29 November 2010 which the Commission sent to Brugg Kabel were drafted in English, it is apparent from the file that the applicants were in a position to understand the requests in question sufficiently to answer each of them. It should also be emphasised that Brugg Kabel requested a translation of only certain passages in the Commission's request of 20 October 2009 and that, after the Commission supplied the translations in question, Brugg Kabel replied to that request for information. It should also be emphasised that the Commission did not require Brugg Kabel to answer the requests for information in English. Accordingly, it must be held that Brugg Kabel was in a position to express its point of view effectively as regards the information requested by the Commission.

47 Likewise, in so far as the applicants' arguments may be interpreted as meaning that the Commission's refusal to send the requests for information to Brugg Kabel in German, as set out in their letter of 27 October 2009, constitutes an infringement of Article 41(4) of the Charter, they lack conviction. That provision lays down the right of any person to write to the institutions in one of the languages of the Treaties and to have an answer in the same language. However, it must be stated that in the present case it was the Commission that wrote to Brugg Kabel requesting an answer from the latter and not vice versa.

48 Secondly, as regards the notification of the statement of objections in English, it should be observed that, while respect for the rights of the defence is binding on the Commission in a preliminary investigation, it is all the more binding after the formal opening of an administrative procedure that may lead to the adoption of sanctions against the undertakings concerned, as was recalled in paragraph 42 above.

49 However, in the present case, irrespective of the precise level of understanding of English that the applicants' staff and management may have had, it must be stated that, as is apparent from the letter sent to the Commission by Brugg Kabel on 1 September 2011, the applicants did not request additional time in order to reply to the statement of objections for reasons relating to translation, but in order to have further time to examine in detail all the documents in the file and the numerous allegations in the statement of objections, and having regard to the limited resources which they were able to devote to that task. It is difficult to understand that, if the applicants were experiencing difficulties in understanding the English version of the statement of objections or needed further time in order to translate it, they would not have mentioned those circumstances in order to substantiate their request for an extension of the deadline for replying to the statement of objections. It must also be stated that they were capable of replying to the statement of objections, even though their reply was drafted in German, which, again, constitutes evidence that the applicants had sufficient knowledge of English to understand the nature and the cause of the accusation against them and to adopt an effective position in that regard.

50 Having regard to the foregoing considerations, the applicants' argument alleging breach of the rights of the defence in the administrative procedure, because the requests for information and the statement of objections were notified to them in English, must be rejected as unfounded.

51 Furthermore, as regards the alleged breach of the applicants' rights of defence in the context of the present judicial proceedings, it must be observed at the outset that it must be rejected as ineffective in that it was submitted in support of a plea alleging breach of Brugg Kabel's rights of defence in the context of the administrative procedure.

52 Moreover, the argument whereby the applicants seek to have certain passages in the defence declared inadmissible on the ground that, as they do not comply with the language of the case, they constitute a breach of their rights of defence cannot succeed.

53 In that regard, it is common ground that the language of the case in the present case is German. Furthermore, it follows from the first and second subparagraphs of Article 35(3) of the Rules of Procedure of 2 May 1991, which were applicable on the date on which the defence was lodged, that the language of the case is to be used in the written and oral pleadings of the parties and in supporting documents, and that any supporting documents expressed in another language must be accompanied by a translation into the language of the case.

54 It follows that the Commission was required to provide a translation into the language of the case of the passages cited in a different language in the defence. The Commission cannot shirk that obligation on the sole ground that there was a translation of some of those passages in the contested decision annexed to the application or that other passages were extracts from the annexes to the application or, again, that they related to statements made by an employee of the applicants.

55 However, it must be stated that the Commission remedied that procedural irregularity by producing a translation of the passages in question in the annexes to the rejoinder.

56 In addition, contrary to the applicants' contention, the fact that they had already put forward in the application a complaint alleging failure to comply with the language of the case did not preclude such regularisation. It is sufficient to point out that the complaint in question related to the language used by the Commission in the administrative procedure, which cannot prejudge the language of the case in the judicial proceedings.

57 It follows that the passages in the defence that are drafted in a language other than the language of the case cannot be considered inadmissible.

58 Having regard to the foregoing considerations, the first part of the first plea must be rejected as unfounded.

(b) The Commission's refusal to give access to the replies of the other addressees of the statement of objections

59 The applicants take issue with the Commission for having breached their rights of defence by refusing to give them access, or to give their lawyer access, to the non-confidential version of the replies of the other addressees of the statement of objections, with the exception of extremely limited access to the replies of ABB and J-Power Systems, although those replies potentially contained exculpatory evidence relating, in particular, to the purpose of the meeting held in Divonne-les-Bains (France) on 14 December 2001, which was wrongly regarded by the Commission as the beginning of Brugg Kabel's participation in the infringement, and to the interruption of its participation in the infringement during 2005.

60 The applicants maintain that there was even more reason why the replies of the other addressees of the statement of objections should be disclosed because, first, as the Court of Justice held in the judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6), it is not for the Commission alone to decide which material is relevant for their defence, which, moreover, it was not in a position to do, and, secondly, they are accused of having participated in a single and continuous infringement, which results in their being held liable for practices of other undertakings in which they did not participate and of which they might not even have been aware.

61 In the applicants' submission, contrary to the Commission's contention, giving them access to the replies of the other addressees of the statement of objections that might have contained exculpatory evidence would not in this instance have had the effect of delaying indefinitely the adoption of the closure of the administrative procedure, as the Commission had already granted such access to other addressees of the statement of objections.

62 Furthermore, the applicants claim that they cannot be required, in order to show that the documents containing potentially exculpatory information would have been of use to their defence, to give precise details of the content of those documents, to which by definition they did not have access. The requirement of prima facie evidence in that respect, which follows from the judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission* (T-343/06, EU:T:2012:478), cited by the Commission, aims to alleviate the burden of proof of the undertakings which the Commission has denied access to an exculpatory document and should not be interpreted in such a way as to render that proof impossible to adduce. The applicants maintain that, in the present case, it would be sufficient for them to state, as they did, that the replies of the other addressees of the statement of objections were capable of confirming that no alleged participant in the cartel referred to the meeting held in Divonne-les-Bains on 14 December 2001 as an 'R meeting' during which Brugg Kabel participated in the implementation of the cartel.

63 The Commission disputes the applicants' arguments.

64 In that regard, in the first place, as regards the applicants' argument that the Commission was required to give them access to the replies of the other addressees of the statement of objections on the ground that it is not for the Commission alone to decide on the relevance for their defence of the documents received during the proceedings, it must be held that it cannot succeed.

65 It should be borne in mind that, according to Article 27(1) of Regulation No 1/2003, before taking decisions as provided for in Articles 7, 8 and 23 and Article 24(2) of that regulation, the Commission is to give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. That provision also states that 'the Commission shall base its decisions only on objections on which the parties concerned have been able to comment' and that 'complainants shall be associated closely with the proceedings'.

66 Thus, access to the file in competition cases is intended, in particular, to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that, on the basis of that evidence, they can express their view effectively on the conclusions reached by the Commission in its statement of objections (judgment of 2 October 2003, *Corus UK* v *Commission*, C-199/99 P, EU:C:2003:531, paragraph 125). Access to the file is therefore one of the procedural guarantees designed to protect the rights of the defence and to ensure, in particular, the effective exercise of the right to be heard.

67 In accordance with the case-law, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating evidence and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68 and the case-law cited).

68 However, 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, the replies to the statement of objections of the other undertakings alleged to have participated in the cartel are not, in principle, included in the documents of the investigation file that the parties may consult (judgments of 30 September 2009, *Hoechst* v *Commission*, T-161/05, EU:T:2009:366, paragraph 163; of 12 July 2011, *Toshiba* v *Commission*, T-113/07, EU:T:2011:343, paragraph 42; and of 12 July 2011, *Mitsubishi Electric* v *Commission*, T-133/07, EU:T:2011:345, paragraph 41).

69 Nonetheless, if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 101(1) TFEU or Article 53 of the EEA Agreement, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes incriminating evidence against the various undertakings alleged to have participated in the infringement (judgments of 12 July 2011, *Toshiba* v *Commission*, T-113/07, EU:T:2011:343, paragraph 43, and of 12 July 2011, *Mitsubishi Electric* v *Commission*, T-133/07, EU:T:2011:345, paragraph 42).

70 By analogy, if a passage in a reply to a statement of objections or in a document annexed to such a reply may be relevant for the defence of an undertaking in that it enables that company to invoke evidence which is not consistent with the inferences made at that stage by the Commission, it constitutes exculpatory evidence. In that case, the undertaking concerned must be authorised to examine the passage or the document concerned and to give its view thereon (judgments of 12 July 2011, *Toshiba* v *Commission*, T-113/07, EU:T:2011:343, paragraph 44, and of 12 July 2011, *Mitsubishi Electric* v *Commission*, T-133/07, EU:T:2011:345, paragraph 43).

71 Furthermore, it should be borne in mind that paragraph 8 of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7) provides that the 'Commission file' in a competition investigation consists of all documents which have been obtained, produced and/or assembled by the Commission Directorate-General for Competition, during the investigation. Paragraph 27 of that notice is worded as follows:

'Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature —, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.'

72 It follows that, contrary to the applicants' contention, it is for the Commission to carry out an initial assessment of the potentially exculpatory nature of the information contained in the documents received after the notification of the objections, where one of the undertakings concerned requests access to such documents.

73 In that regard, the applicants may not rely on the case-law according to which it cannot be for the Commission alone, which notifies any objections and adopts the decision imposing a penalty, to determine the documents of use in the defence of the undertaking concerned, in so far as that argument, relating to documents within the file compiled by the Commission, cannot apply to the replies given by other parties concerned to the statement of objections (judgment of 27 September 2012, *Shell Petroleum and Others* v *Commission*, T-343/06, EU:T:2012:478, paragraph 89).

74 Furthermore, the applicants' argument that the fact that they are accused of having participated in a single and continuous infringement justified their being granted access to the replies of the other addressees of the statement of objections so that they might be able to identify exculpatory evidence in those replies must also be rejected. It is sufficient to point out that in the cases that gave rise to the judgments of 12 July 2011, *Toshiba* v *Commission* (T-113/07, EU:T:2011:343); of 12 July 2011, *Mitsubishi Electric* v *Commission* (T-133/07, EU:T:2011:345); and of 27 September 2012, *Shell Petroleum and Others* v *Commission* (T-343/06, EU:T:2012:478), the applicants were also accused of having participated in a single and continuous infringement.

75 In the second place, as regards the applicants' argument that, in essence, the Commission breached their rights of defence by refusing, on the basis of a flawed assessment of the relevance for their defence of the information contained in the replies of the other addressees of the statement of objections, to give them access to the non-confidential versions of those replies, it clearly cannot succeed either.

76 It should be borne in mind that, if a document in the Commission's possession that may be categorised — since it is capable of exonerating an undertaking which is accused of having participated in a cartel — as exculpatory evidence is not communicated to that undertaking, the latter's rights of defence are breached if that undertaking shows that the document at issue could have been useful for its defence (see, to that effect, judgment of 19 December 2013, *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 367).

77 Such evidence may be furnished by showing that the non-disclosure was capable of influencing, to the detriment of the undertaking at issue, the course of the proceedings and the content of the Commission's decision, or that it could have harmed or rendered more difficult the defence of that undertaking's interests during the administrative procedure (judgment of 19 December 2013, *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 368).

78 The possibility that a document that had not been disclosed might have had an influence on the conduct of the procedure and the content of the Commission's decision can be established only after a provisional examination of certain evidence showing that the undisclosed documents might have had, from the aspect of that evidence, a significance which ought not to have been overlooked (judgment of 14 March 2013, *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, paragraph 688).

79 Applicants who have raised a plea alleging breach of their rights of defence cannot be required to set out in the application detailed arguments or a consistent body of evidence to show that the outcome of the administrative procedure might have been different if they had had access to certain documents which were in fact never disclosed to them. Such an approach would in effect amount to requiring a *probatio diabolica* (judgment of 14 March 2013, *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, paragraph 689).

80 It is nevertheless for the applicant to adduce prima facie evidence that the undisclosed documents would be useful for its defence (judgment of 14 March 2013, *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, paragraph 690).

81 It is therefore necessary to ascertain, in the present case, whether the arguments put forward by the applicants provide prima facie evidence that the replies of the other addressees of the statement of objections would have been useful for their defence.

82 The applicants claim that access to the replies of the other addressees of the statement of objections would have enabled them to prove a negative, namely that neither Pirelli nor Nexans France had stated that the meeting held in Divonne-les-Bains on 14 December 2001, which according to the

Commission constitutes the starting point of the applicants' participation in the cartel, was an R meeting. In their submission, access to those replies would also have given them the opportunity to confirm that the other members of the cartel were aware that the applicants had interrupted their participation in the cartel in 2005.

83 First, as regards the meeting held in Divonne-les-Bains on 14 December 2001, it should be observed that, contrary to the Commission's contention, the fact that that meeting was referred to in its request for information of 31 March 2010 and that the applicants had access to the replies of the other addressees of that request for information does not deprive their request for access to the replies of the other addressees of the statement of objections of interest. In fact, the content of the replies of Nexans France and Pirelli to the Commission's request for information of 31 March 2010, in which those participants in the cartel did not adopt a position on their participation in the meeting held in Divonne-les-Bains on 14 December 2001 and the purpose of that meeting, does not allow their position in that regard in their reply to the statement of objections to be prejudged.

84 However, it should be observed that the fact that the other participants in the cartel did not express their views in their replies to the statement of objections on the nature of the meeting held in Divonne-les-Bains on 14 December 2001, on the assumption that that is true, is not in itself capable of assisting the applicants' defence.

85 In fact, it is common ground that in the statement of objections the Commission stated that an R meeting had been held in Divonne-les-Bains on 14 December 2001 and that the participants in that meeting were, in every case, Nexans France, represented by Mr J., Sagem, represented by Mr V., and Brugg Kabel, represented by Mr N.

86 However, the fact that, faced with such an accusation, Nexans France and Sagem did not seek, where appropriate, to dispute the nature of the meeting held in Divonne-les-Bains on 14 December 2001 in their replies to the statement of objections tends rather to show that they acknowledged the facts stated against them by the Commission in that regard.

87 Furthermore, in so far as the applicants' argument also relates to the Pirelli's alleged failure to adopt a position on the nature of the meeting held in Divonne-les-Bains on 14 December 2001, the applicants having acknowledged that Pirelli participated in that meeting in their own replies to the statement of objections (see paragraph 156 below), it must be rejected. As the Commission did not accuse Pirelli of having taken part in that meeting in the statement of objections, the latter's failure to adopt a position on the nature of that meeting cannot in any event be interpreted as confirming that that meeting did or did not have an anti-competitive nature.

88 Secondly, as regards the applicants' argument that the replies of the other addressees of the statement of objections certainly contained material capable of showing that they had interrupted their participation in the cartel in 2005, it should be observed that that argument lacks precision. The applicants do not state what facts the replies of the other addressees of the statement of objections are supposed to show or what specific allegations by the Commission in the statement of objections concerning their participation in the cartel in 2005 those replies might call in question. Likewise, the applicants do not explain the reason why they consider that exculpatory evidence relating to their participation in the cartel in 2005 might be found in the replies of all the addressees of the statement of objections.

89 Accordingly, it must be held that the applicants' arguments are not capable of providing prima facie evidence of the usefulness for the defence of the replies of the other addressees of the statement of objections that were not communicated to them.

90 Having regard to the case-law set out in paragraph 73 above, the argument which the applicants raised at the hearing, namely that the Commission's failure to prepare non-confidential versions of the replies of all the addressees of the statement of objections, in such a way as to allow the communication, where appropriate, of the exculpatory evidence that they might contain with regard to an undertaking to the undertaking in question, shows that the Commission did not respect the principle of equality of arms in the present case must also be rejected.

91 The second part of the first plea and, accordingly, the first plea in its entirety must therefore be rejected as unfounded.

2. Second plea, alleging that the Commission lacked jurisdiction to penalise an infringement committed in third States and which has no impact in the EEA

92 The applicants maintain that the Commission did not have jurisdiction to apply Article 101 TFEU to practices outside the EEA and to projects to be carried out outside the EEA when they had no impact in the EEA. In the absence of proof that the practices relating to each of those projects had immediate, substantial and foreseeable effects in the EEA, within the meaning of the case-law, the Commission could not simply link them with the single and continuous infringement in order to provide a basis for its extraterritorial jurisdiction, unless it were allowed to confer an unlimited nature on that jurisdiction.

93 The Commission disputes the applicants' arguments.

94 In that regard, as regards the territorial applicability of Article 101 TFEU and Article 53 of the EEA Agreement, it should be borne in mind that the rule on competition in the European Union laid down in Article 101 TFEU prohibits agreements and practices which have as their object or effect the prevention, restriction of distortion of competition 'within the internal market'.

95 In addition, it should be observed that the conditions governing the territorial application of Article 101 TFEU may be satisfied in two hypotheses.

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

97 Secondly, as the Court of Justice has already held, the application of Article 101 TFEU is also justified when it is foreseeable that the practices which it covers will produce an immediate and substantial effect in the internal market (judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11). In that regard, it must be noted that that approach pursues the same objective as that based on the implementation of an agreement on the territory of the European Union, namely to catch conduct which admittedly was not adopted on that territory but the anti-competitive effects of which are likely to be felt on the EU market.

98 It should also be observed that the conditions governing the application of Article 101 TFEU referred to in paragraphs 96 and 97 above, respectively, are alternative and not cumulative means of establishing the Commission's jurisdiction to find and penalise an infringement of that provision.

99 In the contested decision, the Commission considered that the condition relating to the implementation of the cartel in the EEA and the condition relating to the qualified effects produced by the cartel in the EEA were both satisfied in the present case (recitals 467 to 469 of the contested decision).

100 Yet the applicants maintain that the Commission ought to have shown that each of the projects to be carried out outside the EEA had sufficient impact in the European Union to justify, within the meaning of the case-law, the territorial applicability of Article 101 TFEU to that part of the infringement in question.

101 Such an argument cannot succeed.

102 As regards the implementation of the cartel practices relating to projects to be carried out outside the EEA, it should be observed that the agreement on 'export territories', under which the European producers and the Asian producers allocated projects to be carried out in those territories, was implemented on the territory of the EEA. Thus, it is apparent from recital 79 of the contested decision and from recital 247, to which recital 468 refers, that Greece was not part of the 'European home territory' within the meaning of the 'home territory' agreement and that projects based in Greece formed part of the allocation of projects under the '60/40 quota' in application of the agreement on 'export territories'. In addition, it is also apparent from recitals 81 and 82 of the contested decision that the A members of the cartel considered that projects connecting a Member State of the European Union with a third State should count towards the 60% quota allocated to the R members of the cartel, like the Spain-Morocco project referred to in recital 232 of the contested decision.

103 On the other hand, it should also be observed that the conduct of the European undertakings consisting, in application of the 'home territory' agreement, in not competing for projects to be carried on the 'home territory' of the Asian undertakings was, by definition, not implemented on the territory of the EEA.

104 However, contrary to the applicants' assertion, it does not follow that the Commission ought to have adduced proof that each of the projects to be carried out outside the EEA, in application of the 'home territory' agreement, had sufficient impact in the European Union to justify the territorial applicability of Article 101 TFEU.

105 In fact, as is clear from the case-law cited in paragraph 97 above, the Commission was entitled to base the applicability of Article 101 TFEU to the single and continuous infringement as found in the contested decision on the foreseeable, immediate and substantial effects of that infringement in the internal market.

106 In that regard, it should be observed that Article 101 TFEU may be applied to practices and agreements that serve the same anti-competitive objective, provided that it is foreseeable that, taken together, those practices and agreements have immediate and substantial effects in the internal market. Undertakings cannot be allowed to avoid the application of the EU competition rules by combining a number of types of conduct that pursue the same objective, each of which, taken on its own, is not capable of producing an immediate and substantial effect in that market, but which, taken together, are capable of producing such an effect.

107 It should be observed that the single objective of the cartel consisted in restricting competition for (extra) high voltage submarine and underground power cable projects to be carried out in specific territories by agreeing on the allocation of markets and customers and thus distorting normal competition in the EEA.

108 It follows that, contrary to the applicants' contention, it is by reference to the effects, taken together, of the various practices described in recital 493 of the contested decision, including those relating to projects to be carried out outside the EEA, that the Court must assess whether Article 101 TFEU was applicable in the present case.

109 It must be stated that the Commission did not err in stating in recital 469 of the contested decision that the effects on competition in the EEA, including the internal market, of the practices and agreements in which the members of the cartel participated were foreseeable, substantial and immediate.

110 In that regard, it is sufficient to take account of the likely effects of conduct on competition for the condition relating to the requirement of foreseeability to be fulfilled.

111 As regards the immediate nature of the effects of the practices at issue on the territory of the European Union, it should be observed that those practices necessarily had a direct impact on the supply of high and extra high voltage power cables in that territory, since that was the object of the different meetings and contacts between the participants in the cartel (recital 66 of the contested decision). In addition, the allocation carried out between the parties to the cartel, both directly within and outside that territory, had foreseeable effects on competition within that territory, as the Commission correctly observed.

112 As for the substantial nature of the effects in the European Union, it is appropriate to point to the number and size of the producers who participated in the cartel, who represented virtually the entire market, and also the wide range of products affected by the different agreements and the gravity of the practices in question. It is also appropriate to point to the significant duration of the single and continuous infringement, which lasted for 10 years. All of those factors, when assessed together, serve to demonstrate the substantial nature of the effects of the practices in question on the territory of the European Union (recitals 66, 492, 493 and 620 of the contested decision).

113 Accordingly, it must be concluded that the single and continuous infringement as defined by the Commission in the contested decision came within the scope of Article 101 TFEU and that the Commission had jurisdiction to penalise it. In those circumstances, the Commission was not required to show specifically that the conditions required for the application of Article 101 TFEU were satisfied for each of the projects to be carried out outside the EEA.

114 Furthermore, as regards the applicants' complaint that the Commission circumvented the lack of effects in the EEA of the 'export territories' agreement by incorporating that agreement into the single and continuous infringement in such a way as to apply Article 101 TFEU to it, it should be observed that that complaint amounts in reality to disputing the existence of the single and continuous infringement as described by the Commission in the contested decision and not the applicability of Article 101 TFEU to that infringement.

115 Furthermore, it should be observed that the applicants put forward no evidence capable of substantiating that complaint, which should therefore be rejected as a mere allegation.

116 Having regard to the foregoing considerations, the second plea must be rejected as unfounded.

3. Third and fourth pleas, alleging an error of assessment, breach of the right to the presumption of innocence, errors of fact, distortion of evidence and breach of the obligation to state reasons as regards the applicants' alleged participation in a single and continuous infringement

117 In support of the third plea and the fourth plea, which should be examined together, the applicants put forward a number of arguments. First, they take issue with the Commission for having had recourse to the concept of a single and continuous infringement in order to characterise the various elements of the cartel. Secondly, they maintain that the Commission breached its obligation to state reasons as regards the uninterrupted nature of their participation in the infringement and also failed to adduce sufficient evidence as regards the beginning of their participation in the infringement and the uninterrupted duration of the infringement. Thirdly, they take issue with the Commission for having imputed to them liability for a single and continuous infringement, when they did not intend to contribute to all the objectives of the cartel and were not aware of certain unlawful conduct. Fourthly, they claim that the Commission ought to have shown that they were aware of the agreements relating to each of the projects or that they could foresee them at least for the home markets or the submarine power cable projects. Fifthly, they take issue with the Commission for not having specified the projects that were claimed to have been the subject matter of an agreement, merely using abbreviations or generic names, and for having presented the same project as several distinct projects because of slight differences in designation.

(a) Preliminary considerations

118 It follows from the case-law that it is for the Commission to prove not only the existence of the cartel but also its duration. More particularly, as regards the evidence of an infringement of Article 101(1) TFEU, the Commission must adduce proof of the infringements which it finds and establish the evidence capable of demonstrating to the requisite legal standard the existence of the facts constituting an infringement. Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding the infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment of a decision imposing a fine or seeking a reduction of that fine. In the latter situation, it is necessary to take account of the principle of the presumption of innocence, which is one of the fundamental rights which are protected in the European Union legal order and has been affirmed by Article 48(1) of the Charter. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. It is thus necessary for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 50 and the case-law cited).

119 It has also consistently been held, however, that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 51 and the case-law cited).

120 Furthermore, it is normal for the activities which anti-competitive 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. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, such evidence will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, therefore, 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).

121 In addition, the case-law requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should rely, at least, on evidence relating to facts sufficiently proximate in time for it to be reasonable to accept that the infringement continued uninterruptedly between two specific dates (judgment of 7 July 1994, *Dunlop Slazenger* v *Commission*, T-43/92, EU:T:1994:79, paragraph 79; see also judgment of 16 November 2006, *Peróxidos Orgánicos* v *Commission*, T-120/04, EU:T:2006:350, paragraph 51 and the case-law cited).

(b) The single nature of the infringement

122 The applicants maintain, in essence, that the practices identified by the Commission do not meet the criteria of a single and continuous infringement established in the case-law. They claim, in particular, that there is no identity of the goods and services, as submarine power cables and underground power cables represent separate markets, that there is only partial identity of the undertakings participating in the infringement, as the applicants, Silec Cable, Mitsubishi Cable Industries, SWCC Showa Holdings, LS Cable & System, Taihan Electric Wire and nkt cables do not manufacture submarine power cables, that there is only partial identity of the natural persons participating in the different elements of the cartel, as Pirelli or Prysmian, nkt cables and ABB always sent different representatives to the meetings relating to submarine power cables and to those relating to underground power cables, and that there is no identity of the detailed rules for the implementation of the agreements, as underground power cable projects and submarine power cable projects were always discussed separately and the position sheets concerning the '60/40 quota' were established separately according to the type of power cables. They also observe that the Commission has not established the existence of a link of complementarity between the different practices.

123 The Commission disputes the applicants' arguments.

124 In that regard, it should be borne in mind that, as is apparent from a consistent body of case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41, and of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 55).

125 Several criteria have been identified by the case-law as relevant for assessing whether there is a single infringement, namely the identical nature of the objectives of the practices at issue, the identical nature of the goods or services concerned, the identical nature of the undertakings which participated in the infringement and the identical nature of the detailed rules for its implementation. Furthermore, whether the natural persons involved on behalf of the undertakings are identical and whether the geographical scope of the practices at issue is identical are also factors which may be taken into consideration for the purposes of that examination (judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 60).

126 In the present case, the 'home territory' agreement and the allocation of power cable projects in the context of the European cartel configuration within the EEA were implemented concomitantly, related to high voltage submarine power cables and high voltage underground power cables and involved the same European producers and, as concerns that agreement and the 'export territories' agreement, the same South Korean and Japanese producers. Furthermore, contrary to the applicants' assertion, except in Pirelli's case the natural persons involved on behalf of the undertakings were the same for the various aspects of the cartel. Likewise, the various measures shared a common objective, namely the establishment of a system for sharing the worldwide market for high voltage power cable projects, with the exception of the United States.

127 That finding cannot be called into question by the applicants' arguments.

128 As regards the assertion that the infringement cannot be categorised as a single infringement on the ground that high voltage underground power cables and high voltage submarine power cables are distinct products corresponding to distinct needs and, finally, to distinct markets, first, it should be observed that the 'home territory' agreement drew no distinction between the different types of power cables. Secondly, contrary to the applicants' assertion, it is clear from the examples given by the Commission concerning the functioning of the mechanisms for monitoring the 'European cartel configuration' (recitals 333 to 338, 399 and 400 of the contested decision) and the 'A/R cartel configuration' (recital 106 of that decision) that compensation could be applied between high voltage underground power cable projects and high voltage submarine power cable projects, so that, from the viewpoint of the undertakings parties to the cartel, there was manifestly no difference in that respect. That is illustrated by the exchange of emails referred to in recital 399 of the contested decision, in which Mr A., an employee of Prysmian, informed Mr R., an employee of Nexans France, that he refused to compensate the benefit of the allocation of the land portion of a high voltage submarine power cable project to Prysmian by another project, but agreed to envisage a subcontract agreement in line with the principles governing the allocation of a project within the European Union, without drawing any distinction according to whether those projects were high voltage submarine power cable projects or high voltage underground power cable projects.

129 The fact that certain undertakings that were party to the cartel, such as the applicants, did not have the capacity or the desire to seek the allocation of submarine power cable projects is irrelevant in that regard.

130 As regards the applicants' assertion that during the A/R meetings submarine power cable projects and underground power cable projects were the subject of separate meetings, it is sufficient to observe that, even if some of those meetings addressed projects separately depending on the type of power cables concerned, as indicated by the invitations to the meetings of 11 September 2003 and 28 January 2004, that assertion is contradicted by the fact that on other occasions submarine power cable projects and underground power cable projects were discussed in the same meeting. In fact, in answer to a question from the Court, the Commission produced an extract from Annex I to the contested decision, containing a number of meetings which indisputably concerned both underground power cables and submarine power cables during a common session. The Commission stated that that extract contained no information about meetings during which separate sessions had taken place on successive days or about those the organisation of which clearly showed that the underground power cable projects and the submarine power cable projects had been dealt with during different sessions. It observed, however, that even at meetings of that type the representatives of the undertakings were the same for discussions relating to underground power cables and those relating to submarine power cables. In addition, it attached the evidence, referred to in the footnotes to that annex, on which it relies in order to assert that high voltage submarine power cable projects and high voltage underground power cable projects were discussed in common sessions during those meetings.

131 When asked by the Court to comment on those documents at the hearing, the applicants merely stated that as they had not taken part in the A/R meetings they were not in a position to comment on the way in which they functioned.

132 However, it is apparent from the evidence adduced by the Commission that the high voltage submarine power cable projects and the high voltage underground power cable projects were the subject of discussions in common sessions during at least 13 A/R meetings held between 22 February 2001 and 27 March 2003. That finding is sufficient to reject the applicants' argument that submarine power cable projects and underground power cable projects were the subject of separate sessions during those meetings.

133 As regards the applicants' argument that, during meetings of the R members of the cartel, submarine power cable projects and underground power cable projects were also the subject of separate discussions, it should be observed that they adduce no evidence to substantiate that argument.

134 In that regard, it is apparent from recitals 114, 249 and 534 of the contested decision that the Commission considered that the R meetings, which were preceded by a dinner held on the evening before the meetings, attended by all the members present, began with a general part during which the parties discussed the general situation on the market and in their undertakings. Still according to the description provided in that decision, during that general part Nexans and Pirelli/Prysmian also informed the smaller European producers, such as the applicants, of events that had taken place in the A/R meetings and the participants then discussed projects in the EEA and in the 'export territories' and indicated which producer claimed or obtained 'preference' or 'interest' for a certain project. That description of the proceedings in the R meetings gives the impression that the parties discussed all projects without distinguishing between underground power cable projects and submarine power cable projects. However, it is apparent from the applicants' reply to the statement of objections that at the R meeting held on 18 and 19 November 2003 separate meetings for submarine power cable projects and underground power cable projects took place. In order to clarify that point, the Commission was requested, by way of a measure of organisation of procedure, to explain to the Court the extent to which the evidence assembled during the administrative procedure allowed it to consider that the underground power cable projects and the submarine power cable projects were the subject of common discussions at the R meetings. In answer to that request, the Commission produced the minutes of the A/R meeting held in Tokyo (Japan) on 27 March 2003 and the R meetings held on 23 April 2003 and 12 May 2005 and an extract from J-Power Systems' reply to a request for information from the Commission.

135 Requested by the Court to comment on those documents at the hearing, the applicants claimed, without specific reference to one of the R meetings referred to in paragraph 134 above, that those meetings did indeed take place on the same day, but were divided into two sessions. Thus, they maintain, the first session, which was devoted to submarine power cables, was held in the morning and the second, which concerned underground power cables, was held in the afternoon. They also stated that the two sessions were sometimes not held on the same day but on 2 successive days. They claimed, moreover, that the participants in those different sessions were necessarily different in part because the companies interested only in underground power cables, such as the applicants, did not participate even once in a meeting relating to submarine power cables. In their submission, there is to their knowledge no minute of one of those meetings which refers to a common meeting.

136 However, it should be pointed out, first of all, that it is clear from the minutes of the R meeting held on 23 April 2003 that the participants in that meeting, including the representatives of Brugg Kabel, were informed of the discussions that took place at the A/R meeting held on 27 March 2003. It is clear from the minutes of that meeting that the meeting gave rise to discussions relating to high voltage submarine power cable projects. Next, it should be observed that it is apparent from Annex I to the contested decision — and it is not disputed by the applicants — that Brugg Kabel took part in the R meeting held on 30 June and 1 July 2004. It does not follow from the minutes of that meeting,

however, that it gave rise to separate discussions concerning submarine power cables and underground power cables, as the projects discussed were mentioned without particular reference in that regard. Furthermore, it is apparent from the part of those minutes entitled 'Ongoing projects' that the 'Italy Sardigna' and 'Sarco' projects were discussed on that occasion. Admittedly, contrary to the Commission's contention, it is not clear from the extract from J-Power Systems' reply to a request for information from the Commission that those projects were submarine power cable projects, as the latter were not expressly mentioned in J-Power Systems' table. It is clear from the minutes of the R meeting of 30 June and 1 July 2004, however, that the 'Sarco' project was the source of problems between the managers of the French and Italian electricity networks, which confirms the Commission's assertion that that project referred to a link between Sardinia and Corsica and was therefore a submarine power cable project. Last, it is clear from the minutes of the R meeting held on 12 May 2005 that the 'Ireland 220 kV' and 'GCC' projects were mentioned during the latter meeting, and those projects are expressly referred to as high voltage submarine power cable projects in the extract from J-Power Systems' reply to the Commission's request for information.

137 Furthermore, the fact that the participants in the sessions of the R meetings that were devoted to underground power cables were not precisely the same as the participants in the sessions of those meetings that were devoted to submarine power cables is merely the consequence of the fact that some cartel members did not manufacture submarine power cables and might therefore be less interested in taking part in the sessions devoted to that type of power cables. However, given all the other characteristics of the cartel, it cannot follow from that fact alone that the cartel must be regarded as being composed of two separate cartels relating to submarine power cables and underground power cables, respectively.

138 It follows that the Commission did not err in considering that the high voltage underground power cable projects and the high voltage submarine power cable projects were indeed discussed at the same time at the R meetings, even though separate sessions were sometimes held at the meeting of those members on 18 and 19 November 2003.

139 As regards the applicants' argument that separate position sheets were prepared for the submarine power cable projects and the underground power cable projects in the context of the 'A/R cartel configuration', it should be observed that, as is apparent from recital 99 of the contested decision, those position sheets retained the same formal structure and observed the same allocation, namely the '60/40 quota'. Although that is not explicitly stated in the contested decision, it is likely that the need to prepare different position sheets was linked to the intention not to harm undertakings that did not produce one of the types of power cables, which would have been the applicants' case if, for example, the proportion of the '60/40 quota' allocated to the R members of the cartel had consisted solely of submarine power cable projects.

140 As regards the applicants' argument that the Commission ought to have taken account of the lack of complementarity between the different aspects of the cartel, it is sufficient to recall that, in accordance with the case-law, for the purpose of characterising various instances of conduct as a single and continuous infringement, it is not necessary to ascertain whether they present a link of complementarity, in the sense that each of them is intended to deal with one or more consequences of the normal pattern of competition, and, through interaction, contribute to the attainment of the set of anticompetitive effects desired by those responsible, within the framework of a global plan having a single objective. By contrast, the condition relating to a single objective requires that it be ascertained whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the instances of conduct in fact implemented by other participating undertakings do not have an identical object or identical anticompetitive effect and, consequently, do not form part of an 'overall plan' as a result of their identical object distorting the normal pattern of competition within the internal market (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 58 and the case-law cited). It

should be borne in mind that, as is clear from the finding made in paragraph 126 above, the condition relating to the existence of the single object of the infringement is satisfied in the present case.

141 Having regard to the foregoing considerations, it must be held that the Commission did not err in considering that the different aspects of the cartel constituted a single and continuous infringement of Article 101 TFEU.

(c) The duration of the applicants' participation in the infringement

142 The applicants dispute both the Commission's finding that their participation in the cartel commenced on 14 December 2001 and its finding that their participation was uninterrupted.

(1) The beginning of the applicants' participation in the cartel

143 The applicants maintain that the Commission has not shown that the meeting held in Divonne-les-Bains on 14 December 2001 was an R meeting, as defined in the contested decision, or a meeting during which they had participated in an activity contrary to competition law. Nor, in their submission, does the evidence adduced by the Commission show that they began to participate in the cartel between 14 December 2001 and 3 July 2002.

144 The Commission disputes the applicants' arguments.

145 In that regard, it is appropriate to examine the applicants' argument that the Commission has not adduced proof of the anti-competitive nature of the meeting held in Divonne-les-Bains on 14 December 2001 before, if necessary, examining the question whether the evidence assembled by the Commission was sufficient to demonstrate that the applicants had begun to participate in the cartel before 3 July 2002.

146 It is apparent from the file that question 4 in the Commission's request for information of 31 March 2010 was worded as follows:

'The Commission has information that a series of meetings, as well as communications by other means (fax, email, phone calls, etc.) have taken place among competitors as listed below, under d. More specifically, … that the following representatives of your company attended such meetings/engaged in such communications: [Mr N., Mr P. and Mr K.].

In reference to the meetings listed below, under d. and to any other meetings of a similar nature between competitors that may have taken place, please provide or indicate:

– a confirmation of the date of the meeting;

– who initiated the meeting;

– who organised and set up the meeting;

– the precise location of the meeting;

– the names of all the participants in the meeting, their function and the names of the companies they represented;

– the items on the agenda;

– who set the items on the agenda;

– the minutes of the meeting;

– the precise geographic area covered by the meeting.

Please provide copies of all available documents, whether hand-written, typed, digital or in any other format relating to all the meetings listed below, under d. and to any other meetings of a similar nature between competitors, that may have taken place.

Please give the names and functions of all further representatives of your company who participated in the meetings listed below, under d. and in any other meetings of a similar nature between competitors that may have taken place.'

147 In their reply to the Commission's request for information of 31 March 2010, the applicants confirmed that a meeting had taken place at Divonne-les-Bains on 14 December 2001, in which Mr N. had participated. They also produced Mr N.'s credit card receipt bearing that date and an extract from his diary in which the date and place of the meeting and the participants, namely Nexans France and Pirelli, were noted.

148 Furthermore, in their replies to the Commission's request for information of 31 March 2010, none of the other addressees of the statement of objections confirmed that it had participated in a meeting with competitors at Divonne-les-Bains on 14 December 2001.

149 However, in paragraph 292 of the statement of objections the Commission stated that an R meeting had been held in Divonne-les-Bains on 14 December 2001 and that the participants in that meeting had been, in all cases, Nexans France, represented by Mr J., Sagem, represented by Mr V., and Brugg Kabel, represented by Mr N. The Commission stated that the presence of Mr J. and Mr V. was apparent from an email subsequently sent by the former to the latter, which referred to the preceding meeting in which they had both participated. Mr N.'s presence was apparent from the applicants' reply to the Commission's request for information of 31 March 2010.

150 In their reply to the statement of objections, the applicants disputed the anti-competitive nature of the meeting held in Divonne-les-Bains on 14 December 2001, claiming that it was 'none other than a vain attempt by Nexans [France] and Prysmian to convince [Brugg Kabel] to participate in interviews with other power cable producers' and that '[Brugg Kabel] ha[d] however refused to participate in the arrangements and ha[d] continued to be regarded and treated as a pariah by the other addressees of the statement of objections'.

151 In recital 197 of the contested decision, the Commission stated the following:

'In line with what was agreed at the A/R meeting of 13 November 2001, a month later, on 14 December 2001, an R meeting was organised in [Divonne-les-Bains], France. The participants [in] this meeting included in any case [Mr J.] (Nexans) and [Mr N.] (Brugg [Kabel]) and it is highly likely that [Mr V.] from Sagem and a representative from Pirelli were also present. [261] The location, a chateau in [Divonne-les-Bains], would be used repeatedly for several R meetings as well.'

152 In footnote 261, under recital 197 of the contested decision, the Commission also stated the following:

'The participation of [Mr J. and Mr V.] flows from an email sent on 18 February 2002 by [Mr J.] to [Mr V.], which explicitly referred to the prior meeting in [Divonne-les-Bains] that both attended, see ID 318/128, Nexans [France] inspection. Brugg [Kabel] has confirmed the participation of [Mr N.], see ID 1492/4, Brugg reply of 7 May 2010 to [the Commission's request for information] of 31 March 2010. In the annexes supplied by Brugg [Kabel], Pirelli is also mentioned, ID 1492/20, Brugg [Kabel] reply of 7 May 2010 to [that request for information].'

153 In recitals 921 and 922 of the contested decision, the Commission further stated the following:

> '(921) [Brugg Kabel] participated in the cartel arrangements from 14 December 2001. On this day, [Mr N.] (Brugg [Kabel]) attended an R meeting in [Divonne-les-Bains] (see Recital (197)). Kabelwerke Brugg AG Holding bears parental liability for [Brugg Kabel's] conduct also from 14 December 2001. [Brugg Kabel] disputes this starting date as it claims that the meeting of 14 December 2001 had no anti-competitive character and [Brugg Kabel] refused to cooperate on that day.
>
> (922) There are several indications that [Brugg Kabel] had already participated in the cartel arrangements prior to that event (Recitals (161), (167) and (186)). While the purpose of the meeting on 14 December 2001 may well have been to convince [Brugg Kabel] to join the cartel, this does not diminish its anti-competitive character. Nexans and Prysmian had announced at the A/R meeting on 13 November 2001 that they would organise regular R meetings, and they fulfilled their promise through the meeting of 14 December 2001 (Recital (188)). The European cartel participants allocated projects in the EEA and the export territories at the R meetings (see, for instance, Recital (315)). There is no evidence that [Brugg Kabel] announced at that meeting that it would not participate in the arrangement. In fact, there is evidence that Nexans [France] and Prysmian succeeded in their attempts as … Nexans [France] and Pirelli informed the other participants that "[Brugg Kabel] and Sagem [were] invited in the meeting" and "w[ould] continue" at the A/R meeting of 30 January 2002 (Recital (206)). At the A/R meeting on 5 April 2002, the notes report a "gradually growing cooperative atmosphere with [Brugg Kabel], Sagem and nkt" (Recital (212)). Subsequently, in April 2002, Brugg [Kabel] planned to organise an R meeting itself. Although this meeting was cancelled, a second meeting organised by [Brugg Kabel] took place on 3 July 2002 (Recital (217)). It is highly unlikely that [Brugg Kabel] would plan to organise a cartel meeting in April 2002 when it was not yet a member of the cartel.'

154 It is apparent from recitals 197, 921 and 922 of the contested decision that the Commission considered that there was direct proof that the applicants, represented by Mr N., attended a meeting with competitors held in Divonne-les-Bains on 14 December 2001 and also a sufficient body of indirect proof concerning the participation in that meeting, if not of Sagem, at least of Nexans France and Pirelli, and that that meeting was an R meeting, that is to say, a meeting of the 'European cartel configuration'.

155 First, as regards the participation of the applicants, represented by Mr N., at a meeting in Divonne-les-Bains on 14 December 2001, it is sufficient to observe that their participation in that meeting is not disputed.

156 Secondly, as regards the participation of other European power cable producers at that meeting, it should be observed that, as is apparent from the contested decision, the presence at that meeting of the representatives of Nexans France and Pirelli was stated by the applicants themselves in their reply to the Commission's request for information of 31 March 2001.

157 Furthermore, it should be observed that the email sent by Mr J. to Mr V. on 18 February 2002 clearly refers to a meeting that had been held in Divonne-les-Bains. In addition, the fact that persons other than Mr J. and Mr V. attended that meeting is quite clear from the following passage: 'Following our meeting in [Divonne-les-Bains], as the expected dates of 6 and 7/03 have become impossible for some of us, I finally propose that the next meeting be held in Paris, on 28 February in the afternoon (you will be informed of the place later).'

158 The fact that Safran did not confirm in its reply to the Commission's request for information of 31 March 2010 that Sagem's representative, Mr V., had been present at a meeting held in Divonne-les-Bains at the end of 2001 is not significant in that regard, since, as is clear from that reply, Safran was not in a position to deny or confirm that information, for practical reasons.

159 The fact remains that, as the applicants claim, there is nothing in Mr J.'s email of 18 February 2002 to indicate the date of the meeting to which he refers, the applicants' presence at that meeting or the purpose of the meeting, so that all that can be established from that email is that Mr J. and Mr V., at an unspecified time, but necessarily before the date of that email, attended a meeting in Divonne-les-Bains with other persons whose identities are also unspecified. It follows that that email does not in itself establish that Sagem, represented by Mr V., was present at the meeting held in Divonne-les-Bains on 14 December 2001.

160 The evidence examined in paragraphs 156 to 159 above is sufficient to establish that the applicants' representative, Mr N., and the representatives of Nexans France and Pirelli participated in a meeting on 14 December 2001 in Divonne-les-Bains. Conversely, that evidence does not establish with certainty that Sagem's representative, Mr V., attended that meeting.

161 Thirdly, as regards the nature of the meeting held in Divonne-les-Bains on 14 December 2001, it should be observed, first, that meetings of the R members of the cartel were regularly held in that town, during which, after the representatives of Nexans France and Pirelli, then of Prysmian, had informed the other European producers of the discussions held during the preceding A/R meeting, the participants allocated the forthcoming projects on the European 'home territory' and those to be carried out in the 'export territories' that had been allocated to the R members of the cartel (recital 315 of and Annex I to the contested decision). The fact that such meetings were habitually held in that town is illustrated by the fact that some of the participants in those meetings even sometimes spoke of the need to 'Divonne' (recital 364 of the contested decision).

162 Secondly, it should be observed that evidence referred to by the Commission in the contested decision is of such a kind as to show that the first R meeting of the cartel was actually held in Divonne-les-Bains on 14 December 2001.

163 Thus, it is apparent from the notes of an employee of J-Power Systems concerning the discussions at the A/R meeting of 13 November 2001, which are referred to in recital 188 of the contested decision, that Nexans France and Pirelli had stated on that occasion that a discussion between the R members of the cartel would take place in future once per month.

164 In the notes of an employee of J-Power Systems concerning the discussions at the A/R meeting of 30 January 2002, which are referred to in recital 206 of the contested decision, in a part entitled 'Organisation — R side', the following is stated:

'Brugg Kabel and Sagem invited in the meeting. Will continue. ABB never wanted to join. NKT may be necessary because more active in export market.'

165 According to the applicants, the notes of an employee of J-Power Systems concerning the discussions that took place at the A/R meeting of 30 January 2002 show only that the other cartel participants pursued, at the meeting held in Divonne-les-Bains on 14 December 2001, their vain attempts to convince the applicants to participate in the cartel meetings and discussions. They maintain that, if they had agreed at that meeting to participate in the discussions after years of refusing to do so, that would certainly have been mentioned at the A/R meeting of 30 January 2002 as an important item of news. They thus emphasise that, after the R meeting of 3 July 2002 in which they participated, Mr J. stated in an email of 4 September 2002 to Mr O., an employee of J-Power Systems, concerning the A/R meeting to be held on 6 and 7 September 2002, that 'we have now on regular basis contacts with [Brugg Kabel]'.

166 The applicants claim, moreover, that it is just as likely that the purpose of the meeting held in Divonne-les-Bains on 14 December 2001 was to pursue the negotiation of a sub-contract with Nexans France relating to a project to be carried out in Abu Dhabi (United Arab Emirates), which had been begun at a meeting on 21 November 2001 in Paris (France).

167 However, it must be considered that, as the Commission contends, the notes of an employee of J-Power Systems relating to the discussions at the A/R meeting held on 30 January 2002 show, on the contrary, that the purpose of the meeting held in Divonne-les-Bains on 14 December 2001, in which the applicants acknowledge having participated through Mr N., was indeed that of a meeting of the R members of the cartel.

168 In fact, the passage, taken from the notes of an employee of J-Power Systems relating to the discussions at the A/R meeting held on 30 January 2002, cited in paragraph 164 above, refers to the state of the participation of the European power cable producers in a meeting of the 'European cartel configuration' and not to the refusal to accept the invitation to take part in such a meeting. That is clear, so far as Brugg Kabel and Sagem are concerned, from the use of the expression 'invited in the meeting' and the absence of any reference to any refusal on the part of those undertakings. That is also clear from the reference to ABB's longstanding refusal to participate in multilateral contacts by the phrase 'ABB never wanted to join', which justifies ABB's non-participation in the R meeting, and also the reference to the fact that nkt cables' participation might be necessary because it is more active on the export markets. Thus, it may be inferred from that passage that Brugg Kabel and Sagem participated in an R meeting and that they would continue to participate.

169 That interpretation cannot be called in question by the applicants' various arguments.

170 First of all, contrary to the applicants' contention, the email sent on 4 September 2002 by Mr J., an employee of Nexans France, to Mr O., an employee of J-Power Systems, contains no particular reference to Brugg Kabel. Mr J. merely refers to the importance of ensuring that Exsym would participate in the cartel alongside the A members of the cartel, since contacts already exist with nkt cables, Sagem and Brugg Kabel: 'We have now on regular basis contacts with [nkt cables], [Sagem], [Brugg Kabel] if we do not have EXSYM on board this is meaningless.'

171 Next, it seems unlikely that an undertaking would agree to participate in a meeting with competitors the purpose of which for those competitors consists in attempting to convince it to adopt anti-competitive conduct if it intends to decline such a proposal in any event. If the applicants had not intended to take part in an anti-competitive meeting they could have simply refused to participate.

172 Last, the alternative explanation supplied by the applicants, namely that the meeting held in Divonne-les-Bains on 14 December 2001 might equally well have been a meeting concerning a sub-contract with Nexans France relating to a project to be carried out in Abu Dhabi which had been the subject of an earlier meeting on 21 November 2001 in Paris, is difficult to reconcile with the applicants' assertion that the meeting held in Divonne-les-Bains on 14 December 2001 was merely a vain attempt on the part of Nexans France and Pirelli to convince them to participate in the cartel. In addition, that argument lacks credibility because, first, it is clear from Mr N.'s diary, produced by the applicants in reply to a request for information from the Commission, that Mr N. was to meet, on 14 December 2001 in Divonne-les-Bains, not only Nexans France but also Pirelli. It is difficult to imagine why Pirelli would have had to participate in a meeting relating solely to the conclusion of a sub-contract between the applicants and Nexans France. Secondly, it should be observed that the applicants produce no evidence as regards the purpose of the meeting held in Divonne-les-Bains on 14 December 2001, although they provide such evidence concerning the meeting held in Paris on 21 November 2001.

173 In the latter regard, it should be observed that although, as they claim, the applicants are free to propose a different interpretation of the facts from that made by the Commission in order to cast doubt on the Commission's findings as regards the nature of the meeting held in Divonne-les-Bains on 14 December 2001, it is for the Court to assess the credibility of interpretation in the light, in particular, of the evidence adduced or not adduced by the applicants. Thus, as the Commission observes, it is clear from the documents produced by the applicants in the annexes to the reply that, during the exchanges preparatory to the meeting held in Paris on 21 November 2001, the subject of the latter meeting was clearly stated. In fact, in the email sent by Mr C., an employee of Nexans France, to Mr N., an employee of Brugg Kabel, the following, in particular, is stated: 'items addressed: sub-contract to Brugg for the B circuit of the project'.

174 If, as the applicants maintain, the meeting held in Divonne-les-Bains on 14 December 2001 also had as its purpose the conclusion of the sub-contract in question, it is likely that the subject of that meeting would have appeared in the exchanges preparatory to its organisation. However, the applicants have not supplied such documents. In addition, it should be observed that the email sent on the same day by Mr N. to Mr C. contains, under the heading 'Agenda', the expression 'contract negotiation and signature', which makes it difficult to believe that the negotiations were continued at that meeting, in the absence of evidence to that effect.

175 Having regard to the considerations set out in paragraphs 145 to 174 above, it must be considered that the Commission established to the requisite legal standard that the applicants, represented by Mr N., had participated, on 14 December 2001 in Divonne-les-Bains, in a meeting of the R members of the cartel, and the Commission was therefore correct to take that date as the starting date of the applicants' participation in the cartel.

(2) The uninterrupted nature of the applicants' participation in the infringement

176 The applicants claim that, as the Commission acknowledged on a number of occasions in the grounds of the contested decision, the conduct complained of consists of single repeated infringements, which implies that their conduct was interrupted. Consequently, there is a contradiction between Article 1 of the operative part of the contested decision, which imputes to the applicants liability for their participation in a single and continuous infringement, and the grounds which substantiate that finding.

177 Furthermore, the applicants maintain that as the cartel was going through a period of crisis in 2005, they were not required to distance themselves publicly from it in order to show that they had interrupted their participation, which they did from 12 May 2005, the date of departure of one of their employees, Mr P., until 8 December 2005. According to the applicants, the reason for that interruption was the desire of their new management team to comply with the new Swiss legislation prohibiting cartels. They maintain that that is clear from the correspondence between Mr N. and the coordinator of the R members of the cartel, Mr J., and also from the correspondence between Mr J. and several participants in the cartel who complained about the competition which the applicants were providing to them on various projects.

178 The Commission disputes the applicants' arguments.

179 In that regard, first, as regards the alleged contradiction between the grounds and the operative part of the contested decision as regards the repeated or continuous nature of the infringement imputed to the applicants, it should be observed that in the German version of the contested decision the Commission used the expressions 'einheitliche und fortgesetzte' and 'einzige und fortdauernde' to characterise the infringement. Contrary to the applicants' contention, it does not follow that the Commission thus

accepted that there had been any interruption in their participation in the infringement, as those expressions have a close semantic content and express the idea of the same conduct being prolonged without interruption.

180 Furthermore, it is stated, in recital 620 of the contested decision, that, 'according to the evidence, the parties pursued the single aim of the cartel uninterrupted from 18 February 1999 until … 29 January 2009'. Likewise, it is also clear from Table 8, entitled 'Duration multipliers', in recital 1012 of the contested decision, that the Commission did not note any interruption between the start date of the applicants' participation in the infringement, 14 December 2001, and the end date of their participation, 16 November 2006.

181 Accordingly, it cannot be considered that there is any contradiction between the grounds of the contested decision and its operative part as regards the single and continuous nature of the infringement.

182 Secondly, as regards the alleged interruption of the applicants' participation in the infringement between 12 May 2005 and 8 December 2005, it should be pointed out at the outset that, contrary to the impression which the applicants would give, the Commission did not base its refusal in the contested decision to consider that they had interrupted their participation in the infringement in the course of 2005 on their failure to distance themselves publicly from the cartel, but on evidence which showed that their participation had continued.

183 The applicants rely on certain passages in the correspondence between Mr N. and Mr J. in order to show that, from their viewpoint, they had suspended their participation in the cartel.

184 The applicants thus cite an email from Mr N. on 10 May 2005, in which he stated that he refused to take part in the R meeting of 11 and 12 May 2005, referring to Mr P.'s departure from the undertaking at the end of May 2005 and also to a change in the management.

185 The applicants also cite an email of 26 October 2005 from Mr J., in which he complains to Mr N. about the aggressive competition on the applicants' part, stating the following:

'We understand you are getting quite aggressive on above project. In our view this project must be intended for our friend [Mr R.C.] and we believe it is not reasonable to be aggressive in this kind of project in their homeland.'

186 In the applicants' submission, the interruption of their participation was expressly confirmed in an email of 9 December 2005 to Mr N. from Mr J., in which the latter wrote 'Since then [Mr P.] left and you dropped out of the "seminars"'. The applicants emphasise that, in the same email, Mr J. also asked Mr N. whether he would again participate in the meetings and sought confirmation in these terms: 'Are you officially back on the seminars? (We sincerely hope you can confirm yes)'.

187 However, it should be observed that the email of 10 May 2005 from Mr N. was worded as follows:

'Under the current tension from development of AL AWEER case as well as the current change in [Brugg Kabel]'s management / [Mr P.] will leave [Brugg Kabel] by end of [May] 2005/ we regret to inform that for this seminar [Brugg Kabel] will not participate.

We hope that AWEER develops as discussed earlier making later participation viable. …'

188 It follows that the decision not to participate in the R meeting held on 11 and 12 May 2005 was indeed taken because of Mr P.'s departure and the change in management at Brugg Kabel, but also by the tension connected with the development of the 'Al Aweer' project and, furthermore, that that decision related only to that meeting. In addition, as is also clear from his email of 10 May 2005, Mr N. did not

preclude the possibility that Brugg Kabel would participate in subsequent meetings, provided that that project developed in accordance with the discussions which had taken place earlier. It follows that, contrary to the applicants' contention, that email cannot be regarded as announcing a suspension of their participation in the cartel.

189 Likewise, it should be observed that, in an email of 14 June 2005 from Mr N. to Mr J., Mr N. wrote the following concerning a call for tenders in Kuwait:

'Noted [Mr R. of Nexans France]'s absence in prebid meeting.

Intend not to [submit a bid] however checking wether this is "politically acceptable".

In case of [tender being submitted]--> will ask guidance.

noted Yr remark regarding cabel accident and agree.'

190 It should be noted that the comment relating to the cable accident refers to a previous email from Mr J. of 14 June 2005 in which Mr J. had stated: 'Please note that you might be called for a repair on a VC cable accidental breakdown recently occured in the same country. In this case please notify (We will receive guidance this will help to restore contacts)'.

191 It follows from the exchange of emails between Mr J. and Mr N. on 14 June 2005 that on that date the applicants maintained contact with Mr J., the coordinator of the R members of the cartel, with a view to the implementation of that cartel.

192 That is also clear from an email of 21 October 2005, also from Mr N. to Mr J., in which Mr N. wrote, in particular, the following:

'After our cooperative attitude in the MEW/ 60 closing : 18-09-2005 for 92 km XPLE 132 kV allowing TEC to secure this first XLPE in [Kuwait], we have little understanding for their behaviour in [redacted]

When confirming our coop[eration] for MEW/ 60, I mentioned this [redacted] project to you and trust this message was forwarded to TEC. [Brugg Kabel] is very intersted and in fact only hindered by actions of TEC are not prequalified yet. [The price level] is now below [redacted] 100. …

I just note again that cooperation is required from [Brugg Kabel] again and again while many are suffering of "alzheimer") …'

193 The applicants' participation in the infringement in 2005 is further confirmed by two emails sent to Mr J. by Mr N. in December 2005 and January 2006.

194 Thus, in an email of 12 December 2005, Mr N. wrote the following:

'[Brugg Kabel]'s New (young) Management is afraid since we have in Switzerland new [anti-cartel law] and having instruction of the board to adhere to it. You know that despite this, I have acted in 2005 as if … (e.g. [Kuwait]).

We did not spoil level!

All "seminar" attendants can look back to a very nice 2005.

… and are all in excellent position. …'

195 Likewise, in an email of 24 January 2006 concerning a project to be carried out in Kuwait, Mr N. wrote to Mr J. as follows:

'I again note that our views on the situation differ widely. Even though your order books are full, you consistently ask for more. It is difficult for me to establish a survival policy that suits you! I was naïve enough to believe in it for a long time, all the same … So I worked for years in favour of coordination with the [large undertakings] …

… There was a lot of business in 2005 (we let virtually all of it go to you):

e.g.,

"A" MEW 101 (which largely makes up for 082)

"K" MEW/ 60 92km XLPE 132 kV

"[Pirelli]" ME/EW/66-2005/06

"A" MEW/52/2006-06

And just to mention a small cooperation which I asked for via you of "A" in Qatar: ---> they cut me off, claim that they can do no more, etc., etc. At the same time [Nexans]+ABB take GTC/22/04 with 102 km 132kV 1x2000mm2. …'

196 Mr N. states, moreover, in his email of 24 January 2006 that, concerning an alleged breach of the cartel arrangement by the applicants concerning MEW 082, 'we did not undercut the prices!'.

197 It is clear upon reading that correspondence between Mr J., the coordinator of the R members of the cartel, and Mr N. that, from the applicants' viewpoint, although they no longer took part in the meetings because of the fears expressed by their new management, they had not suspended their participation in the cartel and even played an active part in its success.

198 Contrary to the applicants' contention, it is also clear from the emails exchanged between Mr J. and a number of participants in the cartel that those participants considered that the applicants were participating in the cartel even in the second part of 2005.

199 Admittedly, the emails the content of which is cited in the application by the applicants show the irritation displayed by certain participants in the cartel at the applicants' conduct in implementing the cartel.

200 Thus, in an email of 14 September 2005 to Mr J. from Mr R.C., an employee of Prysmian, the latter wrote: 'Please make sure [Brugg Kabel] does not represent a problem'.

201 The displeasure felt by Mr J. and Mr R.C. towards Brugg Kabel's attitude is also clear from the email of 26 October 2005 from Mr J. to Mr N., the content of which is reproduced in paragraph 185 above.

202 In an email of 28 October 2005 to Mr J. from Mr R.C., the latter again referred to Brugg Kabel's attitude as follows:

'I have just been informed that [Brugg Kabel] [is] increasing [its] efforts, and [is] becoming even more aggressive. Just to let you know that if something goes wrong we will chase [Brugg Kabel] on each and every project (anywhere) in order to make sure that they either lose business or lose a lot of money to get business. … You know I do NOT like this, but enough is enough. I am inclined to "personalise" this case.'

203 Still on the subject of the applicants' attitude, in an email of 9 November 2005 to Mr J., Mr R.C. reported that the applicants were fighting for the 'E-Plus' project in these terms: '[Brugg Kabel] apparently confirmed [its] interest to fight ([Mr K.] confirmed this).'

204 Mr R.C. subsequently confirmed to Mr J., moreover, in an email of 3 January 2006 that he had lost the 'E-Plus' project to the applicants.

205 Mr R.C.'s displeasure at the applicants' attitude is also clear from an email of 16 November 2005, in which he wrote the following to Mr J.:

'… your beloved friends of [Brugg Kabel] are very aggressive on another 380kV job here … Does your relaxed attitude on all these aggressions mean you are abandoning this Territory and you therefore don't care about [Brugg Kabel's] arrogance?'

206 However, it must be stated that, as is clear from his email of 16 November 2005, Mr R.C. considered that the applicants were still bound by the rules of the cartel since he specifically complained of their alleged breach of those rules. In fact, had that not been the case, Mr R.C. would have had no reason to complain to the coordinator of the R members of the cartel, Mr J, about the applicants' conduct.

207 Furthermore, it should be observed that, as the Commission states in recital 346 of the contested decision, the alleged breach of the rules of the cartel by the applicants during the second half of 2005 did not lead to their being regarded as 'outsiders' by the other members of the cartel. They were thus not subjected to the coordinated measures envisaged at the meeting held in Divonne-les-Bains on 15 March 2005 which they attended.

208 In addition, it is clear from the list of undertakings participating in the cartel drawn up on 24 June 2005 by Mr J., referred to in recital 353 of the contested decision, that the applicants are still referred to among the medium members ('medium ones') of the cartel. There is no mention of a departure.

209 Likewise, as the Commission correctly observes, it is apparent from the email of 26 August 2005 from Mr J. to Mr I., an employee of Exsym, and Mr R.C., an employee of Prysmian, referred to in recital 358 of the contested decision, that the applicants were still regarded on that date as members of the cartel. The issue is whether it is necessary to ensure that certain participants remain within the cartel, in the following terms:

'If you say [Taihan and LS Cable are] out of A then the [rate of 40%] is no longer valid and should be reduced to may be 20 hence the balance over the last years. Km is definitely in negative for [Mr C. of Pirelli]. So either [Taihan and LS Cable are] "out" of A and next 2 [Oil Filled Cable projects] must be [Mr C. of Pirelli] to rebalance the situation as you agreed already or [they are] "in" [A] and the rotation agreement must apply. We understand you have difficulty to control [Taihan and LS Cable] like we have difficulty to control [ABB] and [Brugg Kabel] and [Sagem] or [nkt cables] but this does mean to have them "out" [of the cartel]. It is simply a fact to adapt to. (Like it was done on … or Philippines or …) Again, it is our global interest to maintain … hence giving the EDC case to [Taihan] or [LS Cable] will help us all.'

210 It should be borne in mind that, in accordance with the case-law, it is indeed the understanding which the other participants in a cartel have of the intention of the undertakings concerned that is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement (judgment of 19 March 2009, *Archer Daniels Midland* v *Commission*, C-510/06 P, EU:C:2009:166, paragraph 120).

211 That assertion cannot be called in question by the email of 9 December 2005 to Mr N. from Mr J., in which the latter wrote that 'since then [Mr P.] left and you dropped out of the "seminars"' and asked Mr N. whether he would again participate in the meetings: 'Are you officially back on the seminars?

(We sincerely hope you can confirm yes)'. In fact, as explained in paragraphs 183 to 210 above, in spite of Mr N.'s absence from the R meetings of the cartel, the applicants clearly continued their participation in the cartel during that period.

212 It is also necessary to reject the argument which the applicants attempt to derive from an exchange of emails between Mr R.C. and Mr J. on 9 January 2006, from which it is apparent that the applicants did not react to the requests for contact from Nexans France, as the applicants have themselves acknowledged that on that date they had resumed their participation in the cartel.

213 Consequently, it must be concluded that the Commission did not err in considering, on the basis of the evidence which it had assembled, that the applicants had participated in the cartel without interruption from 14 December 2001 until 16 November 2006.

(d) The applicants' intention to contribute to all the objectives of the cartel and their awareness of certain unlawful conduct

214 The applicants claim that the Commission has not sufficiently shown that they intended by their conduct to help to achieve all the common objectives of the cartel. In their submission, it thus failed to do so as regards the allocation of submarine power cable projects, the 'allocation of home markets' and the allocation of large contracts. Nor does the contested decision contain precise evidence showing that they were aware of the unlawful conduct of the other cartel participants in relation to the allocation of submarine power cables contracts.

215 The Commission disputes the applicants' arguments.

216 In that regard, it should be borne in mind that an undertaking which has participated in a single and complex infringement of that kind by its own conduct, which fell within the definition of an agreement or concerted practice having an anticompetitive object within the meaning of Article 101(1) TFEU and was intended to help to bring about the infringement as a whole, may thus be responsible also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 56 and the case-law cited).

217 An undertaking may thus have participated directly in all the forms of anticompetitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C-625/13 P, EU:C:2017:52, paragraph 57 and the case-law cited).

218 In the present case, first, as regards the applicants' lack of intention to contribute to all the common objectives of the cartel, it should be borne in mind that, as stated in paragraph 126 above, the measures adopted by the participants in the cartel shared a common objective, namely the establishment of a system for sharing the worldwide market for high voltage power cable projects,

with the exception of the United States. It should also be borne in mind that, as explained in paragraph 128 above, that system for sharing the market for high voltage power cable projects concerned both projects requiring submarine power cables and those requiring underground power cables.

219 Contrary to the applicants' contention, the fact that they did not participate in the allocation of the submarine power cable projects is not capable of showing that they did not intend to contribute by their conduct to the common objective of the cartel referred to in paragraph 218 above, since on their own admission that non-participation was the result of their lack of capacity to produce such power cables and of a clearly expressed intention not to take part in the allocation of such projects. In addition, as reflected in recital 324 of the contested decision, where the Commission states that the applicants had requested preference for a project involving the laying of underground power cables in shallow waters, in spite of their inability to produce submarine power cables in the strict sense, the applicants intended, in so far as technically foreseeable, to participate in the allocation of projects which would, in principle, have required the laying of submarine power cables.

220 Nor does the applicants' argument that their non-participation in the allocation of large projects shows that they did not intend to contribute by their conduct to the common objective of the cartel carry conviction. First of all, it is clear from the contested decision that the cartel mechanisms, whether obligations to supply information, rules on allocation or compensation mechanisms, did not distinguish according to the size of the projects in question (the loss of a large project could be offset by the allocation of several small projects, and vice versa). Next, it should be observed that the applicants' alleged non-participation concerning large projects follows, as they themselves explain in detail, from their lack of capacity to meet customers' requirements for such projects. Last, it follows from an email from Mr J. to Mr I. that the applicants had no hesitation in submitting bids for large projects by calling upon sub-contractors, where necessary, in order to overcome their capacity problems.

221 The applicants' argument that they had not intended to comply with 'the allocation of home markets' must also be rejected. In fact, it should be observed that, as is apparent from recital 108 of the contested decision, the Commission found that, when the power cable projects were allocated between the R members of the cartel, there was proof that some of them were recognised as having a 'home market' (for example, Italy for Nexans France and Prysmian, the Netherlands for Prysmian) on which they were given priority. The applicants claim that, as is apparent from several pieces of evidence, they refused on a number of occasions to respect the allocation of home markets by submitting bids in territories regarded as the home markets of other participants in the cartel. However, it must be stated that in doing so the applicants merely indicate that they did not always respect one of the rules on the allocation of projects between the R members of the cartel, which does not in itself show that they did not intend to contribute to the common objective of the cartel. It should be observed, moreover, that, as the applicants acknowledge, it is not the 'allocation of home markets' in itself that caused them a problem, but the fact that, since they were not recognised as having such a territory by the other participants in the cartel, they could not actually benefit from that allocation.

222 Secondly, as regards the lack of awareness of the unlawful conduct relating to submarine power cables, it should be observed that, as explained in paragraph 134 above, the R meetings in which Mr N. took part began with a general part during which the representatives of Nexans France and Pirelli informed the other R members of that cartel of the discussions that had taken place during the previous A/R meeting. As stated in paragraphs 130 to 132 above, the A/R meetings concerned the allocation of underground and submarine power cable projects in the 'export territories' between, on the one hand, the R members of the same cartel and, on the other hand, the A and K members of the cartel in question. It follows that the applicants were necessarily aware of the fact that submarine power cable projects were allocated between the A and R members of the cartel. As regards the applicants' awareness of the allocation of the submarine power cable projects between the R members of the

cartel, it should be observed that, on the assumption that, as at the R meeting of 18 and 19 November 2003, the discussions relating to submarine power cables and underground power cables were always held separately and that the representatives of Brugg Kabel never attended R meetings at which underground power cable projects and submarine power cable projects were the subject of common discussions, which is seriously called in question by the evidence adduced by the Commission in response to a measure of organisation of procedure adopted by the Court (see paragraphs 134 to 138 above), the fact that the applicants were aware, having regard to the preparatory documents for the meetings of the members in question, of the fact that discussions concerning submarine power cables would take place is sufficient to show that they were aware of that allocation or ought to have suspected it. In addition, it follows from the email sent by Mr J. to Mr N. on 23 January 2006, set out in recitals 377 and 378 of the contested decision and concerning allocation in the 'export territories', that the applicants were aware that the arrangements envisaged coordination for submarine power cable projects. It follows from that email that 'A does not trust anymore and refuses to continue the [Kuwait] exercise (and thus refuse this allocation) if [Mr C. of Pirelli] and you do not commit to respecting future agreements about this country. [Mr C. of Pirelli] has confirmed that they would follow in the future and have given a credible explication of their gesture (regarding a submarine project)'.

223 Having regard to the foregoing considerations, it must be considered that the Commission did not err in considering that the applicants, by their conduct, intended to help to bring about the infringement and were aware of the unlawful conduct of the other members of the cartel, within the meaning of the case-law referred to in paragraphs 216 and 217 above.

(e) The proof that the applicants were aware of the agreements relating to the various power cable projects

224 The applicants maintain that the Commission ought to have shown that they were aware of the agreements relating to each of the projects or that they could have foreseen them at least for the home markets or the submarine power cable projects.

225 The Commission disputes the applicants' arguments.

226 In that regard, it should be observed that, as the Commission found, the general arrangement of the obligations to provide information and the quota obligations concerned all the projects forming the subject matter of the cartel, and it was to that global nature of the plan that the requirement of proof related. As the R members of the cartel were specifically required actively to state their interest in specific projects if they wished to be taken into consideration for the allocation of those projects, it is logical that a smaller producer such as the applicants should not be mentioned for all the projects. That, however, does not alter the fact that they participated, overall, in the detailed rules applied and that, as the Commission has shown, they were aware of the general modus operandi.

(f) The reasoning in the contested decision concerning the identity of the power cable projects at issue

227 The applicants take issue with the Commission for not having specified in the contested decision the projects that were the subject of an agreement, merely using abbreviations or general nicknames and having presented the same project as several distinct projects because of slight differences in designation.

228 The Commission disputes the applicants' arguments.

229 In that regard, it should be observed that it follows, for example, from recitals 234 and 372 of the contested decision, which contain numerous extracts from communications between the members of the cartel, that those members made systematic reference to the power cable projects at issue in the form of abbreviations or coded references with the clear aim of concealment. In such circumstances, the obligation to state reasons, which is binding on the Commission pursuant to Article 296 TFEU, cannot mean that the Commission is required to identify precisely each of the projects mentioned by the participants in the cartel in their communications.

230 Having regard to the foregoing considerations, the third plea and the fourth plea must be rejected as unfounded.

4. The fifth plea, alleging infringement of Article 101 TFEU and Article 53 of the EEA Agreement

231 The applicants maintain that the application of the concept of a single and continuous infringement in the present case constitutes an infringement of Article 101 TFEU and Article 53 of the EEA Agreement.

232 In support of this plea, the applicants merely refer to the arguments already raised in the context of the third and fourth plea to demonstrate that the infringement at issue does not constitute a single and continuous infringement. In particular, they refer to the arguments relating to the beginning of their participation in the cartel from 14 December 2001, to the uninterrupted duration of their participation, to their awareness of the agreements relating to submarine power cables or to the duty to be aware of them, to their participation in agreements relating to home markets and to their participation in large projects. As those arguments have already been rejected as unfounded in the context of the examination of the third and fourth pleas, in the absence of autonomous argument the fifth plea can only be rejected as wholly unfounded.

233 As the second, third, fourth and fifth pleas have been rejected, it must be concluded that the Commission did not err when it imputed to the applicants participation in the single and continuous infringement of Article 101(1) TFEU from 14 December 2001 until 16 November 2006.

5. The sixth plea, alleging infringement of Article 23(2) and (3) of Regulation No 1/2003, breach of the principles of equal treatment and proportionality and of the principle **ne bis in idem***, breach of the obligation to state reasons, a number of errors of assessment and misuse of powers as regards the calculation of the amount of the fine imposed on the applicants*

234 The sixth plea consists of five parts. By the first part, the applicants take issue with the Commission for having erred and having breached the principle of equal treatment in choosing 2004 as the reference year for the value of sales, as that year does not represent their economic power and their contribution in the cartel. By the second part, they take issue with the Commission for having breached its obligation to state reasons and the principle *ne bis in idem* and for having made an error of assessment as regards the gravity of the infringement. By the third part, they take issue with the Commission for having fixed a weighting of 4.91 to reflect the duration of the infringement. By the fourth part, they maintain that the Commission breached its duty to state reasons as regards the setting of the 'entry fee'. By the fifth part, they take issue with the Commission for having made an error of assessment and having breached the principle of equal treatment and the principle of proportionality in the assessment of the mitigating circumstances.

(a) The choice of 2004 as the reference year of the value of sales for the calculation of the basic amount of the fine

235 The applicants claim that, in choosing 2004 as the reference year instead of the last full year of their participation in the cartel, the Commission departed without good reason from the rule laid down in point 13 of the 2006 Guidelines. They maintain that that choice resulted in their being treated in a discriminatory manner owing to the extremely high sales linked with power cable projects which they reported in 2004. In the applicants' submission, in order to avoid that discriminatory treatment, the Commission ought to have either chosen as the reference year the last full year of their participation in the cartel, namely 2005, or used an average value based on the years 2003 to 2005.

236 The Commission disputes the applicants' arguments.

237 In that regard, it should be borne in mind that, as regards the calculation of the fine in the case of a worldwide cartel, point 18 of the 2006 Guidelines provides as follows:

'Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.'

238 It should also be borne in mind that, in accordance with settled case-law, to the extent to which reliance is to be placed on the turnover of the undertakings involved in the same infringement for the purpose of determining the proportions between the fines to be imposed, the period to be taken into consideration must be ascertained in such a way that the resulting turnovers are as comparable as possible (see judgment of 30 September 2009, *Akzo Nobel and Others* v *Commission*, T-175/05, not published, EU:T:2009:369, paragraph 142 and the case-law cited).

239 It should further be borne in mind that, as regards the period to be taken into consideration for the purposes of determining the value of sales used in calculating the fine, point 13 of the 2006 Guidelines provides as follows:

'In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.'

240 However, it should be observed that the use of the expression 'will normally take the sales made by the undertaking during the last full business year of its participation in the infringement' in paragraph 13 of the 2006 Guidelines does not preclude the possibility that the Commission may use a different reference period provided that, in accordance with the case-law cited in paragraph 238 above, that period allows it to obtain figures that are as comparable as possible.

241 In the present case, it is clear from the contested decision that, in order to calculate the basic amount of the fine imposed on the applicants, the Commission referred to the method laid down in point 18 of the 2006 Guidelines (recitals 966 and 968 to 994 of that decision). It is also clear from that decision

that, for the purposes of applying that method, it did not rely on sales during the last full year of participation in the infringement, but on sales figures relating to 2004 (recitals 966 and 968 to 994 of that decision).

242 The Commission justified that choice, first, by the fact that power cable sales at EEA level increased significantly after 2006, so that the choice of the last full year of participation in the infringement would not be sufficiently representative of the infringement period for undertakings that ceased all participation in the infringement after 2006. It maintained that relying on sales by all the undertakings in 2004 made it possible to obtain a more precise estimate of the economic importance of the infringement throughout its duration and also of the relative weight of the participating undertakings in the infringement. Secondly, it considered that the choice of 2004 made it possible to avoid discriminatory treatment between the undertakings which ended their (direct) participation in the infringement earlier and those that continued. It also emphasised in the contested decision that point 13 of the 2006 Guidelines allowed it, in such a situation, not to rely on turnover for the last full year of participation in the infringement (recital 965 of the contested decision). It added that the choice of one single reference year during which all of the parties had participated in the infringement was preferable for the purposes of applying point 18 of those Guidelines, in order properly to reflect the weight of each undertaking in the infringement (recital 966 of that decision).

243 As regards the applicants' argument that the choice of a common reference year is necessarily arbitrary in that it affects the participants in the cartel differently according to the turnover achieved during that year, it should be borne in mind that the use of a reference year common to all the undertakings involved in the same infringement makes it possible, as a general rule, to determine the fines in a uniform manner in accordance with the principle of equality, while enabling the scale of the infringement committed to be assessed in the light of the economic reality as it appeared during that period (see, to that effect, judgments of 2 October 2003, *Aristrain* v *Commission*, C-196/99 P, EU:C:2003:529, paragraph 129, and of 16 November 2011, *ASPLA* v *Commission*, T-76/06, not published, EU:T:2011:672, paragraph 112).

244 Furthermore, it should be borne in mind that, in accordance with the case-law, an individual undertaking cannot compel the Commission to rely, in its case, upon a period different from that used for the other undertakings, unless it proves that, for reasons peculiar to it, its turnover in the latter period does not reflect its true size and economic power or the scale of the infringement which it committed (judgment of 14 May 1998, *Fiskeby Board* v *Commission*, T-319/94, EU:T:1998:95, paragraph 42).

245 In the present case, the applicants claim that they achieved an exceptional turnover in the power cable sector in 2004 owing to the completion of the 'BASF' project for 4 700 000 Swiss franc (CHF) and the 'Spain 9' project for CHF 3 200 000, which is not representative of their turnover during their participation in the infringement. However, they adduce no evidence in support of that assertion and the Court is therefore unable to assess, apart from the reality and the composition of their turnover for 2004, the extent to which that turnover varies from their turnover in 2003 and 2005. It is apparent from Brugg Kabel's annual report for 2005 that, in spite of a difficult start to the year, sales for that year reached a level comparable to that of the preceding year, owing to the numerous orders in the high voltage power cable sector received during the second part of the year.

246 In those circumstances, it must be considered that the applicants have failed to show that the Commission erred in fixing the reference year for the determination of the amount of sales to be taken into account when calculating the basic amount of the fine. It follows that the first part of the sixth plea must be rejected as unfounded.

(b) The assessment of the gravity of the infringement

247 The applicants take issue with the Commission for having breached its obligation to state reasons and having made an error of assessment as regards the proportion of the value of sales, namely 19%, taken into account in their case to reflect the gravity of the single and continuous infringement.

(1) The alleged breach of the obligation to state reasons concerning the determination of the value of sales taken into account to reflect the gravity of the infringement

248 The applicants claim that the Commission stated its reasons in a contradictory fashion in the contested decision by stating, on the one hand, in recital 998 of the contested decision, that in order to determination the proportion of the value of sales taken into account to reflect the gravity of the infringement, it took account of only a single and continuous infringement the gravity of which it assessed at 15% whereas, on the other hand, in recital 999 of that decision, it selectively increased the proportion of the value of sales to be taken into consideration by 2% for the undertakings which had allegedly taken part in the 'European cartel configuration', which made a further allocation of the power cable projects after the allocation already made in the context of the 'A/R cartel configuration'. In doing so, the Commission contradicts the assumption which it has already made that the allocation mechanisms of the 'A/R cartel configuration' and those of the 'European cartel configuration' are an integral part of the single and continuous infringement. The applicants maintain that they are therefore subject to a first percentage for gravity of 15% for their participation in the single and continuous infringement encompassing both cartel configurations and then to a second percentage for gravity of 2% because, again, of their participation in the 'European cartel configuration'. The logic applied by the Commission thus leads to a breach of the principle *ne bis in idem*.

249 Furthermore, the applicants claim that the Commission breached its obligation to state reasons when it stated, in recitals 1003 and 1004 of the contested decision, that an increase in the degree of gravity was justified by the combined market share of the undertakings participating in the cartel and by the geographic scope of the cartel, without specifying either the amount or the composition of that increase. They emphasise that it is only on the basis of the 'findings' as to gravity, in recital 1010 of the contested decision, that it is possible to calculate the amount in question by inference.

250 The Commission disputes the applicants' entire argument.

251 In that regard, first, as regards the increase of the degree of gravity owing to the combined market share of the undertakings participating in the infringement and the geographic scope of the infringement, it should be observed that the amount of that increase, namely 2%, is stated in recital 1010 of the contested decision, as, moreover, the applicants acknowledge. As for the lack of precision in the contested decision as to the respective contribution to that increase of the two factors giving rise to it, namely the combined market share and the geographic scope of the cartel, such precision was not necessary in the present case, as the reasoning in that respect was adapted to the nature of the act in question and revealed the Commission's reasoning in a clear and unequivocal fashion, which enables the applicants to ascertain the justification for the measure adopted and the Court to exercise its power of review.

252 Secondly, as regards what is alleged to be the contradictory nature of the reasoning in the contested decision with respect to the determination of the proportion of the value of sales to be taken into account to reflect the gravity of the infringement, it must be stated that that assertion is based on a misreading of the contested decision.

253 The applicants maintain, in essence, that the Commission initially assessed the conduct of the participants in the single and continuous infringement by determining that the proportion of the value of sales to be taken into account with respect to the gravity of the infringement was 15%, then

that it assessed the same conduct for a second time when it applied an additional percentage of 2% for the undertakings that had taken part in the 'European cartel configuration' as well as the 'A/R cartel configuration'.

254 However, it should be pointed out that, in recital 998 of the contested decision, the Commission stated that the single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement in which the addressees of the contested decision had taken part consisted in customer and market allocation. It stated that such an infringement was, by its very nature, among the most harmful restrictions of competition, as it distorted the main parameters of competition. It observed that, according to point 23 of the 2006 Guidelines, those practices will, as a matter of policy, be heavily fined and the gravity percentage is generally set at the higher end of the scale. It stated that it believed that that element would justify a gravity percentage of 15%.

255 In recital 999 of the contested decision, the Commission then stated that, in addition to the allocation mechanisms of the 'A/R cartel configuration', some EEA projects had been subject to further allocation among the European producers in the context of the 'European cartel configuration' and that that practice, which was carried out exclusively by the European producers, increased the harm to competition already caused by the market-sharing agreement between the European, Japanese and South Korean producers and therefore the gravity of the infringement. The Commission then stated that the further distortion caused by the European cartel configuration justified an increase in the gravity percentage of 2% for the undertakings that had participated in that aspect of the cartel.

256 It is clear from recitals 998 and 999 of the contested decision that the Commission considered that the minimum percentage of sales to be taken into consideration for all the undertakings that could be held liable for the single and continuous infringement was 15%, irrespective of the level of their participation in the cartel, but that an additional percentage of 2% should be applied to the undertakings that had participated in the 'A/R cartel configuration' and also in the 'European cartel configuration', on the ground that the anti-competitive effects of the former configuration were increased by those of the latter.

257 The applicants are therefore wrong to maintain that the reasoning in the contested decision concerning the gravity of the infringement is contradictory in that respect. Likewise, the applicants' claim that there has been a breach of the principle *ne bis in idem* cannot succeed, since the Commission's reasoning set out in recitals 998 and 999 of the contested decision does not result in the same facts being penalised twice.

(2) The alleged error resulting from the failure to take the fact that the applicants did not manufacture submarine power cables during the infringement period into account when determining the proportion of the value of sales taken into consideration to reflect the gravity of the infringement

258 The applicants claim that, in accordance with the case-law, the Commission was required, when determining the proportion of the value of sales taken into account to reflect the gravity of the infringement, to have regard to the fact that they did not produce submarine power cables during the infringement period. In their submission, the Commission could not merely avoid that obligation by claiming that it had already taken that fact into account when calculating the fine by omitting sales of submarine power cables from the value of sales. They assert that the same applies to the fact that they did not apply the home market rule and did not participate in the allocation of large projects.

259 The Commission disputes the applicants' arguments.

260 In that regard, it should be observed that the Commission explained in recital 1000 of the contested decision that, in essence, there was no need to take the fact that the applicants did not produce submarine power cables during the infringement into account when determining the proportion of the value of sales to be taken into consideration to reflect the gravity of the infringement, since it had already been taken into account when the Commission determined the value of their sales.

261 In addition, as the Commission correctly observes, the only case-law on which the applicants rely in order to dispute that assessment has no relevance in the present case.

262 In fact, in the case that gave rise to the judgment of 30 November 2011, *Quinn Barlo and Others* v *Commission* (T-208/06, EU:T:2011:701), the General Court held that the applicant had not been or could not have been aware of the arrangements concerning other products. As stated in paragraph 222 above, in the present case the applicants were aware of the existence of arrangements concerning submarine power cables.

263 Likewise, in the case that gave rise to the judgment of 16 September 2013, *Zucchetti Rubinetteria* v *Commission* (T-396/10, EU:T:2013:446), the arrangements related to various groups of products and different producers. There, too, not all the participating undertakings were aware of all the types of arrangements and the applicant's participation was restricted to a national market.

264 In the cases that gave rise to the judgment of 30 November 2011, *Quinn Barlo and Others* v *Commission* (T-208/06, EU:T:2011:701), and to the judgment of 16 September 2013, *Zucchetti Rubinetteria* v *Commission* (T-396/10, EU:T:2013:446), it was not possible to attribute to the applicants liability for the conduct of the other participants in the cartel since they were not aware of that conduct. In the present case, on the other hand, as stated in paragraph 223 above, the applicants were fully aware of the scope of the agreements and could therefore be properly held liable for the entire infringement.

265 It follows that the applicants have failed to show that the Commission erred in not taking into account, when determining the proportion of the value of sales to be taken into consideration for the applicants in the light of the gravity of the infringement, the fact that they had not manufactured submarine power cables during the infringement period.

(3) The alleged breach of the principle of equal treatment

266 The applicants take issue with the Commission for having considered that their participation in the 'European cartel configuration' and also in the second 'level of allocation' of that cartel presented a higher degree of gravity and therefore required an increase of 2% of the proportion of the value of sales to be taken into consideration in their case to reflect the gravity of the infringement. In their submission, that leads to their being penalised as heavily, on the ground that they were allegedly informed of the results of discussions in the context of the 'A/R cartel configuration', as the undertakings that actively participated in those configurations, which conceived, coordinated and imposed the entire cartel and which also profited the most from the arrangements.

267 The Commission disputes the applicants' arguments.

268 In that regard, it should be borne in mind that, whenever the Commission decides to impose fines under competition law, it is required to respect the general principles of law, which include the principle of equal treatment, as interpreted by the Courts of the European Union. According to settled case-law, the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way,

unless such treatment is objectively justified (see judgments of 27 June 2012, *Bolloré* v *Commission*, T-372/10, EU:T:2012:325, paragraph 85 and the case-law cited, and of 19 January 2016, *Mitsubishi Electric* v *Commission*, T-409/12, EU:T:2016:17, paragraph 108 and the case-law cited).

269 In the present case, in recital 999 of the contested decision, the Commission justified an increase of 2% of the proportion of the value of sales to be taken into consideration to reflect gravity in the case of certain undertakings that participated in the infringement by the fact that they had taken part in the 'European cartel configuration' which had increased the harm to competition already caused by the market-sharing agreement between the European, Japanese and South Korean producers. It follows that the criterion taken into account by the Commission to justify that increase was linked with mere participation in the 'European cartel configuration' and not in the more or less active nature of that participation. Accordingly, since, as already stated in paragraph 233 above, the Commission was correct to attribute to the applicants participation in the single and continuous infringement, including in the 'European cartel configuration', they cannot validly maintain that they were the subject of less favourable treatment than the other European undertakings which participated in the same configuration and to which the same increase was applied.

270 It should be observed, moreover, that the more or less active nature of the participation in the infringement of the various undertakings to which the contested decision was addressed was taken into account at the stage of the assessment of the mitigating circumstances. The applicants were thus classified in the group of intermediate participants, whereas the undertakings which had a leading role in the 'European cartel configuration' and in the 'A/R cartel configuration A/R', that is to say, Nexans France, Pirelli and Prysmian, were classified in the core group of the cartel. As a result of that difference in classification, the Commission granted the applicants a reduction of 5% of the amount of the fine, whereas it excluded such a reduction for Nexans France, Pirelli and Prysmian. It follows that the applicants have failed to show that the Commission breached the principle of equal treatment by imposing on them the same increase of 2% of the proportion of the value of sales to be taken into consideration to reflect the gravity of the infringement as it imposed on Nexans France, Pirelli and Prysmian.

271 Having regard to the foregoing considerations, the second part of the sixth plea must be rejected as unfounded.

(c) The fixing of a weighting of 4.91 to reflect the duration of the applicants' participation in the infringement

272 The applicants take issue with the Commission for having applied a weighting of 4.91 for the duration of their participation in the infringement which does not take account of the fact that the Commission has not shown that the start date of their participation in the infringement was before 3 July 2002 and of the fact that their participation in the infringement was interrupted, in particular between 12 May 2005 and 8 December 2005. In their submission, the Commission ought therefore to have applied a weighting of 3.79.

273 The Commission disputes the applicants' arguments.

274 In that regard, it is sufficient to recall that, as stated in paragraph 213 above, the Commission correctly fixed the start date of the applicants' participation in the infringement at 14 December 2001 and did not err when it considered that their participation had continued until 16 November 2006.

275 The third part of the sixth plea must therefore be rejected as unfounded.

(d) The amount of the entry fee

276 The applicants take issue with the Commission for not having set out an autonomous ground for the entry fee referred to in recital 1013 of the contested decision and for having merely referred to recitals 998 to 1010 of that decision, concerning the calculation of the basic amount. In their submission, the Commission ought, in application of points 22 and 25 of the 2006 Guidelines, to have taken into consideration their objective participation in all the aspects of the infringement or their subjective awareness of those aspects, or indeed of part of them. The entry fee ought therefore to have reflected the fact that the applicants could not be held liable for the agreements relating to submarine power cables, home markets and large projects.

277 The Commission disputes the applicants' arguments.

278 In that regard, it should be borne in mind that, in the words of point 25 of the 2006 Guidelines:

'… irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.'

279 Point 22 of the 2006 Guidelines provides as follows:

'In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.'

280 Relying expressly on point 25 of the 2006 Guidelines, the Commission stated in recital 1013 of the contested decision that for the purpose of determining the specific percentage to be applied the factors referred to in recitals 998 to 1010 of that decision would be considered.

281 It should be observed that recitals 998 to 1002 of the contested decision relate to the nature of the infringement, recital 1003 concerns the combined market share held by the participants to the infringement, recital 1004 concerns the geographic scope of the infringement and recitals 1005 to 1009 cover its implementation. It should be emphasised that, in recital 1008 of the contested decision, the Commission stated that, as was clear from Section 4.3.3 of that decision, all the undertakings had been aware of the other unlawful conduct planned or put into effect by the other participants in the cartel or could reasonably have foreseen such conduct and had been prepared to take the risk.

282 In addition, in recital 1014 of the contested decision, the Commission stated that the percentage to be applied by way of addition amount was 17% for Sumitomo Electric Industries, Hitachi Cable, Furukawa Electric, Fujikura, SWCC Showa Holdings, Mitsubishi Cable Industries, LS Cable & System and Taihan Electric Wire and 19% pour Nexans France, Prysmian, ABB, Brugg Kabel, Safran, Silec Cable, nkt cables and the undertakings held 'jointly and severally' liable with any of them.

283 Therefore, in so far as, by their argument, the applicants rely on a failure to state reasons in the contested decision as regards the entry fee, it must be stated that that argument is factually incorrect, as the applicants are in a position to understand the reasons why the Commission chose to apply to them an entry fee corresponding to 19% of the value of sales and as the Court is in a position to review the legality of the contested decision in that respect.

284 Furthermore, in so far as the applicants take issue with the Commission for having erred in not taking account, when determining the entry fee, of the fact that they could not be held liable for the agreements on submarine power cables, on the home markets and on the large projects, it is sufficient to recall that, as stated in paragraph 233 above, the Commission did not err in imputing to the applicants their participation in the single and continuous infringement.

285 Accordingly, the fourth part of the sixth plea must be rejected as unfounded.

(e) The mitigating circumstances

286 The applicants take issue with the Commission, first, for having erred in classifying them among the intermediate participants in the cartel and attributing to them, consequently, a reduction of 5% of the amount of the fine, whereas the passive role which they played in the cartel, demonstrated by their disruptive attitude and the attempts to discipline them, justified their being classified among the fringe participants in the cartel and being attributed, consequently, a reduction of 10% of the amount of the fine. Secondly, they maintain that that situation constitutes a breach of the principles of equal treatment and proportionality in so far as they played a role comparable to that played by nkt cables, which the Commission classified among the fringe participants in the cartel and to which it therefore granted a reduction of 10% of the amount of the fine. Thirdly, they claim that the Commission erred in not taking into account, by way of mitigating circumstances, the fact that, in the case of a single and continuous infringement, the undertaking concerned is imputed, in addition to its own conduct, with unlawful conduct in which it has not engaged. In their submission, in the case of a single and continuous infringement, the facts that contributed to the infringement should be taken into consideration, particularly when the basic amount of the fine is adjusted. Fourthly, they maintain that they ought, in addition, to have been given an additional reduction of 1% of the amount of the fine, as were Mitsubishi Cable Industries and SWCC Showa Holdings, for the period preceding the formation of Exsym, LS Cable & System and Taihan Electric Wire, because they were unaware of certain aspects of the infringement and, accordingly, of liability for those aspects, in particular concerning submarine power cables and large projects.

287 The Commission disputes the applicants' entire argument.

288 In the first place, as regards the applicants' classification as intermediate participants in the cartel, it should be observed that there is no point in the applicants attempting to claim that they played a passive role in the cartel.

289 It should be borne in mind that, as correctly stated in recital 572 of the contested decision, although the applicants were not involved in the establishment of the cartel and did not attend any A/R meeting, their employees attended at least 17 anti-competitive meetings with the R members of that cartel between December 2001 and November 2006.

290 It should also be recalled that it has already been stated, in paragraph 175 above, that, contrary to the applicants' contention, the evidence assembled by the Commission was sufficient to establish that they had participated in a first meeting of the R members of the cartel in Divonne-les-Bains on 14 December 2001.

291 In addition, it is clear from the evidence assembled by the Commission that the applicants attempted to arrange an R meeting in April 2002.

292 In fact, in an email of 9 April 2002 entitled 'Meeting in the area of BRUGG', Mr N. stated the following:

'this is to confirm the invitation to BRUGG for the next meeting. We have made reservation for meeting and lunch in an nearby private location … on Thursday 25th April 2002.

Max. 20 persons. …

Please inform who / how many will arrive the day before.

Please convey to other participants and reconfirm date and meeting. …'

293 It should be observed that the email of 9 April 2002 is from Mr N. to Mr J., whom he asks to forward the information to the other participants in the meeting, rather than doing so himself. Likewise, Mr N. asks Mr J. to confirm how many persons will arrive on the day before the meeting. It therefore appears that Mr N. is addressing Mr J. in his capacity as coordinator of the meeting. It is not disputed that Mr J. played the role of coordinator of the R members of the cartel. In addition, it must be stated that the applicants do not dispute the Commission's assertions concerning the content of that email in their written pleadings.

294 In addition, the applicants themselves acknowledge in their written pleadings that they assumed responsibility for actually organising a meeting of the R members of the cartel on 3 June 2002. Admittedly, as the applicants claim, the fact of actually organising such meetings is not in itself a sign that they played a role comparable with that played by a coordinator of the cartel. It is common ground, moreover, that that role, which involved, for example, convening the meetings, proposing an agenda or distributing preparatory documents, was in the present case assumed by Mr J. However, it should be observed that the actual organisation of an R meeting necessarily entails an intention on the part the person responsible to make an active contribution to the functioning of the cartel.

295 Nor is there any point in the applicants claiming that the passive role which they played in the infringement is demonstrated by their numerous breaches of the discipline of the cartel.

296 In fact, having regard to the very numerous uncontested examples of the implementation of the cartel by the applicants referred to in recital 493 of the contested decision, the fact that in certain cases they failed to comply with the rules on the functioning of the cartel by refusing to respect the home market rule within the 'European cartel configuration' or not respecting the pre-established preference concerning projects to be carried out in the 'export territories' is not sufficient to invalidate the finding that the agreements were implemented by the applicants. As the Commission correctly observes, that is a fortiori the case because a certain instability is inherent in the very nature of cartels, which means that an occasional defection by certain members and the reprisals which it entails within the 'European cartel configuration' are typical of such market-sharing. During the infringement period imputed to them, the applicants as a general rule complied on a permanent basis with the detailed rules agreed, as Mr N. confirmed in the email to Mr J. of 24 January 2006 cited in paragraphs 195 and 196 above. Thus, the evidence cited by the applicants, relating to possible measures intended to discipline them, cannot serve to prove that they played a passive role.

297 It must therefore be stated that the Commission did not err in classifying the applicants among the intermediate participants in the infringement.

298 Accordingly, the applicants' argument that, as regards their participation in the cartel, they were in the same position as nkt cables must be rejected as ineffective. In fact, such an argument, on the assumption that it was well founded, would be of such a kind as to justify an increase in the amount of the fine imposed on nkt cables. Conversely, such a fact is irrelevant as regards the grant of a reduction of the amount of the fine imposed on the applicants for mitigating circumstances, since the principle of equal treatment does not found an entitlement to the non-discriminatory application of unlawful treatment (see, to that effect, judgment of 11 September 2002, *Pfizer Animal Health* v *Council*, T-13/99, EU:T:2002:209, paragraph 479).

299 Secondly, as regards the alleged breach of the principle of equal treatment in relation to the additional 1% reduction of the amount of the fine, it is sufficient to observe that the applicants' assertion that they ought to have received such a reduction on the ground that they were not aware of the agreements concerning submarine power cables and that they could not take part in the allocation of large projects is, as already stated in paragraphs 219, 220 and 222 above, based on a false premiss.

300 Thirdly, as regards the complaint that the Commission ought, when assessing the mitigating circumstances, to have taken the single and continuous nature of the infringement into account, it should be observed that, as the Commission found, the concept of a single and continuous infringement does not in itself require a reduction of the amount of the fine. As stated in paragraph 297 above, the Commission, having regard to the facts in its possession, correctly assessed the applicants' contribution to the implementation of the cartel by classifying them in the intermediate category. Furthermore, the value of sales reveals the applicants' economic importance, taking account only of the power cables which they produce. Taking the actions of the other participants in the cartel into account cannot justify an additional reduction of the amount of the fine, since those actions are consistent with the mode of organisation of the cartel established by the applicants, based on the division of work, and continuously and strictly monitored.

301 It follows from the foregoing that the Commission did not breach the principle of equal treatment or make an error of assessment when it classified the applicants among the intermediate participants in the cartel and, consequently, reduced the amount of the fine by 5%.

302 Having regard to the foregoing considerations, the fifth part of the sixth plea must be rejected as unfounded, as, accordingly, must the sixth plea in its entirety.

303 As examination of the pleas put forward by the applicants has revealed no illegality affecting the contested decision, the claims for annulment must be rejected in their entirety.

B. The claims for a reduction of the amount of the fine imposed

304 Before examining the claims whereby the applicants seek a reduction of the amount of the fine imposed on them, it should be borne in mind that the review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed. It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (judgment of 8 December 2011, *KME Germany and Others* v *Commission*, C-389/10 P, EU:C:2011:816, paragraphs 130 and 131).

305 The applicants request a reduction of the amount of the fine imposed on them, for the reasons stated in the context of the sixth plea. However, the sixth plea raised by the applicants in support of their claim for annulment has been rejected and, moreover, there is nothing in the present case to justify a reduction of the amount of that fine. It follows that the claim seeking a reduction of that amount must be rejected.

306 In the light of all of the foregoing considerations, the action must be dismissed in its entirety.

IV. Costs

307 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Brugg Kabel AG and Kabelwerke Brugg AG Holding to pay the costs.

Collins Kancheva Barents

Delivered in open court in Luxembourg on 12 July 2018.

[Signatures]

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