Reports of Cases

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

15 June 2022*

(Competition – Abuse of a dominant position – LTE chipsets market – Decision finding an infringement of Article 102 TFEU and Article 54 of the EEA Agreement – Exclusivity payments – Rights of the defence – Article 19 and Article 27(1) of Regulation (EC) No 1/2003 – Foreclosure effects)

In Case T-235/18,

Qualcomm Inc., established in San Diego, California (United States), represented by M. Pinto de Lemos Fermiano Rato, M. Davilla and M. English, lawyers,

applicant,

v

European Commission, represented by N. Khan, A. Dawes and C. Urraca Caviedes, acting as Agents,

defendant,

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of A. Marcoulli (Rapporteur), President, S. Frimodt Nielsen, J. Schwarcz, C. Iliopoulos and R. Norkus, Judges,

Registrar: C. Kristensen, Head of Unit,

having regard to the written part of the procedure,

further to the hearing on 4, 5 and 6 May 2021,

gives the following

Judgment

1 By its action based on Article 263 TFEU, the applicant, Qualcomm Inc., seeks annulment of Commission Decision C(2018) 240 final of 24 January 2018 relating to proceedings under Article 102 [TFEU] and Article 54 of the [EEA Agreement] (Case AT.40220 – Qualcomm

* Language of the case: English.

(Exclusivity payments)), by which the European Commission found that Qualcomm had abused its dominant position from 25 February 2011 to 16 September 2016 ('the period concerned') and imposed on it a fine of EUR 997 439 000 ('the contested decision').

I. Background to the dispute

A. The applicant

2 The applicant is a US company established in 1985 operating in the field of cellular and wireless technologies. It develops and supplies chipsets and software used in voice and data communications. The applicant's chipsets are sold and its system software is licensed to undertakings for use in mobile phones, tablets, laptops, data modules and other consumer electronics. The applicant supplies, inter alia, baseband chipsets ('chipsets').

3 Chipsets enable smartphones and tablets to connect to cellular networks and are used both for voice services and data transmission. A chipset combines three components, namely a baseband processor, a radio frequency integrated circuit and a power management integrated circuit, which are usually contained in separate chips or, less commonly, in the same chip. In addition to the baseband processor, some devices require an application processor, which can be integrated into the same chip as the baseband processor or packaged in a separate chip. A chipset may therefore be an 'integrated' or 'standalone' chipset (also known as a 'slim' chipset), depending on whether or not it integrates an application processor. Chipsets can be compatible with one or more cellular communication standards, such as the GSM (Global System for Mobile Communications), UMTS (Universal Mobile Telecommunications System) or LTE (Long-Term Evolution) standards. They are sold to original equipment manufacturers ('OEMs'), such as Apple Inc. (Apple), HTC Corporation (HTC), Huawei Technologies Co. Ltd (Huawei), LG Corp. (LG), Samsung Group (Samsung) and ZTE Corporation (ZTE), which incorporate them into their devices.

4 The present case concerns, more specifically, the supply of chipsets compliant with the LTE standard together with the UMTS and GSM standards ('LTE chipsets') by the applicant to Apple during the period from 2011 to 2016.

B. The administrative procedure

1. The procedure concerning the applicant

5 In August 2014 the European Commission commenced an investigation into arrangements for the purchase and use of the applicant's chipsets.

6 Between 13 October 2014 and 14 January 2015, pursuant to Article 18(2) and (3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), the Commission sent requests for information to the applicant.

7 On 16 July 2015, the Commission initiated proceedings against the applicant with a view to adopting a decision under Chapter III of Regulation No 1/2003.

8 On 8 December 2015, the Commission sent a statement of objections to the applicant, to which it replied on 27 June 2016. On 27 July 2016 the applicant supplemented that reply.

9 Between 22 November 2016 and 5 May 2017, the Commission sent the applicant further information requests.

10 On 10 February 2017, the Commission sent the applicant a letter of facts, to which it replied on 13 March 2017.

11 On 29 May 2017, the applicant made follow-up submissions on evidence included in the file after the statement of objections.

12 In the course of the administrative procedure, the applicant met with the Commission's services on a number of occasions. On some of those occasions, the chief economist's team was present.

13 On 24 January 2018, the Commission adopted the contested decision.

2. The other undertakings and interested parties

14 Before the Commission commenced the investigation referred to in paragraph 5 above, it held a meeting with a third-party informant who had requested anonymity ('the third-party informant'), such meeting having been organised at the third-party informant's request.

15 Between 12 August 2014 and 23 July 2015, the Commission sent information requests to a number of the applicant's customers and competitors.

16 Before the statement of objections was sent to the applicant, the Commission held meetings and conference calls with third parties.

17 The Commission admitted Apple and Nvidia as interested third parties pursuant to Article 13(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18). Apple is a customer of the applicant and a purchaser of chipsets, including LTE chipsets. Nvidia is a competitor of the applicant and supplies certain types of chipset.

18 On 15 March 2016, the Commission sent Apple a non-confidential version of the statement of objections. On 2 May 2016, Apple made its views known on the statement of objections.

19 On 31 March 2016, the Commission sent Nvidia a non-confidential version of the statement of objections. On 31 May 2016 Nvidia, made its views known on the statement of objections.

20 On 19 October 2016, the Commission sent Apple a non-confidential version of the applicant's reply to the statement of objections. On 21 November 2016, Apple made its views known on the reply to the statement of objections.

21 Between 22 November 2016 and 5 May 2017, the Commission sent information requests to Apple and to some of the applicant's competitors.

3. Access to the file

22 On 21 December 2015, after notification of the statement of objections, the Commission gave the applicant access (on CD-ROM) to the case file. Following requests from the applicant, the Commission forwarded to it non-confidential versions of certain other documents which the Commission had not yet sent to it, as well as less redacted non-confidential versions of certain documents which the Commission had already sent to it.

23 On 23 and 24 May 2016, the Hearing Officer arranged for the applicant's external advisers to have access to a first data room in respect of certain documents. On 1 June 2016, the Hearing Officer arranged for the applicant's external advisers to have access to a second data room in respect of certain other documents. On 28 and 30 June 2016, the applicant's external advisers were given access to a third data room to enable them to make confidential substantive submissions on the documents made available in the first and second data rooms.

24 On 13 February 2017, after notification of the letter of facts, the Commission granted the applicant further access to the case file (on CD-ROM) as regards the documents obtained following notification of the statement of objections. On 17 February 2017, the Hearing Officer arranged for the applicant's external advisers to have access to a fourth data room in respect of some of those documents.

25 On 25 January 2018, after the adoption of the contested decision, the applicant asked the Commission to provide it with the list of meetings and interviews held with third parties concerning the subject matter of the investigation. On 2 March 2018, the Commission replied that certain meetings and conference calls with third parties had taken place and provided the notes of those meetings.

C. The contested decision

26 The contested decision comprises 14 sections: introduction (Section 1); undertakings concerned (Section 2); procedure (Section 3); the applicant's complaints of procedural irregularities (Section 4); standards (Section 5); technology and products covered (Section 6); the applicant's activities in relation to chipsets (Section 7); the applicant's agreements with Apple (Section 8); market definition (Section 9); dominance (Section 10); abuse of a dominant position (Section 11); jurisdiction (Section 12); effect on trade between Member States (Section 13); and remedies and fines (Section 14).

1. The agreements between the applicant and Apple

27 In Section 8 of the contested decision, the Commission stated that, on 25 February 2011, the applicant had concluded an agreement with Apple ('the transition agreement') relating to the delivery of chipsets and that that agreement was amended on 28 February 2013 by the conclusion of a subsequent agreement ('the first amendment to the transition agreement') which entered into force with retroactive effect on 1 January 2013 (together 'the agreements concerned').

28 The Commission pointed out that the agreements concerned provided for incentive payments to be made by the applicant to Apple on condition that Apple source all of its LTE chipsets from the applicant ('the payments concerned'). In that regard, the Commission made clear that, for the purposes of the contested decision, LTE chipsets include chipsets complying with the LTE standard and the GSM and UMTS standards.

29 The Commission stated that, between 2011 and 2015, Apple had obtained LTE chipsets exclusively from the applicant and that the applicant had paid Apple between 2 and 3 thousand million United States dollars (USD).

30 The Commission added that, although the agreements concerned were to expire on 31 December 2016, for the purposes of the contested decision, the agreements concerned had come to an end following the release by Apple on 16 September 2016 of iPhone 7 devices incorporating Intel's LTE chipsets.

2. Market definition

31 In Section 9 of the contested decision, the Commission found that the relevant market was the open market for LTE chipsets and that that market was worldwide in scope ('the relevant market'). In particular, the Commission stated that the relevant market included standalone LTE chipsets and integrated LTE chipsets but excluded captive production of those chipsets. In that regard, the Commission took the view, inter alia, that LTE chipsets were not substitutable for chipsets compatible with the GSM standard or for chipsets compatible with the UMTS standard ('UMTS chipsets').

3. Dominance

32 In Section 10 of the contested decision, the Commission concluded that the applicant had held a dominant position in the relevant market between 1 January 2011 and 31 December 2016. To that end, the Commission stated that the applicant had enjoyed large shares in the relevant market since 2010, that that market was characterised by the existence of a number of barriers to entry and expansion, and that the commercial strength of the applicant's chipset customers was not capable of adversely affecting its dominant position.

4. Abuse of a dominant position

33 In Section 11 of the contested decision, the Commission concluded that the applicant had abused its dominant position in the relevant market by making the payments concerned. To that end, the Commission stated that the payments concerned were exclusivity payments, that those payments were capable of having anticompetitive effects, that the applicant's critical margin analysis did not affect the Commission's conclusion and that the applicant had not demonstrated that those payments were counterbalanced or compensated for by advantages in terms of efficiency also benefiting consumers.

34 The Commission stated that the abuse engaged in by the applicant had taken place during the period concerned.

5. The fine

35 The Commission found that a fine ought to be imposed on the applicant and, after calculation, decided that the fine ought to be set at EUR 997 439 000.

6. Operative part

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

'Article 1

Qualcomm Inc. has committed an infringement of Article 102 of the Treaty [on the Functioning of the European Union] and Article 54 of the Agreement on the European Economic Area by granting payments to Apple Inc. on the condition that Apple Inc. obtain from Qualcomm Inc. all of Apple Inc.'s requirements of baseband chipsets compliant with the Long-Term Evolution standard together with the Global System for Mobile Communications and Universal Mobile Telecommunications System standards.

The infringement lasted from 25 February 2011 to 16 September 2016.

Article 2

For the infringement referred to in Article 1, a fine of EUR 997 439 000 is imposed on Qualcomm Inc.

…

Article 3

Qualcomm Inc. shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 4

This Decision is addressed to Qualcomm Inc. …'

II. Procedure and forms of order sought

A. Procedural milestones

1. Written part of the procedure

37 By application lodged at the Registry of the General Court on 6 April 2018, the applicant brought the present action.

38 On 5 June 2018, the Commission applied for an extension of the time limit for lodging the defence, given the length of the application and the number of annexes. That extension was granted.

39 On 14 September 2018, the Commission lodged the defence at the Court Registry.

40 On 5 October 2018, the applicant applied for an extension of the time limit for lodging the reply, given the length of the defence and the number of annexes. That extension was granted.

41 On 4 January 2019, the applicant lodged the reply at the Court Registry.

42 On 12 February 2019, the Commission applied for an extension of the time limit for lodging the rejoinder, given the length of the reply and the number of annexes. That extension was granted.

43 On 8 May 2019 the Commission lodged the rejoinder at the Court Registry.

44 The written part of the procedure was closed on 20 May 2019.

45 On 7 June 2019 the applicant made a request for a hearing.

2. Apple's application to intervene

46 By document lodged at the Court Registry on 16 July 2018, Apple applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

47 That application to intervene was served on the main parties in accordance with Article 144(1) of the Rules of Procedure of the General Court.

48 By document lodged at the Court Registry on 17 September 2018, the Commission stated that it had no comments on Apple's application to intervene.

49 By document lodged at the Court Registry on 17 September 2018, the applicant asked the Court to refuse the application to intervene and to order Apple to pay the costs.

50 On 16 November and 14 December 2018 and 13 February 2019, the applicant and the Commission requested that some of the information contained in the procedural documents and the annexes thereto be given confidential treatment in relation to Apple, if Apple were granted leave to intervene.

51 By document lodged at the Court Registry on 17 April 2019, Apple informed the Court that, in accordance with Article 144(8) of the Rules of Procedure, it was withdrawing its application to intervene in the present case.

52 On 5 June 2019 the President of the Seventh Chamber of the General Court ordered that Apple be removed from the Register in the present case as applicant for leave to intervene and that the parties bear their own costs in connection with that application to intervene.

3. Application for measures of organisation of procedure or measures of inquiry

53 By separate document lodged at the Court Registry on 16 January 2019, the applicant requested the adoption of a measure of organisation of procedure or a measure of inquiry in order to obtain, first, the complete, that is to say 'unredacted', versions of certain third-party documents and, second, two documents containing 'confidential substantive submissions' made during the third data room procedure held on 28 June 2016.

4. Further evidence lodged after closure of the written part of the procedure

54 By document lodged at the Court Registry on 28 May 2019, namely after closure of the written part of the procedure, the Commission produced, pursuant to Article 85(3) of the Rules of Procedure, further evidence consisting in the communication of a 233-page judgment delivered by the United States District Court for the Northern District of California (United States) ('the District Court') on 21 May 2019 in *Federal Trade Commission v Qualcomm Incorporated*.

55 By document lodged at the Court Registry on 20 June 2019, the applicant provided its comments on the further evidence produced by the Commission.

56 By document lodged at the Court Registry on 26 July 2019, the applicant produced, pursuant to Article 85(3) of the Rules of Procedure, further evidence consisting in a 62-page submission accompanied by a large number of documents from proceedings conducted in the United States ('the further evidence of 26 July 2019').

57 By document lodged at the Court Registry on 14 August 2019, the Commission requested an extension of the time limit for providing comments in that regard in view of the large number of documents annexed to the further evidence of 26 July 2019. That extension was granted.

58 By document lodged at the Court Registry on 30 October 2019, the Commission provided its comments on the further evidence of 26 July 2019, consisting in a 63-page submission with annexes and disputing, inter alia, their admissibility.

59 By document lodged at the Court Registry on 20 May 2020, the applicant provided its comments on the Commission's comments of 30 October 2019. On 3 June 2020 the President of the Sixth Chamber of the General Court decided not to include that document in the file and informed the applicant that it would have the opportunity to put forward its arguments in that regard during the oral part of the procedure.

60 By document lodged at the Court Registry on 25 August 2020, the applicant produced, pursuant to Article 85(3) of the Rules of Procedure, further evidence consisting in the communication of a 56-page judgment delivered on 11 August 2020 by the United States Court of Appeals for the Ninth Circuit (United States) in *Federal Trade Commission v Qualcomm Incorporated*, which overturned the judgment of the District Court mentioned in paragraph 54 above.

61 By document lodged at the Court Registry on 11 September 2020, the Commission provided its comments on the further evidence produced by the applicant on 25 August 2020.

62 By document lodged at the Court Registry on 9 November 2020, the applicant produced further evidence under Article 85(3) of the Rules of Procedure, consisting in the communication of a two-page order dated 28 October 2020 of the United States Court of Appeals for the Ninth Circuit in *Federal Trade Commission v Qualcomm Incorporated*, denying the application for rehearing in connection with the judgment referred to in paragraph 60 above.

63 By document lodged at the Court Registry on 20 November 2020, the Commission submitted its comments on the further evidence produced by the applicant on 9 November 2020.

5. Applications for omission of certain information vis-à-vis the public

64 By document lodged at the Court Registry on 31 May 2019, the applicant made an application, under Article 66 of the Rules of Procedure, for the omission of certain information vis-à-vis the public concerning the procedural documents and annexes thereto lodged up to and after the date of that application.

65 By document lodged at the Court Registry on 6 August 2019, the applicant made an application, under Article 66 of the Rules of Procedure, for the omission of certain information vis-à-vis the public concerning the further evidence of 26 July 2019.

66 On 28 May 2020, acting on a proposal from the Judge-Rapporteur, the Court (Sixth Chamber), in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put questions to the applicant to be answered in writing, asking it to identify accurately the information in certain procedural documents and in the contested decision targeted by the applications for the omission of certain information vis-à-vis the public, in accordance with paragraph 75 of the Practice Rules for the Implementation of the Rules of Procedure.

67 On 15 June 2020, the applicant requested an extension of the time limit for replying to the questions put by the Court on 28 May 2020. An extension was granted.

68 By document lodged at the Court Registry on 8 June 2020, the Commission sent the Court a copy of the non-confidential version of the contested decision published on its website on the same day. On 16 June 2020, the President of the Sixth Chamber, Extended Composition, of the General Court decided to include that document in the file.

69 On 10 September 2020, the applicant requested a further extension of the time limit for replying to the questions put by the Court on 28 May 2020. A final extension was granted.

70 By document lodged at the Court Registry on 30 October 2020, the applicant replied to the measure of organisation of procedure.

6. Assignment of the Judge-Rapporteur to the Sixth Chamber

71 Following a change in the composition of the Chambers of the General Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Sixth Chamber of the Court, to which the present case was accordingly allocated.

7. Referral of the case to a Chamber sitting in extended composition

72 Acting on a proposal from the Sixth Chamber, the Court decided, on 11 June 2020, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

8. Measures of organisation of procedure and inquiry

73 On 8 October 2020, acting on a proposal from the Judge-Rapporteur, the Court (Sixth Chamber, Extended Composition), in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put questions to the applicant and the Commission to be answered in writing and asked the Commission to produce documents.

74 On 12 October 2020, the Commission made a request for an extension of the time limit for the reply to the questions and requests put by the Court on 8 October 2020. The Commission was granted the extension and the same time limit was set for the applicant.

75 On 19 and 20 November 2020, the Commission and the applicant replied to the measures of organisation of procedure.

76 By order of 12 October 2020, acting on a proposal from the Judge-Rapporteur, the Court (Sixth Chamber, Extended Composition), in the context of the measures of inquiry provided for in Article 91(b) of the Rules of Procedure, ordered the Commission to produce certain information and documents.

77 By document lodged at the Court Registry on 19 November 2020 ('the document of 19 November 2020'), the Commission complied with that order.

78 Pursuant to Article 103(3) of the Rules of Procedure, the Court, by a measure of organisation of procedure of 10 December 2020, asked the applicant's representatives to give an appropriate undertaking concerning the confidential treatment of the document of 19 November 2020 at that stage of the proceedings.

79 By document lodged at the Court Registry on 15 December 2020, the applicant's representatives replied to the measure of organisation of procedure of 10 December 2020 by sending a signed confidentiality undertaking.

80 By decision of 8 January 2021, the Court (Sixth Chamber, Extended Composition) decided that the document of 19 November 2020 was relevant in order for it to rule on the dispute in accordance with Article 103(2) of the Rules of Procedure.

81 By document lodged at the Court Registry on 26 January 2021, the applicant's representatives who had given the confidentiality undertaking provided their comments on the document of 19 November 2020.

82 By document lodged at the Court Registry on 21 January 2021, which was included in the file of the present case by decision of the President of the Sixth Chamber, Extended Composition, of the General Court of 3 February 2021, the applicant's representatives who had given the

confidentiality undertaking requested that that confidentiality undertaking be waived and that the document of 19 November 2020 be sent to the applicant. The Commission was invited to provide its comments in that regard.

83 By document lodged at the Court Registry on 22 February 2021, the Commission provided its comments on the document lodged on 21 January 2021 by the applicant's representatives who had given the confidentiality undertaking.

84 In the light of the comments provided by the Commission and by the applicant's representatives who had given the confidentiality undertaking, the Court (Sixth Chamber, Extended Composition), by order of 20 April 2021 and in the context of the measures of inquiry pursuant to Article 91(b) of the Rules of Procedure, ordered the Commission to produce a non-confidential version of the document of 19 November 2020.

85 By document lodged at the Court Registry on 26 April 2021, the Commission complied with that order.

86 The non-confidential version of the document of 19 November 2020 was served on the applicant, and it was stated that the applicant could provide its comments on that document at the hearing and, where necessary, in writing after the hearing.

87 At the hearing on 6 May 2021, during the *in camera* session concerning the document of 19 November 2020 produced pursuant to Article 103 of the Rules of Procedure and covered by a confidentiality undertaking signed by the applicant's representatives, the Court, in the light of the exchanges which took place on that subject at the hearing, asked the Commission whether it could consider waiving confidentiality vis-à-vis the applicant in relation to certain information contained in that document which continued to be confidential as regards the applicant. As the Commission stated that it was not in a position to reply to such an information request at the hearing, a two-week time limit was set for a written reply.

88 By document lodged at the Court Registry on 7 May 2021, the Commission, in essence, stated that it could not reply to that information request as it stood and requested to be able to respond to that request by way of a measure of inquiry pursuant to Article 92(3) of the Rules of Procedure. The Commission also requested to be able to listen to the audio recording of the exchanges which had taken place on that subject at the hearing, pursuant to Article 115 of the Rules of Procedure.

89 The President of the General Court authorised the Commission to listen to part of the audio recording of the hearing.

90 After the applicant had provided comments on the Commission's request for a measure of inquiry, the Court, pursuant, first, to the first paragraph of Article 24 of the Statute of the Court of Justice of the European Union and, second, to Article 91(b) and Article 92(3) of the Rules of Procedure, by order of 4 June 2021, ordered the Commission to indicate, within a time limit set by the Court Registry, whether it waived confidentiality vis-à-vis the applicant in relation to certain information contained in the document of 19 November 2020.

91 By document lodged at the Court Registry on 11 June 2021, the Commission complied with that order, maintaining that there were no grounds justifying waiving confidentiality vis-à-vis the applicant of the information at issue contained in the document of 19 November 2020.

92 By document lodged at the Court Registry on 20 July 2021, the applicant's representatives who had given the confidentiality undertaking, having requested and obtained an extension of the time limit granted to them, provided their comments on the Commission's reply of 11 June 2021.

9. Oral part of the proceedings

93 On 18 November 2020, following a decision of the President of the Sixth Chamber, Extended Composition, of the General Court, the parties were invited to attend a hearing fixed for 2, 3 and 4 February 2021.

94 In accordance with Article 109 of the Rules of Procedure, in view of the applicant's request that any hearing which might refer to some of the documents produced as the further evidence of 26 July 2019 be held *in camera*, the Court decided to hear the parties regarding holding part of the hearing *in camera*.

95 By letter lodged at the Court Registry on 10 December 2020, supplemented on 18 December 2020, the applicant requested that the hearing be postponed having regard, first, to the health situation and, second, to a request made in the United States for confidentiality of some of the further evidence of 26 July 2019 to be waived.

96 By letter lodged at the Court Registry on 15 December 2020, the Commission, first, stated that holding part of the hearing *in camera* could be justified as regards some of the further evidence of 26 July 2019 and, second, submitted comments on the organisation of the hearing.

97 By letter lodged at the Court Registry on 18 December 2020, the applicant, first, requested that the hearing be held *in camera* as regards some of the further evidence of 26 July 2019 and, second, stated that such a request could become nugatory depending on the outcome of the confidentiality waiver request made in the United States.

98 On 22 December 2020 the President of the Sixth Chamber, Extended Composition, of the General Court decided to postpone the hearing.

99 On 29 January 2021, following a decision of the President of the Sixth Chamber, Extended Composition, of the General Court, the parties were invited to attend a hearing fixed for 4, 5 and 6 May 2021.

100 On 22 March 2021, the Commission submitted proposals concerning the organisation of the hearing.

101 On 26 March 2021, the applicant submitted a second request for the hearing to be postponed.

102 On 29 March 2021, the applicant provided comments on the Commission's proposals concerning the organisation of the hearing.

103 On 31 March 2021, the President of the Sixth Chamber, Extended Composition, of the General Court made a decision to refuse the second request for the hearing to be postponed.

104 On 9 April 2021, the Court (Sixth Chamber, Extended Composition) decided to invite the parties to an informal meeting concerning the organisation of the hearing.

105 On 14 April 2021, the applicant requested that its employees participate in the hearing by video-conference.

106 The informal meeting was held on 15 April 2021.

107 On 16 April 2021, first, the President of the Sixth Chamber, Extended Composition, of the General Court made a decision not to allow the applicant's employees to participate in the hearing by video-conference and, second, the Court (Sixth Chamber, Extended Composition) decided to arrange for part of the hearing to be held *in camera*.

108 On 16 April 2021, the applicant submitted a third request for the hearing to be postponed.

109 On 19 April 2021, the President of the Sixth Chamber, Extended Composition, of the General Court made a decision to refuse the third request for the hearing to be postponed.

110 On 21 April 2021, the applicant submitted a request to use technical resources at the hearing.

111 On 22 April 2021, the President of the Sixth Chamber, Extended Composition, of the General Court made a decision to allow technical resources to be used at the hearing.

112 By letter of 28 April 2021, included in the file of the present case by decision of the President of the Sixth Chamber, Extended Composition, of the General Court of 29 April 2021, the Commission lodged at the Court Registry a letter concerning the scope of the *in camera* session and reflecting the common position of the parties.

113 By letter of 3 May 2021, the applicant confirmed the parties' common position on the scope of the *in camera* session and provided the Court with a list of the further evidence of 26 July 2019 in respect of which confidentiality had been totally or partially waived.

114 The hearing was held on 4, 5 and 6 May 2021.

115 The oral part of the procedure was closed on 17 September 2021.

B. Forms of order sought

116 The applicant claims that the Court should:

– annul the contested decision;

– in the alternative, annul or reduce substantially the amount of the fine imposed;

– order the Commission to pay the costs.

117 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

III. Law

118 In support of its action, the applicant raises seven pleas in law.

– the first plea alleges manifest procedural errors;

– the second plea alleges manifest errors of assessment, failure to state reasons and distortion of evidence relating to efficiencies;

– the third plea alleges manifest errors of law and of assessment as regards anticompetitive effects;

– the fourth plea alleges manifest errors of assessment as regards the definition of the relevant market and the existence of a dominant position;

– the fifth plea alleges manifest errors of law and of assessment and failure to state reasons as regards the duration of the alleged infringement;

– the sixth plea alleges manifest errors of assessment in applying the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) and breach of the principle of proportionality;

– the seventh plea alleges manifest errors of assessment as regards the jurisdiction of the Commission and the effect on trade between Member States.

119 In the interests of the proper administration of justice, it is appropriate to examine the first and third pleas in the action.

120 As a preliminary point, it is appropriate to examine the admissibility, which the Commission disputes, of the further evidence of 26 July 2019.

A. Admissibility of the further evidence of 26 July 2019

121 As a preliminary point, it should be noted that the further evidence of 26 July 2019 consists, first, in a very large majority, of a set of documents sent by Apple to the applicant between February and June 2019 following proceedings brought by the applicant on 20 August 2018 against Apple before the District Court pursuant to Section 1782 of Title 28 of the United States Code, entitled 'Assistance to foreign and international tribunals and to litigants before such tribunals' ('the 1782 proceedings') and, second, in a small part, of a set of documents from proceedings brought by the Federal Trade Commission (Federal competition agency, United States) against the applicant before the District Court and which resulted, in the context of a public hearing which commenced on 4 January 2019, in the judgment of 21 May 2019 mentioned in paragraph 54 above ('the FTC proceedings') being adopted. Furthermore, that additional evidence also includes, to a limited extent, certain press articles.

122 As a further preliminary point, it should also be recalled that, before the hearing, the applicant sent the Court a list of the documents submitted in respect of the further evidence of 26 July 2019 stemming from the 1782 proceedings, in respect of which confidentiality had been

totally or partially waived (see paragraph 113 above) and that, during the public part of the hearing, the applicant referred to certain of those documents and to the existence of the 1782 proceedings.

123 The applicant states that those documents were not available to it or its European lawyers at the time of lodging the application or the reply and that it lodged the submission providing the further evidence of 26 July 2019 as soon as possible. First, as regards the documents from the 1782 proceedings, the applicant states that, following an order of February 2019, Apple sent 2 300 documents to it between 23 February and 24 June 2019 in nine separate deliveries and that its lawyers examined those documents and identified those documents to be provided to the Court. Second, as regards the documents from the FTC proceedings, the applicant explains that a protective order prohibited its US lawyers from transmitting the documents concerned to its European lawyers.

124 The Commission contends that the further evidence of 26 July 2019 is inadmissible. First, it submits that certain documents pre-date the application, such as certain press articles, emails between the applicant and Apple and presentations by the applicant. Second, the Commission states that the applicant has not explained why, first, it failed to apply for disclosure of the documents before the District Court before 20 August 2018, in particular before the contested decision was adopted or immediately afterwards and why, second, it failed to inform the Court of that application or of its status in the reply. Third, the Commission submits that the applicant has provided no explanation as to why it did not make an earlier request to Apple to grant permission to use the evidence from the FTC proceedings, in particular before the hearing which took place in January 2019. Fourth, the Commission states that Article 92(7) of the Rules of Procedure concerns evidence provided in response to measures of inquiry and does not entitle a main party to submit, of its own motion and without adequate justification, additional evidence. Fifth, the Commission maintains that the applicant merely refers to certain additional evidence without providing any explanation of the matters addressed or demonstrating how that evidence supports its arguments.

125 In the first place, it should be noted that the applicant, in support of providing the further evidence of 26 July 2019, first, relies on Article 85(3) of the Rules of Procedure and, second, states that that evidence is produced in the light of Article 92(7) of those rules.

126 The Commission contends that the conditions laid down by Article 85(3) of the Rules of Procedure are not satisfied and that Article 92(7) of those rules is, in essence, irrelevant.

127 First, it should be pointed out that Article 85(3) of the Rules of Procedure provides that 'the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed or before the decision of the General Court to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified'. In particular, that possibility is an exception to the general rule set out in paragraph 1 of that article that evidence produced or offered must be submitted in the first exchange of pleadings.

128 It follows from the wording of that provision that, in order to rely on that possibility, the delay in adducing evidence must be justified by exceptional circumstances (see, to that effect, judgment of 11 September 2019, *HX* v *Council*, C-540/18 P, not published, EU:C:2019:707, paragraph 67).

129 Accordingly, the Court allows the lodging of evidence offered after the rejoinder only in exceptional circumstances, that is, if the person offering the evidence was unable, before the end of the written procedure, to obtain possession of the evidence in question (see judgment of

12 September 2019, *Achemos Grupė and Achema* v *Commission*, T-417/16 P, not published, EU:C:2019:597, paragraph 37 and the case-law cited). The exceptional nature of such a submission implies that producing such evidence earlier was impossible or could not reasonably be required (see, to that effect, judgment of 15 December 2016, *TestBioTech and Others* v *Commission*, T-177/13, not published, EU:T:2016:736, paragraph 251).

130 Furthermore, in that regard, it must be pointed out that the exception provided for in Article 85(3) of the Rules of Procedure differs from that provided for in Article 85(2), which allows the main parties to produce evidence in the reply or rejoinder in support of their arguments provided that the delay is justified, the latter exception not requiring there to be exceptional circumstances.

131 Second, it must be observed that, as regards measures of inquiry, under Article 92(7) of the Rules of Procedure, 'evidence may be submitted in rebuttal and previous evidence may be amplified'.

132 In the present case, the applicant does not rely, as such, on that latter provision, but relies on it in so far as the case-law considers that Article 85 of the Rules of Procedure must be interpreted in the light of Article 92(7) of those rules, which provides that evidence may be submitted in rebuttal and previous evidence may be amplified (judgments of 22 June 2017, *Biogena Naturprodukte* v *EUIPO (ZUM wohl)*, T-236/16, EU:T:2017:416, paragraph 17, and of 9 September 2020, *Greece* v *Commission*, T-46/19, not published, EU:T:2020:396, paragraph 30).

133 In the present case, as is apparent from the submission accompanying the further evidence of 26 July 2019, that evidence was produced in support of the first, second, third and fourth pleas in the action. Although the applicant states, in general terms, that that evidence is produced in order to amplify the evidence adduced in support of the arguments put forward in the application and in the reply and in order to refute the Commission's arguments set out in the contested decision, in the defence and in the rejoinder, it must be stated that that evidence is not specifically either evidence in rebuttal intended to refute evidence produced by the Commission, or evidence seeking to amplify previous evidence, but is rather new evidence intended to support certain of the pleas in the action.

134 It is therefore necessary to examine whether, in the present case, the production of the further evidence of 26 July 2019 was justified by exceptional circumstances, in accordance with Article 85(3) of the Rules of Procedure.

135 In that regard, in the second place, it is necessary to examine the Commission's objections seeking to demonstrate that the requirements laid down in Article 85(3) of the Rules of Procedure have not been satisfied.

136 First, as regards the documents from the 1782 proceedings, as a preliminary point, it should be recalled that those documents form part of a set of documents sent by Apple to the applicant between 23 February and 24 June 2019 at the end of the 1782 proceedings. In other words, it is common ground that the applicant received those documents, in a number of deliveries, after the reply had been lodged on 4 January 2019. It must therefore be stated that the applicant did not have the documents in question when it lodged its main pleadings and could therefore not produce them in the context of those pleadings, but that it was able to obtain them only at the end of the 1782 proceedings.

137 On the one hand, however, the Commission objects that the applicant has provided no explanation why it had not brought the 1782 proceedings against Apple before the District Court earlier.

138 However, the Commission's objection is of no relevance for the assessment of whether there are exceptional circumstances as provided for in Article 85(3) of the Rules of Procedure. The question which arises in that regard is whether or not the evidence concerned was available at the stage of the lodging of the application or of lodging of the reply (see, to that effect, judgment of 13 December 2018, *Haeberlen* v *ENISA*, T-632/16, not published, EU:T:2018:957, paragraphs 184 and 185) and not whether, as a matter of speculation, the applicant could have taken steps which, hypothetically, would have enabled it to make use of that evidence earlier.

139 In any event, it must be stated that that objection is based on incorrect premisses.

140 The 1782 proceedings brought by the applicant against Apple before the District Court were intended to gather evidence making it possible to refute certain findings of the Commission in the contested decision in view of the present judicial proceedings. The applicant was therefore not in a position to bring the 1782 proceedings before the contested decision was adopted and, moreover, even if that were possible, was under no obligation to do so as a precautionary and speculative measure in view of possible litigation before that decision had even been adopted.

141 The applicant cannot therefore be criticised for not having brought the proceedings in question before the contested decision was adopted.

142 In addition, in so far as the Commission relies on the fact that the applicant could have brought those proceedings 'in the days and weeks following the adoption of the [d]ecision on 24 January 2018', it must be stated that such an argument is also speculative and, moreover, amounts to imposing an obligation on the applicant which is unreasonable, or even impossible to satisfy. On the contrary, it is justified for the applicant, following the adoption of the contested decision, to have first prepared and brought the present action on 6 April 2018 and then, in the light of the content of the contested decision and of that action, to have brought the 1782 proceedings in order to obtain further evidence in support of its action. The Commission's approach also disregards the inevitable period of coordination between the applicant, its European representatives and its US representatives in order to initiate the 1782 proceedings in the United States for the purposes of the present proceedings. Moreover, since, at the end of the 1782 proceedings, the applicant received the documents from Apple over a period of 6 to 10 months after those proceedings commenced, even if, as the Commission argues, it would have been possible to bring such proceedings when it was preparing its application (between February and March 2018), the applicant would, in all likelihood, not have received all the documents in time to examine them and produce them in the application on 6 April 2018 or in the reply on 4 January 2019.

143 On the other hand, the Commission contends that the applicant did not inform the Court of the existence and status of the action which it had brought before the District Court, in particular in the reply. That objection by the Commission is, however, also irrelevant, since Article 85(3) of the Rules of Procedure in no way requires the Court to be given prior information.

144 Second, as regards the set of documents originating from the FTC proceedings, as a preliminary point, it must be stated that those documents form part of the case file of the FTC proceedings before the District Court and that, before the public hearing commenced before that District Court in January 2019, knowledge and use of those documents were restricted by a protective order of 24 October 2017.

145 Those matters are common ground between the parties, just as it is common ground that, on the date of lodging the reply on 4 January 2019, those documents were not freely available to the applicant, since, first, knowledge and use of them was restricted to a limited number of the applicant's American lawyers and in-house lawyers, those persons having been unable to send them to the applicant's European lawyers, or to use them for the purposes of the administrative proceedings which led to the adoption of the contested decision or for the purposes of the present legal proceedings, and second, the public hearing before the District Court which made those documents public was held from 4 to 29 January 2019.

146 The Commission, however, submits that, under certain provisions of the protective order of 24 October 2017, without waiting for the public hearing held in January 2019 to begin, the applicant could have asked Apple for authorisation to allow it to use those documents earlier in the context of the present proceedings.

147 That objection by the Commission also cannot be accepted, since it is based on pure conjecture which cannot serve as a basis for the review by the Court. As the Commission itself points out, even if the applicant's American lawyers and in-house lawyers with access to those documents had been in a position to assess their usefulness for the present proceedings, any use for that purpose required Apple's prior agreement. There is nothing to indicate that, in the circumstances of the present case, those two eventualities would have become reality.

148 In any event, it should be noted that, as has been pointed out in paragraph 138 above, the question which arises is whether or not the evidence concerned was available at the stage of the lodging of the application or of the reply. In view of the evidence referred to in paragraph 145 above, that was not the situation in the present case, since the applicant lodged its reply on 4 January 2019, that is to say, the very day on which the extended time limit for lodging that document expired, and since the public hearing in the FTC proceedings, under which the documents at issue became public, also began on 4 January 2019. Consequently, it must be held that the applicant could not produce the documents at issue at the point when the reply was lodged.

149 Moreover, it cannot be held that, in the circumstances of the present case, the applicant unduly delayed producing before the Court the documents from the FTC proceedings. Since, in January 2019, the 1782 proceedings remained pending and the applicant received the documents from those proceedings between the end of February and the end of June 2019, it was justified for it to examine as a whole and then to produce together in July 2019 the relevant documents from both sets of proceedings.

150 Third, as regards the documents mentioned by the Commission which, although originating from the 1782 proceedings or the FTC proceedings, were available to the applicant before the application in the present case was lodged, that is to say emails between it and Apple and presentations by the applicant, it must be stated that it is true that those documents were available to the applicant on a document-by-document basis. However, those documents form part of the set of documents sent by Apple to the applicant at the end of the 1782 proceedings or of the set of documents constituting the case file in the FTC proceedings in the context of the

January 2019 public hearing, with the result that they cannot be considered in isolation from the other documents in those sets. Accordingly, the applicant and its lawyers could not necessarily assess their relevance to the present case independently of the other documents in those document sets. In other words, in view of its origin, the further evidence of 26 July 2019 cannot be artificially segmented but, in so far as it stems from the 1782 proceedings or from the FTC proceedings, its admissibility must be assessed as regards the documents as a whole.

151 Fourth, the same is true of the three press articles included in the further evidence of 26 July 2019 which had been published before the application was lodged, since their late production is justified by the production of other additional evidence which they seek to support in footnotes to the pleading producing that evidence.

152 Fifth, as regards the Commission's general allegation that, in the submission which produced the further evidence of 26 July 2019, the applicant does no more than make simple references to that evidence without providing explanations, that circumstance is irrelevant in relation to the assessment required by Article 85(3) of the Rules of Procedure, but relates, where appropriate, to the intelligibility of that evidence in examining the substance of the pleas in the action.

153 In the light of all the foregoing, in the circumstances of the present case, it must be concluded that the production, as a whole, of the further evidence of 26 July 2019 after the end of the written part of the procedure is justified by exceptional circumstances and that that evidence must therefore be admitted under Article 85(3) of the Rules of Procedure.

B. The first plea: manifest procedural errors

154 The first plea in law comprises four parts. The first alleges infringement of the rights of the defence in that the applicant was deprived of the opportunity to comment on important aspects of the contested decision. The second alleges breach of the principle of sound administration in that the Commission failed to conduct a thorough, objective and diligent investigation. The third alleges infringement of the rights of the defence in that the Commission failed to disclose to the applicant evidence relevant to its defence. The fourth alleges breach of the obligation to state reasons and breach of the principle of sound administration in that the Commission's assessment of the facts was inaccurate, biased and incomplete.

155 It is appropriate to examine the first and third parts, alleging infringement of the rights of the defence.

1. Preliminary observations

156 The rights of the defence are fundamental rights forming an integral part of the general principles of law whose observance the General Court and the Court of Justice ensure (see, to that effect, judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraph 52).

157 Observance of the rights of the defence is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 28).

158 That general principle of EU law is enshrined in Article 41(2)(a) and (b) of the Charter of Fundamental Rights of the European Union (judgment of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 105).

159 In the context of competition law, observance of the rights of the defence means that any addressee of a decision finding that that addressee has committed an infringement of the competition rules must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged as well as on the documents used by the Commission to support its claim that there has been such an infringement (judgments of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 53, and of 25 March 2021, *Deutsche Telekom* v *Commission*, C-152/19 P, EU:C:2021:238, paragraph 106).

160 According to well-established case-law, the rights of the defence are infringed where it is possible that the outcome of the administrative procedure conducted by the Commission may have been different as a result of an error committed by it. An applicant undertaking establishes that there has been such infringement where it adequately demonstrates not that the Commission's decision would have been different in content, but rather that it would have been better able to ensure its defence had there been no procedural error (judgments of 2 October 2003, *Thyssen Stahl* v *Commission*, C-194/99 P, EU:C:2003:527, paragraph 31, and of 13 December 2018, *Deutsche Telekom* v *Commission*, T-827/14, EU:T:2018:930, paragraph 129).

161 Such an assessment must be made in the light of the factual and legal circumstances of each case (judgment of 18 June 2020, *Commission* v *RQ*, C-831/18 P, EU:C:2020:481, paragraph 107).

2. The third part of the first plea: infringement of the rights of the defence, in so far as it relates to the absence of notes and information concerning meetings and conference calls with third parties

162 The third part is based on two complaints. The first alleges that the Commission failed to provide the applicant with adequate access to the case file. The second alleges that the case file lacks notes and information concerning the content of the Commission's meetings and conference calls with third parties.

163 It is appropriate to examine the second complaint.

164 The applicant argues that the Commission is required to take notes of its formal or informal meetings with third parties and that it must forward those notes to the parties under investigation. In the present case, the Commission provided the applicant with no notes of its meetings with third parties. After the contested decision had been adopted, following a request from the applicant, the Commission informed the applicant that meetings and conference calls with third parties had taken place and forwarded to it notes which were meaningless. More complete notes would have assisted the applicant's defence in a number of respects. In addition, the Commission refused to reveal whether it had met with a particular third party during the investigation, whereas it is of relevance to the applicant's defence to know whether such meetings took place and which topics had been discussed.

165 The applicant adds that Regulation No 1/2003 draws no distinction between interviews and other types of meetings or conference calls. In the view of the applicant, the Commission is not entitled to determine, at a meeting or a conference call, what is exculpatory and what is not; rather it is for

the undertaking concerned to decide whether specific elements from the case file may be helpful for the purposes of its defence. In the present case, the notes forwarded by the Commission to the applicant are not appropriate, as they do not contain any meaningful information on the content of the discussions or on the nature of the information provided on the topics referred to, but rather identical and vague expressions. The applicant denies that it was able to determine the information exchanged at the meeting and in the conference calls in question on the basis of the third parties' replies to the information requests, since the notes make no reference to those replies, and vice versa. The applicant states that it is not for the Commission to determine whether or not a third party has provided exculpatory information, since the Commission is under an obligation to take notes and provide them to it.

166 First, the Commission, after stating that it took appropriate notes of the meetings and conference calls with third parties, replies that it is under no general duty to take notes during meetings or conference calls with third parties, its obligations being more limited. The Commission states, on the one hand, that it is required to take 'full notes' of meetings or conference calls which constitute interviews within the meaning of Article 19(1) of Regulation No 1/2003, the purpose of which is to collect information relating to an investigation, although the applicant has not submitted in the present case that meetings or conference calls with third parties constituted 'interviews'. On the other hand, the Commission is required to take 'succinct notes' of meetings or conference calls the purpose of which is to collect information relating to an investigation only where third parties provide inculpatory evidence which the Commission intends to use or exculpatory evidence on which the undertaking could rely. Second, the Commission submits that it properly took 'succinct notes' of the meetings and conference calls in question. It states that, in the present case, following the request by the applicant, it found that it had inadvertently failed to provide the applicant with the notes of a meeting and of three conference calls with third parties, but that it had then provided the applicant with those notes, stating the undertakings, timing and topics addressed. Similarly, the Commission states that the contested decision does not rely on any incriminatory evidence provided by those third parties during those meetings and conference calls. Third, the Commission maintains that the applicant has not demonstrated why it would be relevant to its defence to know whether it had met with a particular third party, in so far as the decision is based on evidence provided by Apple and it is difficult to imagine the applicant asserting that the third party in question was likely to provide exculpatory evidence.

167 The Commission adds that the applicant does not take account of the fact that the third party who had had a meeting with it did not provide exculpatory evidence and that third parties who had held conference calls with it stated that they had not discussed matters which were not contained in the information provided in their replies to the information requests. According to the Commission, it is plausible that certain information provided during those conference calls was already contained in the replies to the information requests, just as it is plausible that the information subsequently provided in the replies to the information requests reflects the content of the conference calls, which is logical. The Commission maintains that the applicant's argument that the meeting and the conference calls in question are interviews within the meaning of Article 19 of Regulation No 1/2003 is out of time and inadmissible. Furthermore, the Commission states that the applicant does not explain why the information on meetings with a third party is relevant.

168 From the outset, in the present case, it is common ground that, during the administrative procedure which led to the adoption of the contested decision, the Commission did not forward to the applicant any information concerning either the existence or content of the meetings and conference calls which it had held with third parties.

169 However, the Commission provided the applicant with certain information concerning seven meetings or conference calls with third parties after the contested decision had been adopted. More specifically, information concerning four of them was provided, following a request by the applicant, before the present action was brought, whilst information on the other three was provided during the present proceedings, either in response to the applicant's arguments based on the further evidence of 26 July 2019 or in response to the measures of inquiry ordered by the Court on 12 October 2020.

170 It is therefore necessary to examine whether, in those circumstances, the Commission infringed the applicant's rights of defence.

(a) The meeting and conference calls with third parties in respect of which information was sent to the applicant before the present action was brought

(1) Summary of the background

171 It is apparent from the evidence submitted that, after receiving the contested decision, the applicant asked the Commission on 25 January 2018 to inform it of meetings or interviews which the Commission had held with third parties and of which it had not been informed. On 2 March 2018 the Commission informed the applicant by email that it had verified whether it had inadvertently failed to inform it of 'any meeting or interview' which had taken place 'in the context of Case AT.40220'. In that regard, the Commission informed the applicant that it had inadvertently failed to inform it of the existence of a meeting and three conference calls with third parties. By the same email, the Commission sent the applicant documents containing the notes of that meeting and of those conference calls as well as a presentation made at that meeting.

172 More specifically, the Commission referred to a meeting with [*confidential*] [1] on [*confidential*], a conference call with [*confidential*] on [*confidential*] and two conference calls on [*confidential*], one with [*confidential*] and the other with [*confidential*].

173 In that regard, first, it must be observed that that meeting and those conference calls took place before the statement of objections and after the first information requests referred to in paragraphs 6 and 15 above had been sent. It is common ground, indeed, that that meeting and those conference calls took place, as the Commission stated, 'in the context of Case AT.40220'. Second, as is apparent from the contested decision, those third parties are two competitors and two customers of the applicant, who also replied to some of those information requests.

174 [*confidential*] is a competitor of the applicant. As is apparent from the contested decision, that competitor [*confidential*]. In addition, according to the contested decision, [*confidential*].

175 [*confidential*] is a competitor of the applicant. As is apparent from the contested decision, it is, with [*confidential*], one of the [*confidential*] competitors that [*confidential*].

176 Moreover, [*confidential*] and [*confidential*] are [*confidential*].

177 [*confidential*] is an OEM obtaining supplies of LTE chipsets and [*confidential*].

[1] Confidential information omitted.

178 [*confidential*] is an OEM obtaining supplies of LTE chipsets [*confidential*].

(2) Whether there was a procedural error

179 The applicant submits, in essence, that the Commission failed to fulfil its obligations to take notes of that meeting and those conference calls and to forward them to it. In particular, the applicant states that the notes which the Commission sent to it after the contested decision had been adopted are not appropriate and are meaningless.

180 The Commission submits, as a preliminary point, that the applicant did not maintain in the application that the meeting and the conference calls in question constituted 'interviews' within the meaning of Article 19 of Regulation No 1/2003 and that, therefore, the argument put forward in the reply alleging that that provision was infringed is inadmissible. In any event, the Commission submits, in essence, that the meeting and the conference calls in question did not constitute interviews within the meaning of Article 19 of Regulation No 1/2003 as they were not intended to gather information relating to the subject matter of an investigation. It was not therefore required to take full notes of that meeting and of those conference calls, but solely succinct notes in so far as the third parties provided inculpatory evidence which the Commission intended to use or provided exculpatory evidence on which the undertaking could have relied.

181 As regards the admissibility of the applicant's argument, it is true that the applicant did not expressly refer to Article 19 of Regulation No 1/2003 in the application. However, it submitted expressly that the Commission had infringed the obligation to keep notes, or to take appropriate notes, of that meeting and of those conference calls and relied, for that purpose, on paragraph 91 of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), which concerns specifically the obligations arising from Article 19 of Regulation No 1/2003. Therefore, the argument put forward by the applicant in the application sought clearly to argue that the Commission had infringed its obligations under that provision and the case-law relating to it. Therefore, the Commission's plea of inadmissibility must be rejected.

182 As regards the substance of the applicant's argument, it must be recalled that Article 19(1) of Regulation No 1/2003 constitutes a legal basis empowering the Commission to interview a natural or legal person in the context of an investigation (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 86).

183 It is apparent from the very wording of Article 19(1) of Regulation No 1/2003 that that provision is intended to apply to any interview conducted for the purpose of collecting information relating to the subject matter of an investigation. There is nothing in the wording of that provision or in the objective it pursues to suggest that the legislature intended to exclude certain of those interviews from the scope of that provision (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 84 and 87).

184 As is apparent from the preparatory documents for Regulation No 1/2003, that legal basis refers to the simple fact of hearing a natural or legal person in order to gather information (see the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 (COM(2000) 582 final) (OJ 2000 C 365 E, p. 284)).

185 Therefore, the fact that the interviews which the Commission held with third parties may have taken the form of meetings or conference calls cannot bring them outside the scope of Article 19 of Regulation No 1/2003, when they are conducted for the purposes of collecting information relating to the subject matter of an investigation.

186 In the present case, contrary to the Commission's suggestion, a body of consistent evidence demonstrates that the purpose of the meeting and the conference calls in question was to collect information relating to the subject matter of the investigation which led to the adoption of the contested decision.

187 First, from a procedural perspective, the meeting and the conference calls in question were held after the Commission had commenced the investigation in August 2014 (recital 8 of the contested decision) and, in particular, after the first information requests referred to in paragraphs 6 and 15 above had been sent. Furthermore, the notes drafted by the Commission all refer to the administrative procedure which led to the adoption of the contested decision, namely 'AT.40220'. In addition, the exchanges which the Commission had with the applicant when it forwarded those notes to it (paragraph 171 above) bear that same reference and refer expressly to 'meetings or interviews which had taken place in the context of Case AT.40220'.

188 Second, from a substantive perspective, those notes all indicate that the meeting and the conference calls in question concerned the chipsets market, the applicant's position on that market or certain of the applicant's business practices on that market. More specifically, the note of the meeting with [*confidential*] of [*confidential*] states that it concerned the chipsets market and the applicant's position on that market; the note of the conference call with [*confidential*] of [*confidential*] indicates that it concerned certain business practices of the applicant in the chipsets sector and that no concrete evidence was provided during the conference call; the note of the conference call with [*confidential*] of [*confidential*] indicates that it concerned the chipsets market and certain business practices of the applicant; and the note of the conference call with [*confidential*] of [*confidential*] indicates that it concerned the chipsets market.

189 Since the meeting with [*confidential*] and the conference calls with [*confidential*], [*confidential*] and [*confidential*] were conducted for the purposes of collecting information relating to the subject matter of the investigation, as regards the relevant market, the applicant's position on that market or the applicant's business practices on that market, they fell within the scope of Article 19 of Regulation No 1/2003.

190 When it conducts an interview, pursuant to Article 19 of Regulation No 1/2003, for the purposes of collecting information relating to the subject matter of an investigation, the Commission is required to record such an interview in a form of its choosing. For that purpose, it is not sufficient for the Commission to make a brief summary of the subjects addressed during the interview. The Commission must be in a position to provide an indication of the content of the discussions which took place during the interview, in particular the nature of the information provided during the interview on the subjects addressed (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 91 and 92).

191 In the present case, the notes sent by the Commission to the applicant after the contested decision had been adopted do no more than provide, in addition to the date and names of the participants, a very general indication – limited, in essence, to two to three lines – concerning the subjects addressed, namely the chipsets market, the applicant's position on that market or the applicant's business practices on that market. By contrast, those notes give no indication of the content of the

discussions held during the interviews, in particular regarding the nature of the information provided on the subjects addressed, as required by the case-law referred to in paragraph 190 above.

192 Furthermore, the fact that those notes are incomplete is illustrated with clarity by two circumstances highlighted by the applicant.

193 First, the note concerning the conference call with [*confidential*] states that that third party provided its 'views' on 'certain business practices of [the applicant] in the area of baseband chipsets' and that no 'concrete evidence' was provided. As the applicant correctly points out, such a note raises questions as to the content of the discussions which took place between the Commission and the third party, the information which that third party provided and the absence of 'evidence' – moreover 'concrete' evidence – concerning that information. Such a note does not therefore make it possible to understand the information which [*confidential*] communicated to the Commission without providing concrete evidence and thus leaves the applicant unable to know what evidence was discussed during that conference call and, in particular, the possibility that that third party, namely [*confidential*], might have mentioned inculpatory or even exculpatory evidence, without providing any concrete evidence.

194 Second, the note relating to the meeting with [*confidential*] states that that meeting concerned the chipsets market and the applicant's position on that market. Apart from the fact that such a description does not make it possible to understand the information which [*confidential*] forwarded to the Commission in that regard, it must be stated that that note does not mention that, at that meeting, that third party gave an oral presentation nor, a fortiori, the content of that presentation. A copy of that presentation was, however, forwarded by the Commission to the applicant after the contested decision was adopted, on 2 March 2018, in response to the applicant's request of 25 January 2018. It is apparent from that 10-page presentation that it concerned specifically the investigation which led to the adoption of the contested decision (as is apparent from the cover page of that presentation, which mentioned the name and number of those proceedings), and that one page was devoted to the applicant's dominant position on the chipsets market and five pages were devoted to [*confidential*]. The absence of any reference to such a presentation or to its content in the note drawn up by the Commission demonstrates its lack of precision.

195 Moreover, in addition to being incomplete, while the evidence submitted indicates that the documents containing those notes were drawn up by the Commission on the dates of the conference calls or shortly after the date of the meeting respectively, they also show that those notes were not complete on those dates and that they were supplemented or finalised subsequently, after the contested decision had been adopted. After being requested by the applicant on 25 January 2018 and therefore approximately three years after the date of those interviews, first, the Commission contacted [*confidential*] to obtain a copy of the presentation made by that third party at the meeting and, second, contacted [*confidential*], [*confidential*] and [*confidential*] to confirm the content of the notes which it had prepared of the conference calls, [*confidential*] having even proposed amendments to the note, which were accepted by the Commission. It is, for that matter, apparent from the evidence submitted that the clarification that 'no concrete evidence was produced during the [conference] call' did not appear in an initial version of the note and that it was added following that exchange between the Commission and [*confidential*].

196 It follows that, contrary to Article 19 of Regulation No 1/2003, the Commission did not properly record the interviews it held with [*confidential*], [*confidential*], [*confidential*] and [*confidential*].

197 Moreover, in so far as the applicant also argues that the Commission failed to send to it the notes of the interviews in question, first, it must be observed that, as the Commission explained before the Court, the note of the meeting with [*confidential*] had been recorded in the case file on [*confidential*] as a non-accessible document, that is to say as an internal Commission document, and without a copy of the presentation made by [*confidential*] at that meeting. Second, the notes of the conference calls with [*confidential*], [*confidential*] and [*confidential*] had not been registered in the case file.

198 Whatever the reasons for that, it is therefore common ground that the applicant received no information on the existence and scope of those interviews during the administrative procedure which led to the adoption of the contested decision. Nor are those interviews mentioned in the description of the administrative procedure contained in the contested decision.

199 In that regard, suffice it to note that, while it is indeed permissible to preclude from the administrative procedure evidence which has no relation to the allegations of fact and of law in the statement of objections and which therefore has no relevance to the investigation, it cannot be for the Commission alone to determine the evidence of use in the defence of the undertaking concerned (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, paragraph 126, and of 16 June 2011, *FMC Foret* v *Commission*, T-191/06, EU:T:2011:277, paragraph 306). From that point of view, it must be observed that the record of interviews conducted for the purposes of collecting information on the subject matter of the investigation, which therefore falls within the scope of Article 19 of Regulation No 1/2003, such as the interviews in question, cannot be omitted from the case file.

200 While the Commission argues that the failure to communicate that information or those notes to the applicant had occurred 'inadvertently' and that it sent that information as soon as it had become aware of it after the applicant's request of 25 January 2018, such circumstances, subsequent to the adoption of the contested decision, are not capable of remedying the procedural error committed by the Commission. First, the notes forwarded by the Commission to the applicant, in view of their incompleteness, do not remedy the failure to make a record in accordance with Article 19 of Regulation No 1/2003, since they do not indicate the information gathered during the interviews in question. Second, it must be pointed out that belated disclosure, after the adoption of a decision, of certain material which ought to have been included in the case file does not necessarily return the undertaking to the situation it would have been in if it had been able to rely on that material in presenting its written and oral observations to the Commission (see, to that effect, judgment of 25 October 2011, *Solvay* v *Commission*, C-109/10 P, EU:C:2011:686, paragraph 56).

201 It follows from all the foregoing that, as regards the meeting with [*confidential*] and conference calls with [*confidential*], [*confidential*] and [*confidential*], the Commission failed to fulfil the obligations to make a record arising under Article 19 of Regulation No 1/2003 and, consequently, to include a record of those interviews in the case file.

(3) Infringement of the rights of the defence

202 As regards the inferences to be drawn from the finding made in paragraph 201 above, in accordance with the case-law referred to in paragraphs 160 and 161 above, it is necessary to establish whether, in the light of the specific factual and legal circumstances of the present case, the applicant has demonstrated adequately that it would have been better able to ensure its defence had there been no procedural error.

203 It is appropriate to start by stating that, in view of the identity of the third parties in question, the content of the notes produced by the Commission and the content of the contested decision, the applicant highlighted that those third parties might have provided information which could have helped its defence, in particular as regards relevant market definition, market power and dominant position, foreclosure effects and efficiencies. To that end, the applicant produced before the Court an annex to the application (Annex A.9.7) which was intended to clarify the issues which might have been discussed during those interviews and how that material could have assisted its defence. The Commission, while initially disputing the admissibility of that annex, contested its content in an annex to the defence (Annex B.5). The parties then continued their exchanges on that subject in an annex to the reply (Annex C.12) and an annex to the rejoinder (Annex D.9).

204 In the first place, it should be recalled that the contested decision criticises the applicant for having reduced, through its exclusivity payments, Apple's incentives to switch to competitors on the LTE chipsets market (Sections 11.4.1 and 11.4.2 of the contested decision). In that regard, in the contested decision, the Commission refers expressly to [*confidential*] and also mentions [*confidential*].

205 Accordingly, the third parties heard by the Commission in the interviews in question were two competitors of the applicant who were allegedly foreclosed by the applicant's conduct ([*confidential*] and [*confidential*]) and two OEMs who obtained supplies of LTE chipsets, that is to say, competitors of the applicant's customer who received the payments concerned ([*confidential*] and [*confidential*]).

206 In the second place, on the one hand, it is common ground that the applicant – like the Court – has no precise indication regarding the information gathered by the Commission during the interviews in question, even though those interviews concerned the subject matter of the investigation which led to the adoption of the contested decision and that, as has just been stated, the third parties in question included the applicant's competitors, who were allegedly foreclosed by the applicant's conduct, including, in particular, [*confidential*], namely [*confidential*].

207 Indeed, none of the documents in the case file concerning those interviews makes it possible to reconstitute with certainty the precise information relating to the subject matter of the investigation provided by the third parties in question during those interviews or the extent to which their content could have constituted exculpatory, inculpatory or neutral evidence.

208 In that regard, as concerns the conference calls with [*confidential*], [*confidential*] and [*confidential*], it is a matter of speculation to argue, as the Commission does, that it is 'plausible' that the information provided by those third parties was comparable to that provided in their replies to certain information requests and that the information therefore did not include any potentially exculpatory material. First of all, the notes of the interviews in question contain no

reference to any other document, including the replies given to information requests. Their content cannot therefore be reconstituted from other sources in the case file. Next, the fact that those third parties, approximately three years after those interviews had been held and after the contested decision had been adopted, confirmed to the Commission by email, following its request and in order to respond to the applicant's request of 25 January 2018, that the content of those discussions '[was] reflected' in their replies to certain information requests does not allow any definite conclusion to be drawn as to the content of those discussions, in particular as to the precise nature of the information provided on the subjects addressed.

209 As regards the meeting with [*confidential*], contrary to the Commission's suggestions, the presentation made by that third party at that meeting in no way precludes issues other than those mentioned in that presentation from having been discussed, since that presentation is not mentioned in the note of the meeting and, only one page of that presentation deals with the subjects mentioned in that note. In any event, even if the presentation by [*confidential*] could be regarded as providing an exhaustive reflection of the content of that meeting and as making it possible to rule out the possibility that that third party might have provided information relevant to the applicant's defence, that would not affect the findings made in respect of the interviews with [*confidential*], [*confidential*] and [*confidential*].

210 On the other hand, however, in view of the circumstances referred to in paragraphs 204 and 205 above, several elements submitted by the applicant aim to provide prima facie evidence to support its argument that the information which the Commission and [*confidential*], [*confidential*], [*confidential*] and [*confidential*] might have exchanged during the interviews in question would have made it better able to ensure its defence.

211 First of all, as is apparent from the notes and the presentation produced by the applicant, it is common ground that those interviews all concerned, in the context of the investigation which led to the adoption of the contested decision, the chipsets market, the applicant's position on that market or the applicant's business practices on that market. In particular, it is very clear from the notes of two of those interviews, namely from the interview with [*confidential*] and from the interview with [*confidential*], that the applicant's business practices were discussed by the Commission and those third parties. Although the notes of the two other interviews do not refer to the applicant's business practices, it is hardly credible that, during the interview with [*confidential*] on the same day as the interview with [*confidential*], the Commission did not seek to obtain information regarding the applicant's business practices covered by its investigation also from one of the competitors who was allegedly foreclosed. In addition, as is apparent from the presentation forwarded by the Commission to the applicant, the meeting with [*confidential*] also concerned the applicant's business practices on the chipsets market. Even if that third party had provided information concerning [*confidential*], it is equally not credible that the Commission did not seek to obtain information on the applicant's practices covered by its investigation.

212 Therefore, in such circumstances, as the applicant argues, it must be held that the information obtained by the Commission from those third parties during the interviews in question, and particularly from the competitors who were allegedly foreclosed, might have been relevant for its defence.

213 Next, for the sake of completeness, it should be stated that, in the tables contained in Annex A.9.7, having regard to the content of the contested decision and the specific circumstances of the present case, the applicant highlighted the fact that the Commission could have discussed certain specific issues with the third parties in question.

214 In that regard, as a preliminary point, it must be observed that, contrary to what the Commission maintains, Annex A.9.7 to the application submitted by the applicant cannot be regarded as being inadmissible. It seeks to substantiate in a schematic form, via tables, the arguments put forward in the application in relation to each of the interviews in question by reference to the content of each note. Moreover, the breadth of the exchanges which took place in that regard between the parties, contained in tables produced in Annex B.5 to the defence, in Annex C.12 to the reply and in Annex D.9 to the rejoinder, comprising many pages, demonstrates the appropriateness of such tables being set out in the annexes and not reproduced in the body of the main pleadings.

215 In the present case, the clarifications provided by the applicant relate to certain issues which it regards as relevant for its defence.

216 First, the applicant argued that the conference call with [*confidential*] might have concerned, inter alia, the capacity of [*confidential*] to supply Apple with LTE chipsets for iPhones and iPads during the period concerned, the reasons for and relevance of the lack of competing standalone LTE chipsets from [*confidential*], the nature and extent of the investments necessary to meet Apple's requirements and the related contractual protection and [*confidential*], as well as the possibility that [*confidential*] had no objections to the agreements concerned or had no complaint [*confidential*] which would have been exculpatory. According to the applicant, in so far as, according to the contested decision, [*confidential*] was [*confidential*], any information provided by [*confidential*] would have been of obvious relevance to the applicant's defence.

217 Second, the applicant argued that the conference call with [*confidential*] might have related, inter alia, to the relative merits of its LTE chipsets and those of [*confidential*] and [*confidential*], Apple's demands vis-à-vis its potential suppliers, the nature and extent of the specific investments necessary for Apple and related contractual protection and market dynamics and the reasons for [*confidential*]. According to the applicant, in so far as, according to the contested decision, [*confidential*] LTE chipsets had been regarded by Apple as potential competitive alternatives to the applicant's chipsets for certain iPad models, any indication provided by [*confidential*] would have been of obvious relevance to the applicant's defence.

218 Third, the applicant argued that the meeting with [*confidential*] and the conference call with [*confidential*] might have related in particular to Apple's requirements vis-à-vis its suppliers in relation to those of other OEMs and to the relative merits of its chipsets and those of its competitors.

219 In order to disprove the applicant's arguments, the Commission stated, in Annex B.5 to the defence, that [*confidential*]'s replies to the information requests of [*confidential*] and [*confidential*] confirm that a note of the conference call with [*confidential*] would have disclosed no exculpatory evidence regarding the issues mentioned by the applicant, on the ground that, in those replies, [*confidential*] provided no information relating to those matters. The Commission put forward an identical line of argument as regards the issues raised by the applicant in relation to [*confidential*], by relying on that third party's replies to the information requests of [*confidential*] and [*confidential*], as regards issues mentioned by the applicant in relation to [*confidential*], by

relying on the presentation made by that third party at the meeting in question, and as regards issues raised by the applicant in relation to [*confidential*], by relying on that third party's replies to the information requests of [*confidential*] and [*confidential*] and of [*confidential*].

220 At the outset, in so far as the Commission refers to the replies of [*confidential*], [*confidential*] and [*confidential*] to the information requests and to the presentation by [*confidential*] for the purposes of maintaining that those third parties did not make reference to exculpatory evidence, it is sufficient to state that such arguments must be rejected for the reasons referred to in paragraphs 208 and 209 above.

221 However, contrary to the Commission's suggestions, in the specific circumstances of the present case, the clarifications provided by the applicant in an annex to the application tend to demonstrate in concrete terms that the interviews which the Commission held with the third parties in question could have related to matters such as those referred to in paragraphs 216 to 218 above, which, depending on the circumstances, could have helped the applicant to defend itself better with regard, in particular, to the effects of and justification for its conduct on the LTE chipsets market.

222 Last, and for the sake of further completeness, as the Commission states, it should be observed that, in Sections 11.4.1 and 11.4.2 of the contested decision, in addition to the information provided by the applicant itself, the Commission referred solely to information and documents from Apple. By contrast, in those sections of the contested decision, the Commission did not refer to any evidence provided by [*confidential*], [*confidential*], [*confidential*] and [*confidential*], and in particular by the competitors who were allegedly foreclosed by the applicant. Information provided by some of those third parties ([*confidential*], [*confidential*] and [*confidential*]) is mentioned only in Section 11.4.4 of the contested decision (recitals 475, 476 and 478) in order to support the argument of Apple being an 'attractive customer'.

223 However, such an observation, in the specific circumstances of the present case, far from precluding an adverse effect on the applicant's rights of defence, tends to demonstrate that, as the applicant in essence submits, knowledge of the content of the interviews in question could have proved relevant for its defence. Knowledge of the fact that those third parties, and in particular the applicant's competitors who were allegedly foreclosed by the applicant's conduct ([*confidential*] and [*confidential*]), had not provided any inculpatory evidence capable of supporting the foreclosure effect alleged by the Commission when they were heard in the administrative procedure which led to the adoption of the contested decision could have enabled the applicant to present its conduct in a different light and to substantiate its defence differently.

224 It follows from all the foregoing that, having regard to the specific factual and legal circumstances of the present case, in so far as (i) the Commission did not properly make a record of the interviews in question, and (ii) the applicant or its representatives received no information on the very existence of those interviews until after the contested decision had been adopted and before the present action was brought, the Commission infringed the applicant's rights of defence. The evidence submitted by the applicant tends to demonstrate that the interviews with [*confidential*] and [*confidential*], namely two competitors of the applicant who were allegedly foreclosed, and with [*confidential*] and [*confidential*], namely two OEMs who obtained supplies of LTE chipsets, could have provided information essential to the further course of the proceedings which could have been relevant to the applicant, by making it better able to ensure its defence.

225 In the light of that infringement of the applicant's rights of defence, the third part of the first plea in the action must be upheld in so far as it concerns the meeting with [*confidential*] and the conference calls with [*confidential*], [*confidential*] and [*confidential*] in respect of which information was provided to the applicant before the present action was brought.

226 In the circumstances of the present case, it is appropriate to continue the examination of the present part of the plea as regards the meeting and conference call with a third party in respect of which information was provided to the applicant during the present proceedings in response to arguments based on the further evidence of 26 July 2019.

(b) The conference call and the meeting with a third party in respect of which information was sent to the applicant during the present proceedings in response to arguments based on the further evidence of 26 July 2019

(1) Summary of the background

227 It is apparent from the evidence submitted that, following the Commission's reply of 2 March 2018 sending the applicant, by email of 5 March 2018, information on the existence of the meeting with [*confidential*] and the conference calls with [*confidential*], [*confidential*] and [*confidential*], the applicant asked the Commission to confirm that it had not met formally or informally with [*confidential*]. By email of 13 March 2018, the Commission reiterated that, following the applicant's request of 25 January 2018, it had checked whether it had inadvertently failed to inform it of 'any meeting or interview' which had taken place 'in the context of Case AT.40220' and that it had provided the applicant with information in that regard in its email of 2 March 2018 for reasons of good administration. The Commission added that, since the contested decision had been adopted, it would no longer address requests of that type.

228 The responses which the Commission gave to the applicant on 2 and 13 March 2018 could suggest that the information provided in relation to the meetings or conference calls with third parties was exhaustive and that, therefore, the Commission had not held meetings or conference calls with [*confidential*], but solely with [*confidential*], [*confidential*], [*confidential*] and [*confidential*].

229 In the application, however, the applicant submitted that it had no express indication confirming or denying the existence and scope of any meetings or conference calls between the Commission and [*confidential*].

230 The Commission did not confirm or deny either in the defence or in the rejoinder whether such meetings or conference calls had been held.

231 It was only after the applicant had adduced the further evidence of 26 July 2019 that the Commission, in its comments of 30 October 2019 on that evidence, referred to there having been a conference call with [*confidential*] on [*confidential*] and a meeting with [*confidential*] on [*confidential*], and expressly stated that it had no notes or records of that conference call or that meeting.

232 As the Commission had, however, stated that it was prepared to provide further information regarding the context of the conference call with [*confidential*] of [*confidential*] in the context of measures of inquiry, the Court adopted such measures aimed at obtaining that information. The handling of the Commission's response to those measures of inquiry gave rise to the procedural steps set out in paragraphs 78 to 92 above.

233 In that regard, first, it must be noted that the conference call and the meeting with [*confidential*] took place before the statement of objections and after the first information requests referred to in paragraph 15 above had been sent. Second, as is apparent from the contested decision, that third party [*confidential*], and replied to some of those information requests.

234 However, [*confidential*] has a particular position in the context of the contested decision. Indeed, a number of factors demonstrate that third party's importance in the logic of the contested decision: [*confidential*]. Furthermore, from a procedural point of view, that third party [*confidential*].

(2) Whether there was a procedural error

235 The arguments put forward by the applicant seek to maintain that the Commission failed to fulfil its obligations to make the applicant aware of that conference call and of that meeting and to make notes of them.

236 The Commission, when the existence of that conference call and meeting had not yet been confirmed (at the stage of the defence and the rejoinder), argued that the applicant had not demonstrated the relevance of such information. Subsequently, after having admitted that they had been held (at the stage of comments on the further evidence of 26 July 2019), the Commission submitted, first, that the applicant had not demonstrated that the regrettable absence of notes of the conference call of [*confidential*] had been to its detriment and, second, that the meeting of [*confidential*] concerned general matters rather than Case AT.40220.

237 At the outset, as regards the notes of the conference call and the meeting in question, it is common ground, as the Commission acknowledged in its comments on the further evidence of 26 July 2019, that it took no note of either the conference call of [*confidential*] or the meeting of [*confidential*]. The Commission also acknowledges that the absence of notes of the conference call of [*confidential*] is a regrettable failure on its part.

238 In any event, in so far as the Commission's arguments ought to be understood as suggesting that the conference call and the meeting in question were not subject to the obligations to make a record arising from Article 19(1) of Regulation No 1/2003 upon which the applicant relies in the application, it is sufficient to state that it is apparent from the evidence submitted that both the conference call of [*confidential*] and the meeting of [*confidential*] – in addition to the fact that they were held after the Commission had commenced the investigation in August 2014 (recital 8 of the contested decision) and, in particular, after the first information requests referred to in paragraph 15 above had been sent – were intended to collect information relating to the subject matter of the investigation which led to the adoption of the contested decision.

239 As regards, first, the conference call with [*confidential*] of [*confidential*], the non-confidential version of the document containing an electronic diary entry concerning that conference call, adduced by the Commission on 26 April 2021 in response to the measure of inquiry of 12 October 2020, refers in the subject field to the name of the administrative procedure which

led to the adoption of the contested decision, that is to say 'Sapphire'. In addition, in its comments on the further evidence of 26 July 2019 and in the non-confidential version of the document of 19 November 2020, the Commission itself explained that that conference call was intended to gather information on market definition and on the dynamics of the market concerned by that procedure, in order to obtain a basic overview of that market and to prepare relevant questions to be included in the information requests. It follows that that conference call was intended to collect information relating to the subject matter of the investigation which led to the adoption of the contested decision.

240 As regards, second, the meeting with [*confidential*] of [*confidential*], the Commission stated that it was intended to cover general issues of competition law and the applicant's patent practices. The exchange of emails concerning the organisation of that meeting adduced by the Commission in response to the measures of organisation of procedure of 8 October 2020 does confirm that [*confidential*] had requested that that meeting be held in order to discuss 'current competition and [intellectual property] issues'. However, that information in no way precludes the possibility that the subject matter of the investigation which led to the adoption of the contested decision could have been discussed. The Commission itself explained that, at that meeting, [*confidential*] maintained that some of the applicant's intellectual property practices ought to have been included in the scope of that investigation. Consequently, in so far as the scope of the investigation which led to the adoption of the contested decision was expressly mentioned by the third party in order to broaden it, it must be held that that meeting also concerned, wholly or in part, information relating to the subject matter of that investigation.

241 Furthermore, that latter finding is supported by the further evidence of 26 July 2019.

242 An initial presentation by [*confidential*] of [*confidential*] concerning the applicant and preceding the meeting of [*confidential*], adduced by the applicant as part of the further evidence of 26 July 2019, states expressly that [*confidential*] envisaged having a meeting with the Commission the week of [*confidential*] regarding the Commission's investigations of the applicant concerning, first, 'loyalty rebates', namely the incentives offered to customers to purchase exclusively the applicant's chipsets, and, second, [*confidential*]. That presentation also stated, with regard to those 'loyalty rebates', that [*confidential*] and raised the question [*confidential*]. In addition, that presentation contained a page concerning [*confidential*], stating that [*confidential*].

243 A second presentation by [*confidential*] of [*confidential*] concerning the applicant and following the meeting of [*confidential*], adduced by the applicant as part of the further evidence of 26 July 2019, first, gave an update on the Commission's investigation, noting that the statement of objections was imminent and that the Commission had met the applicant on [*confidential*], that that investigation concerned loyalty rebates and exclusivity provisions, that it was [*confidential*] and that it was [*confidential*]. Second, after describing [*confidential*], that presentation stated that there were a number of [*confidential*], namely [*confidential*], according to which [*confidential*], and that a significant fine of around USD 1 thousand million was likely.

244 Those presentations by [*confidential*] which preceded and followed the meeting which that third party had with the Commission on [*confidential*] clearly support the finding that, at that meeting, the Commission and that third party discussed information relating to the subject matter of the investigation which led to the adoption of the contested decision.

245 Since the conference call and the meeting with [*confidential*] were intended to collect information relating to the subject matter of the investigation which led to the adoption of the contested decision, as regards, inter alia, market dynamics, the scope of the investigation, and even some of the applicant's arguments in defence, they fell within the scope of Article 19 of Regulation No 1/2003.

246 In the present case, as has been pointed out in paragraph 237 above, it is common ground that the Commission did not make any form of record of the interviews in question.

247 Furthermore, such a failure is difficult to reconcile with the documents adduced by the applicant in the context of the further evidence of 26 July 2019, which disclose that, for its part, the third party which met with the Commission had first prepared and then ensured internal follow-up of the meeting of [*confidential*] (see paragraphs 242 and 243 above), which supports its importance in the investigation which led to the adoption of the contested decision.

248 It follows that, in breach of Article 19 of Regulation No 1/2003, the Commission did not properly record the interviews which it had conducted with [*confidential*].

249 Moreover, in so far as the applicant also claims that the Commission failed to inform it of the interviews in question, it must be recalled that, during the administrative procedure which led to the adoption of the contested decision, the Commission did not actually refer to the interviews which it had held with [*confidential*]. As is apparent from paragraph 199 above, the Commission cannot fail to include in the case file a record of interviews such as those which it had conducted with [*confidential*].

250 Furthermore, that infringement cannot be remedied by the mere fact that the Commission provided certain information regarding the interviews it had conducted with [*confidential*] in the course of the present proceedings. The examination undertaken by the Court is limited to review of the pleas in law put forward, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure (see, to that effect, judgment of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686, paragraph 56). Furthermore, first, in the present proceedings, the Commission has produced no record indicating the information gathered during the interviews in question. Second, as is apparent from the case-law referred to in paragraph 200 above, belated disclosure of certain materials which ought to have been included in the case file does not return the undertaking, which has brought an action against a Commission decision, to the situation it would have been in if it had been able to rely on that material in presenting its written and oral observations to that institution.

251 It follows from all the foregoing that, as regards the conference call and the meeting with [*confidential*], the Commission failed to fulfil its obligations to make a record under Article 19 of Regulation No 1/2003 and, therefore, to include a record of those interviews in the case file.

(3) Infringement of the rights of the defence

252 As regards the inferences to be drawn from the finding made in paragraph 251 above, in accordance with the case-law referred to in paragraphs 160 and 161 above, it is necessary to establish whether, in the light of the specific factual and legal circumstances of the present case, the applicant has demonstrated adequately that it would have been better able to ensure its defence had there been no procedural errors.

253 To that end, it should be noted first of all that, given the identity of that third party and the content of the contested decision, the applicant stated that it would be of obvious relevance to its defence to know what was discussed between the Commission and that third party. In particular, the applicant emphasised that appropriate notes of those interviews would have assisted it in relation to various aspects of its defence, and provided further details in that regard in Annex A.9.7 to the application. According to the applicant, the fact that that third party was hostile to it does not rule out the possibility that it might have provided information relevant to the applicant's defence, either because that information might have been exculpatory or because it might have been inculpatory information which was incomplete or incorrect.

254 In the first place, it should be recalled that the contested decision criticises the applicant for having reduced Apple's incentives to switch to competitors on the LTE chipsets market (paragraph 204 above).

255 Accordingly, the third party heard by the Commission in the context of the two interviews in question [*confidential*]. Furthermore, from a procedural point of view, that third party [*confidential*].

256 In the second place, on the one hand, it is common ground that the applicant – like the Court – has no precise indication regarding the information gathered by the Commission during the interviews in question, even though those interviews concerned the subject matter of the investigation which led to the adoption of the contested decision and that, as has just been stated, the third party in question [*confidential*].

257 None of the documents in the case file concerning those interviews makes it possible to reconstitute with certainty the information relating to the subject matter of the investigation provided by the third party in question during those interviews or the extent to which their content could have constituted exculpatory evidence, inculpatory or neutral evidence.

258 In that regard, the Commission's arguments – that, as regards the conference call of [*confidential*], first, it is not 'plausible' that [*confidential*] could have provided exculpatory evidence and, second, that it is 'plausible' that the subjects addressed during that conference call would be found in [*confidential*]'s replies to the information requests – are purely speculative, since the Commission relies on pure assumptions and was not in a position to set out precisely the content of the information provided by [*confidential*] during that interview.

259 Nor can there be any success for the Commission's argument that the applicant did not ask the Court to hear the [*confidential*] employees who participated in that conference call, and did not contact those employees directly in order to confirm whether they had provided exculpatory evidence. Apart from the fact that the applicant became aware of the materiality of that conference call only at a very late stage in the present proceedings and that, moreover, the Commission did not specify the identity of the employees or representatives of [*confidential*] who participated in that call, it should be noted that, in any event, it is not for the applicant – nor, for that matter, for the Court – to conduct interviews with a third party (or with its employees or representatives) who has been heard by the Commission in the course of an investigation with the aim of establishing, after the event, the information which was provided to the Commission in order to compensate for the Commission's failure to make a record, since it is for the Commission to comply with the obligations arising from Article 19 of Regulation No 1/2003. Moreover, in the present case, the applicant – like the Court – has no document capable of reconstituting the information provided by the third party in question, unlike the situation referred to in

paragraphs 99 to 101 of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), upon which the Commission relies, which was characterised by the fact that, in that case, the applicant undertaking had obtained, during the administrative procedure, the non-confidential version of an internal note drawn up by the Commission in relation to the interview at issue and a follow-up document containing written responses to oral questions put during that interview.

260 On the other hand, however, in view of the circumstances referred to in paragraphs 254 and 255 above, a number of elements submitted by the applicant tend to provide prima facie evidence to support its argument that the information which the Commission and [*confidential*] could have exchanged during the interviews in question could have made it better able to ensure its defence.

261 First of all, as the applicant stated in the document producing the further evidence of 26 July 2019, knowledge of the information provided by [*confidential*] on market definition during the conference call on [*confidential*] could have been relevant to its defence. As noted in paragraph 239 above, the Commission itself explained that that conference call was intended to clarify basic concepts of market definition and market dynamics to enable relevant questions to be included in the second round of information requests. It follows that [*confidential*], at an early stage in the proceedings, contributed to clarifying basic concepts underlying the questions asked by the Commission in the information requests which were subsequently sent to the applicant, its competitors and its customers, without it having been possible to establish the information actually provided in that regard and without the applicant having had an opportunity to comment on the basic concepts which [*confidential*] contributed to clarifying.

262 Next, in the document adducing the further evidence of 26 July 2019, the applicant argued, in essence, that the Commission and [*confidential*] had discussed certain confidential aspects of the investigation, concerning [*confidential*]. In its observations on the further evidence of 26 July 2019, the Commission indicated that it had not disclosed confidential information to [*confidential*], particularly as regards [*confidential*] mentioned in the second presentation by [*confidential*] of [*confidential*] (see paragraph 243 above). However, irrespective even of the confidentiality of such information, it must be observed that, in so far as, during the interview of [*confidential*] which predated that presentation, the Commission and [*confidential*] discussed [*confidential*], knowledge of the information gathered by the Commission during such discussions could have made the applicant better able to ensure its defence.

263 Last, in Annex A.9.7 to the application, the applicant stated that the notes relating to interviews which the Commission might have conducted with [*confidential*] could have assisted its defence in order, first, to demonstrate that the agreements concerned did not foreclose equally efficient competitors and generated pro-competitive efficiencies and, second, to obtain additional information regarding the Commission's finding that, in the absence of the agreements concerned, [*confidential*].

264 In that regard, as a preliminary point, to the extent that the Commission's arguments seek to challenge the admissibility of that annex in so far as concerns interviews with [*confidential*], such arguments cannot be accepted. Apart from the fact that the annex in question is intended to support the arguments made in the application (paragraphs 214 and 253 above), it must be recalled, as regards the interviews with [*confidential*], that, at the stage of the application, the applicant had no information regarding their existence. Accordingly, in the specific

circumstances of the present case, the applicant cannot be criticised for having provided such details in the annex to the application supporting its arguments concerning meetings and conference calls with third parties.

265 As the applicant therefore submits in that annex, given the identity of the third party in question and the content of the contested decision, the Commission, during the interviews in question, could actually have obtained information relevant to its defence, concerning the relative merits of its chipsets and those of its competitors, Apple's requirements compared with the requirements of other OEMs or even Apple's ability to source from its competitors for all or some of its models. Furthermore, in recital 322 of the contested decision, the Commission made the finding, without providing any details or references, that Apple had no technical alternative to the applicant in relation to its LTE chipset requirements for iPhones between 2011 and 2015.

266 It follows from all the foregoing that, having regard to the specific factual and legal circumstances of the present case, in so far as (i) the Commission did not draw up notes of the interviews in question and (ii) the applicant or its representatives received no information regarding whether those interviews even took place other than in the course of the present proceedings in response to the arguments based on the further evidence of 26 July 2019, the Commission infringed the applicant's rights of defence. The evidence submitted by the applicant tends to demonstrate that the interviews with [*confidential*], that is [*confidential*], could have provided information essential to the further course of the proceedings which could have been relevant to the applicant, by making it better able to ensure its defence.

267 In the light of that infringement of the applicant's rights of defence, the third part of the first plea in the action must be upheld in so far as it relates to the conference call and the meeting with [*confidential*], in respect of which information was communicated to the applicant in the course of the present proceedings in response to arguments based on the further evidence of 26 July 2019.

268 In the circumstances of the present case, it is appropriate to continue the examination of the present part of the plea also as regards the meeting with a third party in respect of which information was communicated to the applicant in the course of the present proceedings in response to the measures of inquiry of 12 October 2020.

(c) The meeting with a third party in respect of which information was communicated to the applicant in the course of the present proceedings in response to the measures of inquiry of 12 October 2020

(1) Summary of the background

269 It is apparent from the evidence submitted that, in response to the measures of inquiry of 12 October 2020 seeking to obtain further information on the context of the conference call with [*confidential*] of [*confidential*], the Commission, in the confidential version of the document of 19 November 2020, referred to a meeting with a third-party informant who had requested anonymity, such meeting having been organised at the request of that third party and having taken place before the Commission commenced the investigation referred to in paragraph 5 above and, in particular, before the information requests referred to in paragraphs 6 and 15 above were sent.

270 The Commission also adduced before the Court an electronic diary entry recording the date of that meeting and two internal emails, having, in essence, identical content concerning that meeting ('the internal emails').

271 It must be recalled that the confidential version of the document of 19 November 2020 was brought to the attention of the applicant's representatives, subject to having first given a confidentiality undertaking, including vis-à-vis the applicant, whilst a non-confidential version of the document of 19 November 2020, adduced by the Commission on 26 April 2021, was brought to the attention of the applicant.

272 After those documents had been lodged, the applicant, through its representatives who had signed the confidentiality undertaking, submitted, in essence, that the Commission was required to take notes of the meeting in question and to provide them to it, in accordance with the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), in order not to prejudice the rights of defence of the undertaking under investigation. In the present case, however, the Commission failed to maintain a record of the meeting in question, although its obligation to take notes and to provide them to the undertaking concerned was well established. The applicant, through its representatives who had signed the confidentiality undertaking, stated that the right of access to the file formed part of the fundamental procedural rights and the guarantees necessary for the proper exercise of its rights of defence and that, in the present case, it had suffered harm arising from the fact that the Commission had failed to take notes of the meeting in question and had disclosed its existence only before the Court.

273 The Commission replied that the obligation to make a record laid down in Article 19 of Regulation No 1/2003 did not apply to that meeting.

(2) Whether there was a procedural error

274 As a preliminary point, it is apparent from the evidence submitted and it is common ground between the parties that, in the course of the administrative procedure which led to the adoption of the contested decision, the Commission did not inform the applicant or its representatives of the existence or, a fortiori, of the content of that meeting. It is also common ground that neither the electronic diary entry in respect of the date of the meeting nor the internal emails adduced by the Commission before the Court were recorded in the case file.

275 The Commission, however, argued at the hearing that the meeting with the third-party informant took place before the Commission adopted its first investigative act and that, therefore, it was not subject to the obligations to make a record laid down in Article 19 of Regulation No 1/2003, as confirmed by the judgments of 5 October 2020, *Casino, Guichard-Perrachon and AMC* v *Commission* (T-249/17, under appeal, EU:T:2020:458), and of 5 October 2020, *Les Mousquetaires and ITM Entreprises* v *Commission* (T-255/17, under appeal, EU:T:2020:460).

276 First, it is true, as the Commission stated at the hearing, that it is apparent from the case-law of the Court referred to in paragraph 275 above that the obligation to make a record laid down in Article 19 of Regulation No 1/2003 does not apply to interviews prior to the first investigative act (see, to that effect, judgment of 5 October 2020, *Casino, Guichard-Perrachon and AMC* v *Commission*, T-249/17, under appeal, EU:T:2020:458, paragraphs 193 and 195).

277 Second, however, irrespective of Article 19 of Regulation No 1/2003, it must be recalled that, as the applicant points out by relying on (i) an obligation on the Commission to provide it with the notes which it ought to have taken at that meeting and (ii) the importance of the right of access to the file for the exercise of its rights of defence (see paragraph 272 above), the Commission is required to comply with the obligations incumbent on it as regards the right of access to the case file (see, by analogy, judgments of 25 October 2005, *Groupe Danone* v *Commission*, T-38/02, EU:T:2005:367, paragraph 67, and of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 652 (not published)), such right being a corollary of the principle of respect for the rights of the defence (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).

278 In that regard, it should be recalled that the right of access to the file in competition cases is intended 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 views effectively on the conclusions reached by the Commission in its statement of objections (judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 334).

279 In particular, it follows from those obligations that if the Commission intends to use in its decision inculpatory evidence provided orally by a third-party informant or complainant, it must make it available to the undertakings to which the statement of objections is addressed, where necessary, by creating a written document to be placed in the file. The practice of using information provided orally by third parties cannot be permitted to infringe the rights of the defence (see, to that effect, judgments of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 352; of 25 October 2005, *Groupe Danone* v *Commission*, T-38/02, EU:T:2005:367, paragraph 67; and of 5 October 2020, *HeidelbergCement and Schwenk Zement* v *Commission*, T-380/17, EU:T:2020:471, paragraph 652 (not published)).

280 Furthermore, the Commission itself, in the context of the present proceedings, argued that, irrespective of Article 19 of Regulation No 1/2003, it was under an obligation, in accordance with the case-law referred to in paragraph 279 above, to take 'succinct notes' of meetings with third parties when they provided inculpatory evidence which the Commission intended to use (see paragraph 166 above).

281 That was so in the present case as regards the meeting with the third-party informant. It is apparent from the internal emails adduced by the Commission before the Court that the third-party informant made allegations against the applicant which, in essence, concurred with the Commission's theory found at the end of the administrative procedure which led to the adoption of the contested decision, as set out in the title of Section 11.4.1 and in the wording of recital 412 of that decision, stating that '[the applicant's] exclusivity payments reduced Apple's incentives to switch to competing LTE chipset suppliers'.

282 However, in the present case, the Commission did not make a record, even a succinct one, in any document nor in any other medium of the material which the third-party informant might have provided in relation to its allegations or even the answers to questions which the Commission might have asked it in that regard. Moreover, the internal e-mails also do not refer to such evidence.

283 It follows that the Commission failed to fulfil its obligations by making no reference to the meeting which it had held with the third-party informant and by failing to include in the case file a written document making available the inculpatory evidence provided orally by the third-party informant.

284 Moreover, as is apparent from paragraph 250 above, that infringement cannot be remedied by the mere fact that the Commission has referred to that meeting in the course of the present judicial proceedings.

285 In addition, the fact that, in the present case, the third-party informant did not wish to submit a formal complaint and to participate in the investigation as a complainant, and requested that its involvement be dealt with on an anonymous and confidential basis, cannot exempt the Commission from complying with its obligations and cannot permit it to affect adversely the rights of defence of the undertaking concerned.

286 Any protection which, in certain circumstances, the Commission may legitimately grant to a natural or legal person making allegations of anticompetitive conduct on the part of an undertaking must be reconciled with respect for those rights of defence and, as appropriate, must be granted in a manner which does not render futile the exercise of such rights, in particular in the specific circumstances of the present case, by preparing a non-confidential and anonymous version of the written document or, by reason of the very specific, even unique, factual circumstances of the present case, by permitting access to the confidential version of that written document solely to the representatives of the undertaking concerned who have signed a confidentiality undertaking.

287 It follows from all the foregoing that, as regards the meeting with the third-party informant, in the circumstances of the present case, the Commission failed to fulfil its obligations to make available the inculpatory evidence provided orally by the third-party informant.

(3) Infringement of the rights of the defence

288 As regards the inferences to be drawn from the finding made in paragraph 287 above, in accordance with the case-law referred to in paragraphs 160 and 161 above, it must be established whether, in the light of the specific factual and legal circumstances of the present case, the applicant has demonstrated adequately that it would have been better able to ensure its defence had there been no procedural error.

289 It should be noted at the outset that the applicant, through its representatives who had signed the confidentiality undertaking, submitted that the Commission had infringed its rights of defence, in that (i) an adequate record of the meeting in question could have contained exculpatory evidence, including information concerning the motivation of the third-party informant, (ii) the Commission had uncritically accepted the statements of the third-party informant and built its case on the basis of those statements, and (iii) the protection of that third-party informant's anonymity was not justified. The applicant, through its representatives who had signed the confidentiality undertaking, added that, if it had been aware of the meeting in question during the administrative procedure, it would have been able to defend itself differently, put forward additional arguments, provide clarification on the validity and credibility of the third-party informant's anonymity request, raise the issue with the Hearing Officer, the Commissioner for Competition or the European Ombudsman and to request access to internal Commission documents.

290 First of all, in so far as, as has been stated in paragraph 281 above, the internal emails refer to allegations made by the third-party informant at the meeting in question, on the one hand, it should be recalled that it is apparent from the evidence submitted that the theory applied by the Commission in the contested decision – as set out in the title of Section 11.4.1 and in the wording of recital 412 of that decision – concurs with the inculpatory allegations made by the third-party informant at the meeting in question. On the other hand, it is common ground that the applicant – like the Court – has no precise indication of the inculpatory evidence provided orally by the third-party informant in support of those allegations. In those circumstances, the Court cannot therefore establish the extent to which, in the contested decision, the Commission relied on such information, or, as the applicant argues through its representatives who had signed the confidentiality undertaking, was unduly influenced by the third-party informant's statements.

291 However, in the specific circumstances of the present case, it cannot be disputed that, as the applicant argues, in essence, through its representatives who had signed the confidentiality undertaking, that meeting had an impact in the context of the administrative procedure which led to the adoption of the contested decision, the applicant having had no opportunity to make known its views on the origin, basis and credibility of the inculpatory allegations made by the third-party informant, which concur with a central aspect of the Commission's reasoning in the contested decision against the applicant. Furthermore, it is not possible to accept the Commission's argument that the information provided by the third-party informant at the meeting in question was not used in the contested decision, and that objections in the decision were proved by other evidence. That argument implies that the third-party informant provided other, possibly inculpatory, information to which the Commission has not yet referred. In any event, the precise information provided by that third party at the meeting in question remains unknown.

292 Next, it should be observed that the internal emails also provide some indication as to the reasons for the Commission granting anonymity and confidentiality to the third-party informant. As the applicant pertinently states, via its representatives who had signed the confidentiality undertaking, it would have been better able to ensure its defence if it had been put in a position, where appropriate, in the very specific circumstances of the present case, via its representatives acting under a confidentiality undertaking, to be able to comment, at the stage of the administrative procedure, on the evidence relied on by the third-party informant in support of its request for anonymity and confidentiality. Indeed, any rejection of that request could have influenced the applicant's defence in the context of its reply to the statement of objections, or the conduct of the administrative procedure, by involving, inter alia, an *inter partes* verification of the inculpatory allegations made by the third-party informant.

293 Last, apart from the information in the internal emails concerning, first, the inculpatory allegations made by the third-party informant and, second, the reasons for the Commission granting it anonymity and confidentiality (paragraphs 290 and 292 above), it is common ground that the applicant – like the Court – has no indication as to whether other issues relevant to the investigation which led to the adoption of the contested decision were discussed between the third-party informant and the Commission at the meeting in question.

294 Accordingly, the Court cannot establish with certainty what could have been discussed at that meeting and the extent to which exculpatory evidence, neutral evidence or even factual material was provided orally to the Commission by the third-party informant (see, by analogy, paragraphs 207 and 257 above).

295 It must therefore be stated that, in the specific circumstances of the present case, having regard also to the clarification provided by the Commission in the confidential version of the document of 19 November 2020, to which the applicant's representatives who had signed the confidentiality undertaking were able to have access, knowledge of the existence of the meeting in question and of the information provided to the Commission by the third-party informant could have been relevant for the applicant's defence.

296 It follows from all the foregoing that, having regard to the specific factual and legal circumstances of the present case, in so far as the Commission made no record of the meeting with the third-party informant and in so far as neither the applicant nor its representatives received any information concerning whether that meeting even took place, other than in the course of the present proceedings subsequent to the measures of inquiry of 12 October 2020, the Commission infringed the rights of defence of the applicant. The evidence submitted following the measure of inquiry of 12 October 2020 tends to demonstrate that that meeting could have provided information essential to the further course of the proceedings which could have been relevant to the applicant, by making it better able to ensure its defence.

297 In view of that infringement of the rights of defence of the applicant, the third part of the first plea in the action must be upheld in so far as it relates to the meeting with a third party in respect of which information was provided to the applicant in the course of the present proceedings in response to the measures of inquiry of 12 October 2020.

298 In the circumstances of the present case, it is appropriate to continue the examination by reviewing the first part of the first plea.

3. The first part of the first plea: infringement of the rights of the defence, concerning the differences between the statement of objections and the contested decision

299 The first part of the first plea alleges infringement of the rights of the defence, in so far as the statement of objections and the contested decision differ on key aspects of the analysis and complaints raised against the applicant.

300 That part comprises, in essence, five complaints. In particular, the first complaint alleges that the statement of objections referred to abuse in the markets for UMTS chipsets and for LTE chipsets, whereas the contested decision refers to abuse in the market for LTE chipsets alone. The fourth complaint alleges that, by narrowing the scope of the abuse, 'the "contestable" share of Apple's demand assumed by the [statement of objections] was fundamentally different from that assumed by the [contested decision]'.

301 Furthermore, in the context of the third part of the third plea in the action, and in particular its sixth complaint, the applicant, referring to the first part of the first plea, alleged infringement of its rights of defence and of its right to be heard on account of the fact that the contested decision diverged from the theory of harm set out in the statement of objections.

302 It is therefore appropriate to examine together the first and fourth complaints in the first part of the first plea, also in the light of the sixth complaint in the third part of the third plea.

303 In those respects, the applicant submits that the agreements concerned and the payments concerned relate to two types of chipset used in Apple devices (UMTS and LTE), but that the contested decision, unlike the statement of objections, refers solely to abuse on the market for

LTE chipsets. The applicant states that it was denied the opportunity to comment on the critical margin analysis presented in the contested decision in view of the different contestable share of Apple's demand, whereas the narrower scope of the contested decision does not operate to its advantage in that respect and those factors are fundamental to assessing foreclosure capacity in accordance with paragraph 140 of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632). The applicant states that, despite the fact that the contested decision diverges substantially from the statement of objections, it did not have the opportunity to address the criticisms of the critical margin analysis or to correct the Commission's revised analysis.

304 The applicant adds that the altered findings on the chipsets concerned and on the contestable share of Apple's demand are not in its favour. The Commission withdrew from the contested decision the objections relating to the supply of at least [*confidential*] UMTS chipsets, the payments relating to those chipsets therefore being lawful. However, the applicant states that in the contested decision the Commission ignored those units, distorting the analysis to the detriment of the applicant, since the payments relating to UMTS chipsets should have been excluded from the critical margin analysis.

305 The Commission replies that the differences identified by the applicant concern the same conduct and did not trigger a further right to be heard and that the Commission was not required to send the applicant a supplementary statement of objections. In particular, the limitation of its objections solely to LTE chipsets is favourable to the applicant and demonstrates that the Commission respected its right to be heard. In addition, the Commission was not required to discuss with the applicant its doubts regarding the assumptions on which the analysis of the applicant's critical margin was based. The Commission did not rely on any economic model in order to conclude that the exclusivity payments were capable of having anticompetitive effects and concluded only that the applicant's critical margin analysis did not undermine its conclusion. No infringement of the right to be heard can be found, in so far as (i) the critical margin analysis was adduced by the applicant and (ii) the Commission did not rely on an alternative version of that analysis. The Commission is, furthermore, not required to provide an undertaking with the opportunity to comment on the Commission's final assessment of the undertaking's defence before it adopts its decision.

306 The Commission adds that the argument alleging that a competing supplier might also have spread the costs of compensating for the exclusivity payments over [*confidential*] UMTS chipsets is (i) inadmissible, since it was not put forward in the application, and (ii) irrelevant, since Apple's UMTS devices were existing devices and were not contestable for the purposes of the critical margin analysis, the last of such devices having been launched in 2011, whereas the first reference year for the critical margin analysis was 2012. Similarly, the argument that withdrawing the objections concerning UMTS chipsets was unfavourable, in addition to being inadmissible for the same reasons, is unfounded, since the applicant has not demonstrated how that had unfavourable consequences, particularly since the applicant, in its reply to the statement of objections, maintained that the Commission ought to withdraw its objections regarding UMTS chipsets.

307 As a preliminary point, it should be recalled that Article 27(1) of Regulation No 1/2003 envisages that the parties are to be sent a statement of objections. That statement must set out clearly all the essential elements on which the Commission is relying at that stage of the procedure (order of 7 July 2016, *Panasonic* v *Commission*, C-608/15 P, not published, EU:C:2016:538, paragraph 20).

308 However, that information may be given in summary form and the Commission decision by which it finds the existence of an infringement is not necessarily required to be a copy of the statement of objections, since that statement of objections is a preparatory document containing assessments of fact and of law which are purely provisional in nature. The Commission is required to hear the addressees of a statement of objections and, where relevant, to take account of any observations made in response to the objections upheld by amending its analysis specifically in order to respect their rights of defence (order of 7 July 2016, *Panasonic* v *Commission*, C-608/15 P, not published, EU:C:2016:538, paragraph 21).

309 Furthermore, the statement of objections is a procedural measure adopted preparatory to the decision which represents the culmination of the administrative procedure. Consequently, until a final decision has been adopted, the Commission may, in view, in particular, of the written or oral observations of the parties, abandon some or even all of the objections initially made against them and thus alter its position in their favour or, conversely, decide to add new complaints, provided that it affords the undertakings concerned the opportunity of making known their views in that respect (judgment of 27 June 2012, *Microsoft* v *Commission*, T-167/08, EU:T:2012:323, paragraph 184).

310 Communication to the parties concerned of further objections is necessary only where the result of the investigations leads the Commission to take new facts into account against the undertakings or to alter materially the evidence for the contested infringements and not where the Commission fulfils its duty to abandon such objections as have, in the light of the replies to the statement of objections, been shown to be unfounded (judgment of 27 June 2012, *Microsoft* v *Commission*, T-167/08, EU:T:2012:323, paragraph 191).

311 It is necessary to assess the applicant's arguments in the light of those principles.

312 Those arguments concern, in essence, three distinct issues.

313 In the first place, in so far as the applicant's arguments make general reference to the fact that the Commission, in recital 388 of the contested decision, found abuse solely on the market for LTE chipsets, whereas, in recitals 254 and 256 of the statement of objections, the Commission was contemplating abuse on the market for LTE chipsets and on the market for UMTS chipsets, that fact, while being correct, does not in itself imply a procedural error, nor *a fortiori* an infringement of the rights of defence of the applicant.

314 In the contested decision, the Commission limited the infringements found to have been committed by the applicant in comparison with those which it had contemplated in the statement of objections, by abandoning the infringement on the UMTS chipsets market. In other words, the Commission did not add new objections or evidence against the applicant, but rather abandoned certain objections which, in the light of the replies to the statement of objections, were shown to be unfounded. In accordance with the case-law referred to in paragraphs 309 and 310 above, such an alteration gives rise to no obligation on the Commission to provide the applicant with a supplementary statement of objections.

315 In the second place, the applicant's arguments refer to the fact that the Commission did not provide it with the opportunity to make known its views on the reasons which resulted, in the contested decision, in it rejecting the critical margin analysis which it had presented in its reply to the statement of objections. It should be noted that the Commission, before adopting the contested decision, was not required to provide the applicant with the opportunity to comment

on why it intended to reject that analysis in the contested decision. The right to be heard covers all the matters of fact and of law which form the basis for the decision-making act but not the final position which the administration intends to adopt (see judgment of 15 March 2006, *BASF* v *Commission*, T-15/02, EU:T:2006:74, paragraph 94 and the case-law cited; judgments of 19 May 2010, *IMI and Others* v *Commission*, T-18/05, EU:T:2010:202, paragraph 109, and of 9 March 2015, *Deutsche Börse* v *Commission*, T-175/12, not published, EU:T:2015:148, paragraph 344).

316 In the third place, the applicant criticises the fact that the Commission, while having abandoned the objections relating to UMTS chipsets, did not take account of its having done so in its examination of the critical margin analysis and did not afford the applicant the opportunity to comment on the inferences to be drawn from such a circumstance as regards the critical margin analysis, which was unfavourable to it. As is apparent from the applicant's written submissions and the explanations provided by it at the hearing, the applicant is criticising the fact that the Commission did not allow it to be heard regarding the data used in the critical margin analysis, given the fact that the objections concerning UMTS chipsets had been abandoned and did not allow it to amend those data accordingly.

317 As a preliminary point, it must be recalled that, as follows from the case-law referred to in paragraph 159 above, respect for the rights of the defence means that any addressee of a decision finding that it has committed an infringement of the competition rules must have been afforded the opportunity during the administrative procedure to make known its views on the objections raised against it.

318 In particular, the undertaking concerned may submit, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 138).

319 In the present case, it is common ground that the statement of objections sent by the Commission to the applicant contemplated abuse of a dominant position both on the market for LTE chipsets and on the market for UMTS chipsets. In other words, the statement of objections contemplated abuse over two markets.

320 It is also common ground that, in its reply to the statement of objections, the applicant presented a 'critical margin analysis' which sought to demonstrate that the conduct attributed to it was not capable of having foreclosure effects on those two markets.

321 As the applicant confirmed expressly in response to a measure of organisation of procedure by the Court, without being contradicted by the Commission, the critical margin analysis submitted in response to the statement of objections concerned the UMTS chipsets and LTE chipsets covered by the agreements concerned and was based on the data relating to those two types of chipset.

322 The critical margin analysis presented by the applicant is described in recital 487 of the contested decision and summarised in Table 16 in that recital.

323 In essence, it is an economic analysis which seeks to demonstrate that a hypothetical competitor as efficient as the applicant could have competed with the applicant to supply LTE and UMTS chipsets to Apple, since that competitor would have been in a position to offer a price covering its costs while also being able to compensate Apple for the loss of the payments concerned.

324 It is also common ground that, in the contested decision, before concluding that the applicant had abused its dominant position solely on the LTE chipsets market, the Commission rejected that same critical margin analysis submitted by the applicant in response to the statement of objections. As the Commission expressly stated in its written submissions, it did not express a view on an alternative version of that analysis.

325 In particular, in the contested decision, the Commission presented that analysis, stated the reasons why it could not be accepted and presented a 'revised' analysis including its corrections.

326 It is also apparent from the contested decision that the Commission rejected the critical margin analysis submitted by the applicant on account of it containing three allegedly incorrect assumptions, which the Commission corrected in its 'revised' analysis, and that the Commission in no way called into question the fact that that analysis was, as such, a tool making it possible to challenge the capability of the payments concerned to have foreclosure effects.

327 In other words, in the contested decision, the Commission, first, rejected the critical margin analysis presented in response to the statement of objections including data concerning both LTE chipsets and UMTS chipsets and, second, carried out a 'revised' critical margin analysis which continued to rely on data concerning both LTE chipsets and UMTS chipsets, even though, in recitals 487, 491, 492, 498, 499 and 503 of the contested decision, in referring to that analysis, it erroneously referred only to LTE chipsets.

328 In the contested decision, the Commission therefore presented, examined and revised a critical margin analysis (concerning both the market for UMTS chipsets and the market for LTE chipsets) which was not, or was no longer, relevant to the abuse found in that decision (which concerned solely the market for LTE chipsets).

329 By proceeding in that manner, regardless of the substance of the three objections to the assumptions made in the applicant's critical margin analysis and of the corresponding corrections made to it in the 'revised' critical margin analysis, the Commission infringed the applicant's rights of defence.

330 As is apparent from the case-law referred to in paragraph 318 above, the applicant was entitled to rely on evidence such as the critical margin analysis presented in response to the statement of objections in order to submit that its conduct was not capable of restricting competition and, in particular, of producing foreclosure effects.

331 The applicant relied on that possibility by devoting, in the section of its reply to the statement of objections which sought to demonstrate that there were no foreclosure effects (Section VII), a subsection to a presentation of its critical margin analysis (Section VII.F). That critical margin analysis therefore had an important role in the applicant's defence against the objections put forward by the Commission. Moreover, in the section of the contested decision concerning the existence of an abuse of a dominant position (Section 11), the Commission devoted a section to examining and rebutting that critical margin analysis (Section 11.5).

332 The possibility for an undertaking to submit that conduct is not capable of restricting competition and, in particular, of having foreclosure effects by relying on an economic analysis such as the critical margin analysis adduced in the present case by the applicant is of no practical effect if the scope of the conduct concerned is modified by the Commission after the statement of objections as regards, in particular, the markets concerned.

333 The definition of the scope of the conduct concerned affects the economic data used in that analysis, as regards in particular the costs and unit prices of the products concerned, the contestable share of the market or even the costs to be borne by an as-efficient competitor.

334 A critical margin analysis concerning two allegedly distinct and non-substitutable product markets (such as, according to the contested decision, the markets for UMTS chipsets and for LTE chipsets) necessarily differs from an analysis concerning only one of those two markets (such as the market solely for LTE chipsets).

335 In particular, in the present case, the alleged abuse having been limited solely to the LTE chipsets market has an effect on the essential parameters of an analysis such as the critical margin analysis. Such essential parameters are, notably, (i) the amount of the payments concerned, since, as the applicant states, payments corresponding to UMTS chipsets ought to have been excluded from the critical margin analysis, (ii) the contestable share taken into account in the critical margin analysis, that is to say, the share of Apple's demand for which a competitor as efficient as the applicant could compete with the applicant and over which it could spread the costs necessary to compensate Apple for the loss of the payments concerned, and (iii) the costs and prices of chipsets taken into account in the critical margin analysis, since the Commission found, in particular, in the contested decision, that the average prices of UMTS and LTE chipsets were not similar (recital 217 of the contested decision).

336 Therefore, in so far as the Commission's alteration of the objections had an effect on the relevance of the data forming the basis of the critical margin analysis submitted by the applicant in response to the statement of objections in order to argue that its conduct was not capable of having foreclosure effects, that undertaking, in order to be able to exercise its rights of defence effectively, had to be put in a position to be heard and, where appropriate, to adapt that economic analysis, even if, in such a situation, the Commission was not required to communicate to it 'further objections' in accordance with the case-law recalled in paragraph 310 above and the findings made in paragraphs 313 and 314 above.

337 The statement of objections is inherently provisional and subject to amendments to be made by the Commission in its further assessment on the basis of the observations submitted to it by the parties and subsequent findings of fact. Because it is provisional, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned and it is not obliged, in doing so, to explain any differences with respect to its provisional assessments as set out in that statement (judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraph 36).

338 However, those considerations do not permit the inference that, subsequent to the statement of objections, the Commission may modify the scope of the objections in the light of which the undertaking concerned has presented an economic analysis, such as the critical margin analysis submitted by the applicant in the present case, without that modification being brought to the attention of that undertaking and allowing it to submit its comments in that regard, where necessary by adapting the economic analysis previously submitted. Such an interpretation would be contrary to the principle of observance of the rights of the defence and to Article 27(1) of Regulation No 1/2003, which require that the undertaking concerned must have had the opportunity of making known effectively its view on the matters to which the Commission has taken objection (see, by analogy, judgment of 16 January 2019, *Commission* v *United Parcel Service*, C-265/17 P, EU:C:2019:23, paragraphs 31 and 37).

339 Indeed, while, in the contested decision, the Commission was able to reject the critical margin analysis presented by the applicant which concerned the market for LTE chipsets and the market for UMTS chipsets, taking the view that it did not call into question its conclusions on the market for LTE chipsets alone, it cannot be inferred that it would have been able, in the same way, to reject a critical margin analysis concerning the market for LTE chipsets alone.

340 It must therefore be held that, in the present case, in order to be able to have its views on the alleged foreclosure effect made known effectively and therefore to be better able to ensure its defence, the applicant ought to have been given the opportunity to be heard and, where necessary, to adapt its critical margin analysis in order to take into account the withdrawal of the objections relating to UMTS chipsets, the supply of which was no longer criticised by the Commission.

341 That finding cannot be called into question by the Commission's assertions disputing the admissibility and relevance of the applicant's argument concerning the quantity of UMTS chipsets which was not taken into account, to its disadvantage (paragraph 306 above). First, that argument was put forward by the applicant in the reply in order to support the complaint made in the application that amending the scope of the abuse to exclude UMTS chipsets was unfavourable to it as regards its critical margin analysis. That argument is therefore admissible. Second, the applicant included UMTS chipsets in the critical margin analysis presented in response to the statement of objections, since the statement of objections also envisaged abuse on the market for UMTS chipsets and, in that regard, expressly stated, on the basis of the data provided by Apple, that Apple had sourced UMTS chipsets from the applicant from 2011 to 2014 for a total number of units corresponding, in essence, to the number relied on by the applicant (see Table 14 of the statement of objections). The applicant's argument is therefore not irrelevant.

342 It follows that the Commission infringed the rights of defence of the applicant, in that it did not hear the applicant on the consequences to be reached regarding the withdrawal of the objections concerning the market for UMTS chipsets as concerns the critical margin analysis submitted by the applicant in order to demonstrate that the conduct criticised was not capable of restricting competition and, in particular, of having foreclosure effects.

343 In view of that infringement of the rights of defence of the applicant, the first part of the first plea in the action must also be upheld.

4. Conclusion

344 It follows from the examination of the first plea in the action, and in particular its first and third parts, that the administrative procedure which led to the adoption of the contested decision is vitiated by a number of procedural errors which affected the applicant's rights of defence.

345 For those reasons, in view of the infringements of the rights of defence of the applicant established in the context of examining the first and third parts of the first plea, whether taken individually or jointly, and there being no need to give a ruling on the other parts of that plea raised by the applicant, the first plea in the action must be upheld and, on that basis, the contested decision must be set aside.

346 In the circumstances of the present case, in the interests of the proper administration of justice, it is appropriate also to examine the third plea in the action.

C. The third plea: manifest errors of law and of assessment regarding the finding that the agreements concerned were capable of having potential anticompetitive effects

347 The third plea comprises three parts. The first alleges a manifest error of law and breach of the principles of legal certainty and legitimate expectations in that the Commission did not apply the correct legal standard. The second alleges manifest errors of law and of assessment in that the Commission failed to apply the case-law on pricing practices. The third alleges a manifest error of assessment in so far as the Commission found that the agreements concerned were capable of having potential anticompetitive effects.

348 It is appropriate to examine the third part.

1. Preliminary observations

(a) Summary of the case-law principles

349 It should be recalled that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market (judgments of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 21, and of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 133).

350 Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits (see judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 136 and the case-law cited).

351 Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation (judgments of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 22, and of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 134).

352 In that context, however, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 135).

353 In that regard, it has already been held that an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with those purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer's

obtaining all or most of its requirements – whether the quantity of its purchases be large or small – from the undertaking in a dominant position (see judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 137 and the case-law cited).

354 However, in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects, it is for the Commission to carry out an analysis of the foreclosure capacity of competitors that are at least as efficient (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 138 to 140).

355 Indeed, if such conduct is to be characterised as abusive, that presupposes that that conduct was capable of restricting competition and, in particular, producing the alleged exclusionary effects, and that assessment must be undertaken having regard to all the relevant facts surrounding that conduct (see judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 154 and the case-law cited).

356 If, in a decision, the Commission carries out such an analysis, the Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings as to the foreclosure capacity of competitors that are at least as efficient, relating to the practice in question (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 141).

357 Furthermore, in that latter regard, it should be recalled that the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings under Article 102 TFEU, which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the applicant and taking into account all the elements submitted by the applicant, whether those elements pre-date or post-date the contested decision, whether they were submitted previously in the context of the administrative procedure or, for the first time, in the context of the proceedings before the General Court, in so far as those elements are relevant to the review of the legality of the Commission decision (judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 72).

358 Even in areas giving rise to complex assessments, the EU Courts must, among other things, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising the situation and whether it is capable of substantiating the conclusions drawn from it (see, to that effect, judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 54).

359 Last, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringement found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. Where the Court still has a doubt, the benefit of that doubt must be given to the undertaking accused of the infringement (judgment of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraphs 71 and 72).

(b) Summary of the structure of the contested decision

360 In Section 11 of the contested decision, which is divided into eight parts, the Commission concluded that the applicant had abused its dominant position (see paragraph 33 above).

361 In particular, in Section 11.3 of the contested decision, the Commission concluded that the payments concerned were exclusivity payments (recital 395 of the contested decision).

362 In Section 11.4 of the contested decision, the Commission stated that the presumption that the grant of exclusivity payments by the applicant constituted an abuse of a dominant position was borne out in the circumstances of the present case by the analysis of the capability of the payments at issue to have anticompetitive effects (recital 406 of the contested decision). That section comprises four parts.

363 First, the Commission found that the payments concerned had reduced Apple's incentives to switch to competing LTE chipset providers (Section 11.4.1 of the contested decision).

364 Second, the Commission stated that Apple's internal documents and explanations confirmed that the payments concerned had reduced Apple's incentives to switch to competing LTE chipset suppliers (Section 11.4.2 of the contested decision).

365 Third, the Commission found that the payments concerned covered a significant share of the market for LTE chipsets during the period concerned (Section 11.4.3 of the contested decision).

366 Fourth, the Commission considered that Apple was an attractive customer because of its importance for entry or expansion in the relevant market (Section 11.4.4 of the contested decision).

367 In Section 11.5 of the contested decision, the Commission concluded that the applicant's critical margin analysis did not demonstrate that its exclusivity payments were incapable of having anticompetitive effects (recital 488 of the contested decision).

(c) Summary of the applicant's complaints

368 As is apparent from paragraphs 361 and 362 above, the Commission did not confine itself to characterising the payments concerned as exclusivity payments, but carried out an analysis of the capability of those payments to have anticompetitive effects. Consequently, in accordance with the case-law referred to in paragraph 356 above, the Court must examine the applicant's arguments seeking to call into question the validity of that analysis.

369 In that regard, in the third part of the third plea, the applicant puts forward eight complaints and certain preliminary arguments by which it criticises the Commission, in essence, for having made manifest errors of assessment in its analysis of the capability of the payments concerned to have anticompetitive effects and in its assessment of the critical margin analysis presented by the applicant.

370 As regards the analysis of the capability of the payments concerned to have anticompetitive effects, it is appropriate to examine the first three complaints in the third part of the third plea and the related preliminary arguments.

2. The first complaint in the third part of the third plea: failure to take account of all the relevant circumstances

371 The applicant submits that the contested decision does not provide evidence that the agreements concerned were capable of leading to the anticompetitive foreclosure of competitors. The applicant further submits that the Commission failed to prove that Intel or any other rival undertaking was capable of satisfying Apple's exacting technical and scheduling requirements. On the contrary, the applicant argues that the contested decision acknowledges that no competitor was capable of supplying LTE chipsets for use in iPhones throughout the period concerned and contains no allegation that the payments concerned had any impact on Apple's supply decisions for iPads launched in 2011 to 2013 and in 2016. The contested decision seeks to demonstrate the foreclosure of a single competitor (Intel) regarding supply for iPads to be launched in 2014 and 2015, which represents less than 1% of the relevant market and suggests that the payments concerned could not foreclose any competitor.

372 The applicant maintains that the Commission failed to identify, analyse or interpret certain crucial facts and that the contested decision contains inaccuracies as regards the devices and competitors concerned. It states, as the Commission acknowledges in the contested decision, that the agreements concerned could not have foreclosed any competitor from supplying LTE chipsets used in iPhone models launched while those agreements were in force. In particular, as is apparent from the contested decision, between 2011 and 2015 Apple had no technical alternative as regards its requirements for LTE chipset for its iPhones. In addition, the Commission did not allege that the agreements concerned were capable of foreclosing any competitors in the supply of LTE chipsets used in the iPad models launched in 2011, 2012, 2013, and 2016. Thus, in essence, the Commission alleges only possible foreclosure of Intel from supplying LTE chipsets intended for use in iPads launched in 2014 and 2015.

373 The applicant adds that the Commission acknowledges in the defence that Apple did not consider Intel to be a credible supplier of LTE chipsets for use in mobile phones. The applicant demonstrated that that was also the case for any other competitor. Last, the applicant asserts that the Commission has not addressed any of the arguments that the capability to foreclose should have been determined by reference to all chipset customers in the wider relevant market. The contested decision does not even allege potential anticompetitive foreclosure from the market, as opposed to being prevented from supplying a particular customer.

374 Against this, the Commission contends that the applicant's arguments are based on a fundamental misconception of the contested decision. The Commission found that, throughout the period concerned, the applicant had made exclusivity payments to Apple in respect of both iPhones and iPads which were capable of having anticompetitive effects, Intel being merely a tangible example of that capability. The Commission's findings therefore include, in particular, but are not limited to, the fact that the payments concerned actually affected Apple's procurement decisions for iPads intended to be launched in 2014 and 2015. The Commission argues that, given the applicant's misunderstanding, it is unnecessary for the Court to consider the third part of the third plea further but, in any event, the Commission puts forward arguments to refute the applicant's arguments.

375 Accordingly, first of all, the Commission submits that the applicant has not identified clearly the relevant circumstances or the reasons why the Commission erred in giving weight to the factors upon which it relied. Next, the Commission refers to the circumstances set out in recital 411 of the contested decision. In particular, the Commission (i) states that the extent of the applicant's

dominance, the market coverage and the conditions under which payments were granted are factors to be taken into account, (ii) makes clear that the third part of the third plea does not address the issue of the duration of the agreements concerned, (iii) specifies that the amount of the payments concerned was significant, and (iv) explains that the contested decision is not based on the existence of a strategy to foreclose. Last, the Commission explains that, according to the contested decision, the payments concerned were capable of having anticompetitive effects throughout the period concerned and that they actually did have anticompetitive effects on the LTE chipset procurement decisions for iPads which Apple planned to launch in 2014 and 2015.

376 Second, the Commission states that it did not acknowledge that Intel was a less efficient competitor. The applicant, it submits, fails to take account of the finding in recital 464 of the contested decision that Apple regarded Intel as an attractive source of LTE chipsets for its iPads. In any event, the finding made in recital 486 is not based solely on it being accepted that Intel was an as-efficient competitor, since the Commission took into account the capability of the payments concerned to have foreclosure effects on any as-efficient competitor, recital 426 of the contested decision noting that Apple had considered three alternative suppliers for the iPads which it planned to launch in 2014.

377 The Commission adds that the applicant's insistence that Intel could not be considered to be an as-efficient competitor serves no purpose, since the conclusion regarding the capability of the payments concerned to have anticompetitive effects applies to an as-efficient competitor.

378 As a preliminary point, and assuming that the Commission's arguments – that an examination of the third part of the third plea serves no purpose – must be understood as pleading that that part is ineffective, they must be rejected as unfounded. In the context of that part of the plea, the parties disagree, in essence, on the validity of the Commission's demonstration in the contested decision as to the capability of the payments concerned to have anticompetitive effects. Therefore, if the third part of the third plea were to prove to be well founded, it would result in the contested decision being set aside.

379 In that context, for the purposes of examining the applicant's arguments, certain elements relating to the structure and content of the contested decision must first be recalled.

380 First of all, it must be pointed out that, while the relevant market found by the Commission in the contested decision is the worldwide market for LTE chipsets (see paragraph 31 above), the applicant's conduct falls solely within the scope of its contractual relations with Apple. More specifically, the Commission found that the unlawful conduct consisted of the applicant granting the payments concerned to Apple (Article 1 of the operative part of the contested decision).

381 Next, it must be recalled that, in Section 11.4 of the contested decision, the Commission concluded that the payments concerned constituted an abuse of a dominant position on the ground that they were exclusivity payments capable of having anticompetitive effects (recital 406 of the contested decision), in that they had reduced Apple's incentives to switch to the applicant's competitors (recital 407 of the contested decision).

382 In particular, the Commission demonstrated the reduction of Apple's incentives to switch to the applicant's competitors in Sections 11.4.1 and 11.4.2 of the contested decision (recitals 407 and 408 of the contested decision).

383 Last, it should be noted that, in order to reach the conclusion that the payments concerned were capable of having anticompetitive effects, in the contested decision, the Commission stated that it had also taken account of the significant share of the relevant market covered by the payments concerned referred to in Section 11.4.3 of the contested decision (recitals 409 and 411 of the contested decision), the importance of Apple as a customer for entry or expansion on the relevant market referred to in Section 11.4.4 of the contested decision (recitals 410 and 411 of the contested decision) as well as the extent of the applicant's dominant position referred to in Section 10 of the contested decision, the conditions for granting the payments concerned referred to in Section 11.3 of the contested decision and the duration and amount of those payments referred to in Section 11.4.1 and Section 11.8 of the contested decision (recital 411 of the contested decision). By contrast, as is apparent from the contested decision and as the Commission confirmed in its written submissions, it did not rely on the existence of a strategy to foreclose, that is to say, anticompetitive intent on the part of the applicant.

384 In so far as, as is apparent from paragraph 381 above, the Commission's conclusion that the payments concerned were capable of having anticompetitive effects is based, above all, on the assessment that those payments had reduced Apple's incentives to switch to the applicant's competitors, it is appropriate to begin by examining whether, as the applicant submits, the Commission made such an assessment without taking account of all the relevant circumstances.

385 In the first place, it must be recalled that, as was observed in paragraph 382 above, the Commission arrived at the assessment that the payments concerned had reduced Apple's incentives to switch to the applicant's competitors in accordance with the analysis contained in Sections 11.4.1 and 11.4.2 of the contested decision.

386 First, in Section 11.4.1 of the contested decision, the Commission arrived at that assessment (recital 412 of the contested decision) on the basis of a comparative analysis of the amount of the payments concerned received during the period concerned (recital 413 of the contested decision), of the amount of the payments concerned which Apple would have lost had it launched a device incorporating an LTE chipset from a competitor of the applicant during the period concerned (recital 414 of the contested decision) and of the amount of the repayments which Apple would have had to make had it launched a device incorporating an LTE chipset of a competitor of the applicant in 2013, 2014 and 2015 (recital 416 of the contested decision) and the potential cumulative impact of that loss and that repayment of the payments concerned (recital 417 of the contested decision).

387 Second, in Section 11.4.2 of the contested decision, the Commission found that Apple's internal documents and explanations confirmed that assessment (recital 423 of the contested decision). Section 11.4.2 comprises four parts: the first contains the Commission's analysis of Apple's internal documents and explanations (Section 11.4.2.1 of the contested decision); the second seeks to respond to the applicant's argument that those internal documents and explanations are unreliable (Section 11.4.2.2 of the contested decision); the third seeks to respond to the applicant's argument that Apple requested the exclusivity (Section 11.4.2.3 of the contested decision); and the fourth seeks to respond to the applicant's argument that Apple chose it, in any event, given the higher quality of its LTE chipsets and contains the Commission's assessment that, contrary to the applicant's arguments, the payments concerned had an impact on Apple's sourcing strategy (Section 11.4.2.4 of the contested decision).

388 In the second place, it should be noted that, as is apparent from their content and from the explanations provided by the Commission before the Court, the demonstrations provided in Sections 11.4.1 and 11.4.2 of the contested decision differ in scope.

389 First, Section 11.4.1 of the contested decision seeks to demonstrate that the payments concerned had reduced Apple's incentives to switch to the applicant's competitors during the period concerned to source LTE chipsets for all its devices, namely iPhones and iPads. In that context, as is apparent from the contested decision and as the Commission clarified before the Court, it relied on an analysis of the capability of the payments concerned to have anticompetitive effects.

390 Furthermore, as regards Apple's demand for LTE chipsets referred to in the Commission's analysis, it should be noted that, in Section 11.4.3 of the contested decision, in order to determine the market coverage of the payments concerned, the Commission referred also to all the LTE chipsets obtained by Apple from the applicant, without distinguishing between iPhones and iPads. Similarly, in Section 11.4.4 of the contested decision, the Commission found that Apple was an attractive customer for LTE chipset suppliers, without distinguishing between iPhones and iPads.

391 Accordingly, Section 11.4.1 of the contested decision, like Sections 11.4.3 and 11.4.4 of the contested decision, concerns the whole of Apple's LTE chipset demand for iPhones and iPads. The Commission confirmed, moreover, in its written submissions that it had found that, throughout the period concerned, the payments concerned were capable of having anticompetitive effects in relation to the LTE chipsets intended for both iPhones and iPads.

392 Second, Section 11.4.2 of the contested decision seeks to confirm, essentially on the basis of Apple's internal documents and explanations, the assessment in Section 11.4.1 of the contested decision and, more specifically, as is apparent from the contested decision and as the Commission clarified before the Court, to demonstrate that the payments concerned had actually reduced Apple's incentives to switch to the applicant's competitors in order to source LTE chipsets for some of its devices.

393 In that regard, in the defence, the Commission confirmed expressly that that section of the contested decision sought to demonstrate that the payments concerned had 'actually affected', or had the 'actual effect of affecting', Apple's LTE chipset procurement decisions for 'iPads that [it] planned to launch in 2014 and 2015'. Accordingly, the Commission explained that the conclusion it had reached in that regard concerned the 'actual effects' of the payments concerned.

394 Furthermore, as regards Apple's demand for LTE chipsets referred to by its analysis contained in Section 11.4.2 of the contested decision, when questioned under a measure of organisation of procedure on the scope of the words and expressions 'devices', 'launched' (in 2014 and 2015) and 'to be launched' (in 2014 and 2015) used in that section, the Commission confirmed expressly that that section did not concern iPhones but only iPads, stated that there had been a regrettable 'clerical error' in that that section referred to iPads actually 'launched' in 2014 and 2015 and went on to confirm expressly that that section concerned solely certain 'non-CDMA' iPads which were 'to be launched' by Apple in 2014 and 2015.

395 It follows that, as is apparent from the content of the contested decision and as the Commission confirmed both in its written submissions and at the hearing, first, the whole of the Commission's analysis found in Section 11.4.1 of the contested decision concerns the capability of the payments concerned to have anticompetitive effects in connection with both iPhones and

iPads, as is suggested, moreover, by the title of Section 11.4 of the contested decision in so far as it refers generally to the 'potential' anticompetitive effects of those payments. That analysis is covered by the first complaint in the third part of the third plea. Second, the Commission's analysis contained in Section 11.4.2 of the contested decision concerns the effects that the payments concerned would actually have had in connection with certain iPad models which Apple planned to launch in 2014 and 2015. That analysis is covered by the second and third complaints in the third part of the third plea (see paragraph 429 et seq. below).

396 In the third place, in accordance with the case-law referred to in paragraph 355 above, the analysis of whether the payments concerned were capable of restricting competition and, in particular, of foreclosing at least as-efficient competitors must be carried out in the light of all the relevant factual circumstances surrounding that conduct.

397 It follows that, since all the relevant circumstances surrounding the conduct complained of must be taken into account, the analysis of the anticompetitive capability of that conduct cannot be purely hypothetical (see, to that effect, judgment of 6 October 2015, *Post Danmark*, C-23/14, EU:C:2015:651, paragraphs 65 and 68).

398 In the fourth place, in the light of the foregoing, it is necessary to examine whether, as the applicant maintains, the Commission arrived at the assessment that the payments concerned had reduced Apple's incentives to switch to the applicant's competitors to source LTE chipsets for iPhones and iPads to be launched during the period concerned without having properly taken account of all the relevant factual circumstances.

399 First, it is apparent from the contested decision that, for iPhone and iPad models launched before 2011, Apple sourced UMTS chipsets from Infineon, whose chipset supply activities were acquired by Intel in 2011 (recitals 89 and 90 of the contested decision). Between 2011 and 2015, and until 16 September 2016, namely during the period concerned, Apple obtained LTE chipsets for iPhones and iPads only from the applicant (recital 168 of the contested decision). Starting from the iPhone 7 launched on 16 September 2016, Apple incorporated Intel's LTE chipsets into certain versions of that model (recitals 91 and 169 of the contested decision).

400 Second, as the applicant states, it should be noted that, in recital 322 of the contested decision, in the context of Section 10 of that decision concerning the applicant's dominant position, the Commission found that, between 2011 and 2015, 'Apple had no alternative as regards its requirements of LTE chipsets for its iPhone devices'.

401 In that regard, first, it should be noted that, in the contested decision, the Commission did not state the basis for the finding made in recital 322 of that decision. The related footnote 392, in the version of the contested decision notified to the applicant, refers to a section of the contested decision which does not exist (Section 0) and, in the public version of the contested decision, refers, with no further explanation, to Section 11.4.2 of the contested decision. However, it should be recalled that, as the Commission confirmed in response to the measures of organisation of procedure, Section 11.4.2 of the contested decision does not concern iPhones, but concerns only certain iPad models to be launched in 2014 and 2015 (paragraph 394 above). When questioned in that regard at the hearing, the Commission explained that the reference to Section 0 in the version of the contested decision notified to the applicant was the result of a technical error and that the reference to Section 11.4.2 of the contested decision in the public version of the contested decision, had to be understood in contrast, meaning that while Apple had no alternative to the applicant's LTE chipsets for iPhones to be launched between 2011

and 2015 in accordance with recital 322 of the contested decision, it did have such an alternative for certain iPads to be launched in 2014 and 2015, in accordance with Section 11.4.2 of the contested decision.

402 Second, it is apparent from the contested decision that the finding in recital 322 of that decision refers to the lack of technical alternative as regards Apple's requirements for LTE chipsets for iPhones. In recital 447 of the contested decision, relying on Apple's comments on the applicant's response to the statement of objections, the Commission stated that, for devices to be launched in 2016, Intel's improvement in 'key technologies' would have enabled Intel to be considered for iPhones and not only for iPads. Similarly, in recitals 491, 492 and 495 of the contested decision, the Commission stated that Apple's requirements for LTE chipsets for iPhones were not contestable between 2012 and 2015, highlighting, inter alia, the fact that Intel's LTE chipsets lacked certain technical functionalities.

403 In response to the questions put by the Court at the hearing regarding the basis for the finding in recital 322 of the contested decision, both the Commission and the applicant confirmed expressly, first, that that finding ought in fact to be understood as referring to there being no technical alternative in view of Apple's requirements for LTE chipsets for iPhones which were to be launched between 2011 and 2015 and, second, that that finding was correct from a factual point of view.

404 Moreover, in the context of the present dispute, it is not necessary to establish the technical functionality or functionalities concerned by that lack of an alternative for the various iPhone models which Apple had to launch between 2011 and 2015, and in particular whether what was involved was (i) the 'Code Division Multiple Access' (CDMA) standard referred to in the statements reproduced in recital 187(2), and in recitals 454 and 461 of the contested decision, (ii) 'Voice over LTE' (VoLTE) technology referred to in the statement set out in footnote 586 to the contested decision relating (by means of a reference to footnote 587) to recital 447 of that decision, (iii) 'voice connectivity' or 'voice functionality' referred to in recital 492 of the contested decision, or other functionalities.

405 Whatever the technical explanation for the finding of fact made by the Commission in recital 322 of the contested decision, it is common ground between the parties that Apple had no technical alternative to the applicant's LTE chipsets as regards its requirements for iPhones to be launched between 2011 and 2015.

406 Moreover, there is nothing in the contested decision to indicate, first, that Apple envisaged obtaining supplies, for iPhones to be launched between 2011 and 2015, of LTE chipsets which did not meet its technical requirements and, second, that that lack of an alternative for iPhones, noted in recital 322 of the contested decision, was for reasons other than technical reasons.

407 Third, in recitals 491, 493 and 495 of the contested decision, the Commission also observed that only approximately half of Apple's requirements for LTE chipsets for iPhones to be launched in 2016 were contestable. To that end, in recital 493 of the contested decision, the Commission relied on a statement by Apple, contained in Apple's comments on the applicant's reply to the statement of objections, indicating that it was able to obtain only less than half of its volume requirements for iPhones to be launched in 2016 from Intel. The information in the contested decision in that regard also refers to technical considerations. Footnote 586 to the contested decision, which reproduces Apple's comments on the applicant's response to the statement of objections, indicates that Apple could have obtained supplies from Intel only for the 'non-CDMA

portion' of its requirements for LTE chipsets for iPhones to be launched in 2016, which substantiates Apple not being able to obtain supplies from Intel for the CDMA portion of those requirements.

408 Fourth, according to the estimates in the contested decision, iPhones represented approximately 90% of Apple's sales of LTE devices during the period concerned, and therefore of its requirements for LTE chipsets, while iPads represented approximately 10% of Apple's sales of LTE devices during the period concerned, and therefore of those requirements (see recital 421 of the contested decision).

409 It follows that, for a very large part of Apple's requirements for LTE chipsets for devices to be launched during the period concerned, namely all iPhones to be launched between 2011 and 2015 and more than half of iPhones to be launched in 2016, Apple had no technical alternative to the applicant's LTE chipsets and could not therefore switch to competing suppliers.

410 The undisputed fact that, on the relevant market, there was no technical alternative to the applicant's LTE chipsets for a very large part of Apple's requirements during the period concerned is a relevant factual circumstance which must be taken into account when analysing the capability of the payments concerned to have foreclosure effects, since the Commission found that capability in the light of Apple's total requirements for LTE chipsets and, in particular, in the light of the reduction of Apple's incentives to switch to the applicant's competitors for all its requirements.

411 Fifth, in the light of the foregoing, it must be held that the Commission reached the conclusion that the payments concerned were capable of restricting competition in that they had reduced Apple's incentives to switch to the applicant's competitors to source LTE chipsets for all of its demand for iPhones and iPads on the basis of an analysis in which the Commission failed to take proper account of all the relevant factual circumstances surrounding the conduct concerned.

412 Although the Commission found that Apple had no technical alternative to the applicant's LTE chipsets for all iPhones to be launched between 2011 and 2015 and for more than half of the iPhones to be launched in 2016, it did not make a link between that relevant factual circumstance, which implied that no competitors were able to supply Apple with LTE chipsets for those iPhones, and the alleged lessening of Apple's incentives to switch to the applicant's competitors to source LTE chipsets for all its requirements, including therefore for iPhones, although those devices represented a very large part of those requirements.

413 Moreover, in Section 11.5 of the contested decision, the Commission, in contradiction, relied inter alia on that circumstance in order to reject the applicant's critical margin analysis, on the ground that the contestable share of Apple's demand relied on by the applicant did not take account of the fact that Apple could not have switched supplier for LTE chipsets for iPhones to be launched in 2012, 2013, 2014 and 2015 and for more than half of the iPhones to be launched in 2016 (recital 491 and recital 495(2) of the contested decision).

414 In those circumstances, in so far as the Commission failed to take account of the fact that Apple could not switch to any other supplier to fulfil its technical requirements for a very large part of its LTE chipset demand (corresponding to iPhones, with the exception of less than half of the iPhones to be launched in 2016), it could not legitimately conclude that the payments concerned had reduced Apple's incentives to switch to the applicant's competitors for all of its requirements covering all iPhones and iPads to be launched during the period concerned, and that those

payments were, accordingly, capable of restricting competition in the entire relevant market for LTE chipsets. The fact – which was not properly taken into account in the contested decision – that Apple sourced LTE chipsets from the applicant, and not from the applicant's competitors, in the light of the absence of alternatives fulfilling its own technical requirements could fall within competition on the merits, and not an anticompetitive foreclosure effect resulting from the payments concerned.

415 It is true that Article 102 TFEU prohibits conduct of an undertaking in a dominant position the purpose of which is to strengthen that position and to abuse it, in particular when such conduct is intended to deprive parties demonstrated to be potential competitors of effective access to a market (see, to that effect, judgment of 30 January 2020, *Generics (UK) and Others*, C-307/18, EU:C:2020:52, paragraph 151). In the present case, in view of the theory of harm set out in the contested decision, which is based on a reduction in Apple's incentives to switch to the applicant's competitors for the whole of its LTE chipset requirements during the period concerned, the Commission could not ignore the circumstance that, because of its own technical requirements, Apple could not switch to the applicant's competitors for a very large part of its LTE chipset demand during that period.

416 Moreover, it must be stated that, in the contested decision, the Commission in no way maintained that the applicant's conduct prevented competitors which were less efficient than the applicant from developing products fulfilling Apple's requirements, but solely that Apple's incentives to switch to the applicant's competitors for all its LTE chipset requirements had been reduced. In any event, it should be pointed out that, as is apparent from the case-law referred to in paragraph 351 above, competition on the merits may lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.

417 It follows from all of the foregoing that the Commission's conclusion regarding the capability of the payments concerned to have foreclosure effects on the ground that they had reduced Apple's incentives to switch to the applicant's competitors in order to source LTE chipsets for all its demand is based on an analysis which was not carried out in the light of all the relevant factual circumstances and which is, on that ground, unlawful.

418 That finding is unaffected by the Commission's other arguments.

419 First, at the hearing, in response to questions put by the Court, the Commission relied on recital 421 of the contested decision in order to argue that it described the 'leverage' effect on which the demonstration of the capability of the payments concerned to have anticompetitive effects was founded. In essence, according to the Commission, even if were not technically possible for the applicant's competitors to provide supply for iPhones, the agreements concerned made it possible for the applicant to 'leverage' that non-contestable share of Apple's demand relating to iPhones in order to foreclose competitors on the contestable share of that demand relating to iPads and, accordingly, to prevent competitors from expanding and growing on the market.

420 In that regard, first of all, it must be observed that the Commission's argument does not align with the theory of harm set out in the contested decision, which refers to the capability of the payments concerned to have anticompetitive effects on the whole of the relevant market for LTE chipsets on the ground that Apple was dissuaded from sourcing from the applicant's competitors for the whole of its LTE chipset requirements for iPhones and iPads. In other words, the contested

decision refers to a foreclosure effect concerning all LTE chipsets for both iPhones and iPads equally, and not to a foreclosure effect limited solely to Apple's sourcing of LTE chipsets for iPads. Moreover, first, in the contested decision, the infringement which the applicant is alleged to have committed was defined by reference to Apple's total demand for iPhones and iPads and, second, the very concept of the applicant using 'leverage' in relation to the various Apple devices does not appear in the reasoning put forward by the Commission in Section 11.4 of the contested decision.

421 Next, it must be noted that, while it forms part of Section 11.4.1 of the contested decision, recital 421 of that decision seeks to respond, together with recitals 419 and 420 of that decision, to an argument put forward by the applicant during the administrative procedure concerning the ability of the applicant's competitors to offer identical incentives to Apple. It is therefore not possible to make a finding that the theory of harm underpinning the capability of the payments concerned to have anticompetitive effects is explained in that recital. Moreover, in any event, contrary to the Commission's suggestion, recital 421 of the contested decision contains no clear indication that the applicant, through the non-contestable share of Apple's demand for LTE chipsets, obtained 'leverage' over the contestable share of that demand.

422 Last, for the sake of completeness, it should be noted that the Commission's argument taken from recital 421 of the contested decision is based on the premiss that the contested decision demonstrates the anticompetitive capability of the payments concerned in relation to iPads. First, as has been observed in paragraph 391 above, in Sections 11.4.1, 11.4.3 and 11.4.4 of the contested decision, the Commission carried out a general analysis of the capability of the payments concerned to have anticompetitive effects, without carrying out any specific analysis relating to iPads. Second, as observed in paragraphs 392 to 394 above, in relation to iPads, in Section 11.4.2 of the contested decision, the Commission did no more than examine the alleged actual effects of the payments concerned in relation to non-CDMA iPad models to be launched in 2014 and 2015, an analysis which is covered by the second and third complaints examined below.

423 Second, as has been pointed out in paragraph 375 above, the Commission relies on the factors mentioned in recital 411 of the contested decision and which are referred to in paragraph 383 above in order to demonstrate that it took into account the relevant circumstances of the present case.

424 First, in so far as the Commission relies on the conditions for granting the payments concerned referred to in Section 11.3 of the contested decision, it should be recalled that, in that section, the Commission did no more than conclude that the payments concerned were exclusivity payments, and that the analysis of the alleged capability of those payments to have anticompetitive effects was found in Section 11.4 of that decision. In addition, it must be observed that, in the circumstances of the present case, characterising the payments concerned as exclusive payments was not sufficient to conclude that those payments constituted an abuse of a dominant position. In accordance with the case-law referred to in paragraph 354 above, in view of the objections put forward by the applicant during the administrative procedure, the Commission was required to carry out an analysis of (i) the capability of the payments concerned to have anticompetitive effects and, in particular, (ii) the foreclosure capacity of at least as-efficient competitors.

425 Second, while the Commission is correct in stating, in essence, that the factors referred to in paragraph 383 above should not be disregarded, the fact remains that those factors, while they may be relevant to assessing the capability of conduct to have anticompetitive effects, do not in

themselves demonstrate, in the present case, anticompetitive effect and, in particular, foreclosure. The same applies in relation to the extent of the applicant's dominant position (referred to in Section 10 of the contested decision), the duration and amount of the payments concerned (referred to in Section 11.4.1 and Section 11.8 of the contested decision), the market share covered by those payments (referred to in Section 11.4.3 of the contested decision) and the importance of Apple as a customer (referred to in Section 11.4.4 of the contested decision). Making reference to those factors cannot call into question the fact that, in the present case, the Commission's demonstration of the capability of the payments concerned to have anticompetitive effects, in particular as regards the capability of the practice at issue to foreclose at least as-efficient competitors, was not carried out in the light of all the relevant factual circumstances surrounding the conduct concerned given the alleged reduction in Apple's incentives to switch to the applicant's competitors for all its LTE chipset requirements for iPhones and iPads.

426 Moreover, it should be noted that, as is apparent from the contested decision and as the Commission expressly stated before the Court, in that same decision it did not rely on an economic model, such as an as-efficient competitor test, in order to conclude that the payments concerned were capable of having anticompetitive effects and, in Section 11.5 of the contested decision, the Commission merely stated that the critical margin analysis presented by the applicant did not undermine its conclusions.

427 Third, the Commission's arguments regarding recitals 426, 464 and 486 of the contested decision cannot be accepted. Recitals 426 and 464, which relate to Section 11.4.2 of the contested decision, concern only certain iPad models to be launched in 2014 and 2015 and cannot therefore undermine the findings made in paragraph 409 above in relation to iPhones. Last, contrary to the Commission's suggestion, the conclusion in recital 486 of the contested decision is also not capable of undermining those findings.

428 In the light of all those factors, the first complaint in the third part of the third plea in the action must be upheld.

3. The second and third complaints in the third part of the third plea: failure to demonstrate that the agreements concerned influenced Apple's sourcing decisions concerning '2014' and '2015' iPads

429 The second and third complaints in the third part of the third plea seek to challenge the demonstration made in Section 11.4.2 of the contested decision.

430 The applicant disputes the Commission's findings in recitals 424 and 451 of the contested decision, claiming that the contested decision does not prove, as regards the first of those recitals, that the agreements concerned reduced Apple's incentives to switch to competing suppliers for 'devices launched in 2014 and 2015' or, as regards the second of those recitals, that they had an impact on Apple's sourcing strategy for 'devices to be launched in 2014 and 2015'.

431 First, as regards the '2014' iPads, the applicant maintains, first of all, that the contested decision contains no evidence that Apple considered using Intel chipsets in the iPads 'actually released in October 2014'. Next, the Commission makes a number of references to an iPad model that Apple '[*confidential*]', called '[*confidential*]', but does not demonstrate that the agreements concerned influenced Apple's sourcing decision for that model. However, Apple never seriously considered using Intel chipsets for that model, rather it realised that the Intel chipset could not be used,

which is confirmed by the applicant's report annexed to its reply to the statement of objections. Last, it was the inability of Intel's chipsets to satisfy Apple's technical and schedule requirements which explains why they were not selected for use in '2014' iPads.

432 The applicant adds that the Commission's assertion that it was aware of the devices for which Apple was considering obtaining supplies from Intel is incorrect. In addition, the contested decision contains no analysis regarding the selection of the supplier for the '[*confidential*]' model and does not establish a causal link between the first amendment to the transition agreement and the decision to use the applicant's chipset for the '[*confidential*]' model.

433 The Commission states, first of all, that the contested decision concerns devices 'to be launched in 2014', and not those 'actually released'. The applicant was, it submits, well aware of the devices for which Apple was considering obtaining supplies from Intel. Apple also confirmed that it was seeking to diversify its sourcing. Next, as regards the '[*confidential*]' model, the Commission states that recitals 428 to 435 of the contested decision demonstrate the impact of the agreements concerned. In addition, the negotiations between the applicant and Apple concerning the first amendment to the transition agreement influenced Apple's purchasing decision taken at the beginning of 2013. The transition agreement was in any event sufficient to influence Apple, which was considering the introduction of Intel for some of the iPads to be launched in 2014. In addition, the applicant's allegation that Apple never seriously considered using Intel's chipsets in the '[*confidential*]' model is not substantiated. Last, as regards the report submitted by the applicant as an annex to its reply to the statement of objections, the Commission refers to Apple's response in that regard in its comments on the applicant's response to the statement of objections.

434 The Commission adds that Apple had decided to [*confidential*] and that that decision had been influenced by the conclusion of the first amendment to the transition agreement and by the loss of the payments concerned resulting from the transition agreement. Apple's documents demonstrate that the payments concerned did actually affect the decision to purchase LTE chipsets for 'iPads that [it] planned to launch in 2014'.

435 Second, as regards the '2015' iPads, the applicant states that the Commission does not refer to the iPad models 'launched' in spring or in September and November 2015, or to those which '[were] to be launched in spring 2015', but refers to an undefined model 'to be released in fall 2015'. In the applicant's view, in order to substantiate the assertion that Intel chipsets had been seriously considered, the contested decision relies on only one email from a single Apple engineer whom the Commission misquotes. The file contains no evidence, in particular from Apple employees who actually made chipset purchasing decisions, showing that Intel's chipset was a genuine option. In addition, the evidence in the file shows that Intel's chipsets failed to comply with Apple's technical and schedule requirements.

436 The applicant adds that the Commission interpreted certain Apple internal documents for the first time in the defence.

437 The Commission notes, as regards the actual effects of the payments concerned on chipset purchases, that Apple's internal emails demonstrate Apple's interest in using another supplier. Next, in the email from an Apple engineer referred to in recital 436 of the contested decision there is no uncertainty regarding Intel's chipset, which is confirmed by an email from another Apple employee. Last, the Commission refers to recital 437 of the contested decision, which contains the statement of an Apple employee describing, from a commercial point of view, a

switch to an Intel chipset as untenable, given the payments concerned, and also refers to a statement contained in Apple's comments on the applicant's reply to the statement of objections. In the view of the Commission, the applicant's arguments concerning Intel's chipset scheduling are therefore irrelevant and, in any event, erroneous.

438 The Commission adds that the report submitted by the applicant as an annex to its reply to the statement of objections is based on tests conducted on chipsets used in other manufacturers' devices and that its conclusions are therefore not surprising. Furthermore, the applicant fails to explain why the Commission's interpretation of the Apple employee email referred to in recital 437 of the contested decision is inaccurate and does not call into question Apple's statement relied on in the defence. In addition, in the Commission's view, the applicant's arguments are repudiated by its own evidence in the FTC proceedings.

(a) Preliminary observations

439 It must be recalled that, as is apparent from paragraphs 392 to 394 above, Section 11.4.2 of the contested decision seeks to demonstrate that, according to the Commission, Apple's internal documents and explanations confirm that the payments concerned actually reduced Apple's incentives to switch to the applicant's competitors in order to source LTE chipsets specifically as regards its requirements for some of its devices. As the Commission expressly confirmed before the Court, that demonstration concerns the 'actual effects' of the payments concerned in relation to those devices.

440 In other words, that section seeks to confirm that the payments concerned could have anticompetitive effects by demonstrating their actual effects in relation to certain devices.

441 In particular, as regards Apple's demand covered by the Commission's analysis in Section 11.4.2 of the contested decision, it should be recalled that that section refers only to the alleged actual effects of the payments concerned in relation to certain non-CDMA versions of certain iPad models which were 'launched' or 'which were to be launched' in 2014 and 2015. However, that section does not refer to other iPads which were 'launched' or 'which were to be launched' during the period concerned.

442 At the outset, it should be noted that such a specific demonstration of the alleged actual effects of the payments concerned, limited to certain versions of iPad 2014 and 2015 models, cannot remedy the failure to take account of all the relevant factual circumstances in the Commission's general demonstration, which has been examined in the examination of the first complaint in the third part of the third plea, of the capability of the payments concerned to have anticompetitive effects during the period concerned in relation to all of Apple's LTE chipset requirements for both iPhones and iPads.

443 In other words, even if the second and third complaints in the third part of the third plea in the action were unfounded and the analysis in Section 11.4.2 of the contested decision were not therefore undermined, that section, given that its scope is limited to certain 2014 and 2015 iPads, cannot validly support the conclusion reached in the contested decision regarding the anticompetitive nature of the payments concerned during the whole of the period concerned in relation to all of Apple's LTE chipset requirements for both iPhones and iPads.

444 It is therefore for the sake of completeness that, in the circumstances of the present case, the substance of that section is to be examined and therefore whether, as the applicant disputes, the Commission has not properly demonstrated the actual effects of the payments concerned on Apple's incentives to switch to the applicant's competitors for the iPad models covered by that section.

445 In the present case, the second and third complaints in the third part of the third plea each comprise, in essence, three sub-complaints, concerning (i) the identification of the devices examined in Section 11.4.2 of the contested decision, (ii) the evidence taken into account by the Commission in that section, and (iii) the failure to take account of other relevant factors.

446 In the circumstances of the present case, initially, the first sub-complaint will be examined, then the third sub-complaint and, last, the second sub-complaint, in the light of the case-law referred to in paragraphs 357 to 359 above.

(b) The first sub-complaint, concerning devices covered by Section 11.4.2 of the contested decision

447 The applicant submits, in essence, as a preliminary point, that the Commission has failed to specify the devices to which its analysis relates. That complaint aligns with the first complaint in the third part of the third plea, in which the applicant stated that the Commission's reasoning was imprecise, in that it referred generically to 'devices' and erroneously referred to the '[*confidential*] iPad' as the '[*confidential*]'.

448 In that regard, as a preliminary point, it should be recalled that Section 11.4.2 of the contested decision comprises four parts: the first (11.4.2.1) contains the analysis of Apple's internal documents and explanations which resulted in the Commission concluding that the payments concerned actually reduced Apple's incentives to switch to competing suppliers, while the last three (11.4.2.2, 11.4.2.3 and 11.4.2.4), in essence, are limited to addressing arguments of the applicant which do not affect that conclusion (see recital 423 of the contested decision and paragraph 387 above).

449 First of all, Section 11.4.2.1 of the contested decision comprises recitals 424 to 439 of that decision and, as is apparent from recital 424, seeks to demonstrate that the payments concerned reduced Apple's incentives to switch to the applicant's competitors, in particular Intel, whose chipsets had been evaluated seriously by Apple in order to be used in 'devices launched in 2014 and 2015'.

450 In the body of that section, the Commission no longer refers to such devices but rather to the evidence referring to 'non-CDMA iPad models' (recital 425 of the contested decision), to the 'launch in 2014 of the non-CDMA versions of iPads' (recital 426 of the contested decision), to '2014 mobile devices' (recital 427 of the contested decision), to '[*confidential*]' and '[*confidential*]' (recital 428 of the contested decision), to 'some of its iPads in 2014 and the entirety of its cellular iPad portfolio in 2015' (recital 430 of the contested decision), to 'the 2014 and 2015 iPad models as well as the 2015 iPhone model' (recital 431 of the contested decision), to '[*confidential*] originally planned for launch in spring 2014' and 'finally launched in Autumn 2013' (recital 433 of and footnote 558 to the contested decision), to '2014 and 2015 mobile devices' (recital 435 of the contested decision), to 'the [a]utumn 2015 iPad model' (recital 436 of the contested decision), to 'launch of an iPad … in 2015' (recital 437 of the contested decision), to 'Apple's non-CDMA baseband chipset needs' (recital 438 of the contested decision), to '2015 device models' and the

'fall 2015 lineup of mobile devices' (recital 439 of the contested decision). It must therefore be held that the Commission was not consistent in its description of the devices and the periods referred to by the evidence relied on.

451 Next, as regards Sections 11.4.2.2 and 11.4.2.3 of the contested decision, they are intended to respond to the applicant's arguments seeking, first, to challenge the reliability of Apple's internal documents and explanations and, second, to maintain that exclusivity had been requested by Apple.

452 In the first of those sections, the Commission referred both to 'devices launched in 2014 and 2015' (recital 442 of the contested decision) and to 'devices to be launched in 2014' (recital 445 of the contested decision) and, in a single sentence, to 'devices to be launched in 2015' and to 'devices launched in 2015' (recital 446 of the contested decision).

453 Last, as regards Section 11.4.2.4 of the contested decision, responding to the applicant's arguments that Apple would, in any event, have selected to obtain supplies from the applicant given the superiority of its chipsets (recital 423 of the contested decision), the Commission concluded that the payments concerned had had an impact on Apple's sourcing strategy for 'devices to be launched in 2014 and 2015' (recital 451 of the contested decision).

454 While in the body of that section the Commission referred to 'devices to be launched in 2014 and 2015' (recital 455 of the contested decision) and to 'iPads to be launched in 2014 and 2015' (recital 464 of the contested decision), it referred a number of times to 'devices launched in 2014 and 2015' (recitals 456 to 458, 462 and 463 of the contested decision) and to 'the CDMA version of the iPhone 4 that was launched in February 2011' (recital 460 of the contested decision) and to '[*confidential*]' (recital 465 of the contested decision).

455 It follows from the foregoing that, in Section 11.4.2 of the contested decision, the Commission put forward general reasoning concerning, and addressing together, on some occasions 'devices' and on other occasions 'iPads', identified variously as, inter alia, those from '2014 and 2015', those 'launched in 2014 and 2015' or those 'to be launched in 2014 and 2015', without specifying the scope of those expressions or explaining how they were related.

456 In particular, in recital 424 of the contested decision, in setting out the conclusion drawn from Section 11.4.2.1 of that decision, the Commission referred to devices 'launched' in 2014 and 2015, whereas, in recital 451 of that decision, in setting out the conclusion drawn from Section 11.4.2.4 of that decision, the Commission referred to devices 'to be launched' in 2014 and 2015. However, in the body of each of those sections, the Commission also referred to other devices, the wording of which does not correspond to the devices covered by its demonstration.

457 It is true that, in the defence, and in response to the measures of organisation of procedure, the Commission stated that the demonstration of the actual effects of the payments concerned, contained in Section 11.4.2 of the contested decision, not only did not concern iPhones, but concerned only certain 'non-CDMA' iPad models which 'were to be launched' in 2014 and 2015, and not the iPads actually 'launched' in 2014 and 2015, the Commission regretting any misunderstanding caused by that 'clerical error'.

458 However, contrary to the Commission's suggestion, the erroneous identification of the devices referred to in the demonstration of the actual effects of the payments concerned cannot be regarded as a mere 'clerical error'. Thus, in particular, the [*confidential*] model identified by the

acronym '[*confidential*]' referred to in recitals 433 and 465 of the contested decision corresponds, from a commercial point of view, to the '[*confidential*]' model and that model, as the Commission itself states in the contested decision, was 'launched' in autumn 2013. Since that model was 'launched' in 2013, it is irrelevant to a demonstration such as that contained in Section 11.4.2.1 of the contested decision which seeks to examine the actual effects of the payments concerned on the models 'launched' in 2014 and 2015.

459 In addition, it must be recalled that the review of legality under Article 263 TFEU relates to the contested act and not to the content of the pleadings lodged by the defendant before the EU Courts (see, to that effect, judgment of 25 July 2018, *Orange Polska* v *Commission*, C-123/16 P, EU:C:2018:590, paragraph 85).

460 Furthermore, in that latter regard, the Commission's argument that the applicant was aware of the devices for which Apple intended to obtain supplies from Intel is irrelevant, since, as is apparent from paragraph 459 above, the Court's review relates to the content of the contested decision. Moreover, having regard to the terms used in the contested decision, the applicant found it necessary to challenge the Commission's reasoning in respect of both devices 'launched' and those 'to be launched' (paragraph 430 above).

461 Last, it must be stated that, in the absence of any details in that regard in the contested decision, it is not for the Court to determine, after the event, the devices covered by each of the terms used by the Commission in each recital in Section 11.4.2 of the contested decision.

462 It must therefore be held that the evidence on which the Commission relied in support of its findings in Section 11.4.2 of the contested decision is inconsistent, both internally within such evidence and in relation to the findings which it seeks to support in Sections 11.4.2.1, 11.4.2.2 and 11.4.2.4 of that decision, which, moreover, has an effect on the internal consistency of Section 11.4.2 of that decision.

463 It follows that the Commission's assessment in Section 11.4.2 of the contested decision of the actual anticompetitive effects of the payments concerned, that is to say, having actually reduced Apple's incentives to switch to competing LTE chipset providers for certain devices, is vitiated by a lack of consistency in the evidence relied on in support of its findings.

(c) The third sub-complaint, concerning the failure to take account of certain relevant evidence in the demonstration in Section 11.4.2 of the contested decision

464 The applicant submits, in essence, that Intel's chipsets had not been selected by Apple because they failed to comply with Apple's technical and schedule requirements for those devices, and not because of the payments concerned, a fact which the Commission failed to take into account.

465 In that regard, while the contested decision already suffers from a lack of consistency noted in the context of the first sub-complaint (see paragraph 463 above), it is necessary to ascertain whether, in addition, the Commission took account in its analysis of all the relevant factors which had to be considered. To that end, it is appropriate to continue the analysis on the assumption that, as the Commission stated in the defence and at the hearing, the devices covered by that analysis were the 'non-CDMA' versions of the '[*confidential*]' (or '[*confidential*]') 2014 model and the '[*confidential*]' and '[*confidential*]' 2015 models ('the models allegedly concerned'), there being no need to address further the question whether those devices are identified clearly and unequivocally in the contested decision.

466 At the outset, it must be stated that the question whether LTE chipsets of the applicant's competitors were genuinely capable of meeting Apple's technical and schedule requirements for the models allegedly concerned is, in the circumstances of the present case, a relevant factor to be taken into account when analysing the actual effects of the payments concerned on Apple's sourcing decisions for its LTE chipset requirements for the models allegedly concerned. If, as the applicant submits, Apple had no technical or schedule-related alternative to the applicant's LTE chipsets for the models allegedly concerned, such a circumstance necessarily had an impact on its sourcing decisions for those models and accordingly on the possible effects of the payments concerned on such decisions.

467 The evidence relied on by the applicant gives rise to doubts in that regard.

468 First, as regards the model allegedly concerned which was to 'be launched' in 2014, identified by the acronym '[*confidential*]', as the applicant points out, it is apparent from the evidence submitted that the development of the Intel chipset ([*confidential*]) which Apple had considered for possible use in the '[*confidential*]' model was [*confidential*].

469 In particular, Apple's internal presentation of [*confidential*], which the Commission mentions in footnote 612 to the contested decision relating to recital 464 of that decision, states [*confidential*].

470 The further evidence of 26 July 2019 supports those findings. An internal Apple email of [*confidential*] states, as regards the use of the [*confidential*] chipset for the iPad planned for [*confidential*], namely the '[*confidential*]' model, that [*confidential*] and that [*confidential*]. Another internal Apple email of [*confidential*] reveals that that chipset was [*confidential*] and that, if [*confidential*].

471 Furthermore, in so far as Apple planned to launch iPad models other than the '[*confidential*]' model in 2014, it must be observed that, in any event, the documents in the file disclose that the chipsets of the applicant's competitors did not meet Apple's technical and scheduling requirements. Accordingly, the table entitled [*confidential*] relating to 2014, which was attached to an internal Apple email of [*confidential*], shows that the chipsets of the applicant's competitors, and in particular those of Intel, did not fully satisfy Apple's technical or scheduling requirements, as is apparent from [*confidential*].

472 In particular, as the Commission moreover confirmed in response to the measures of organisation of procedure, the Intel chipset which had been envisaged for the '[*confidential*]' model [*confidential*] met 'in part' the 'Apple requirement[s]', the missing characteristic being related to the absence of [*confidential*] technology. In that regard, it is sufficient to note that an internal Apple email of [*confidential*], the subject matter of which was [*confidential*], states, in essence, that [*confidential*], that, however, [*confidential*] and that, in that new context, [*confidential*]. From that point of view, an internal Apple email of [*confidential*] refers to a [*confidential*]. Moreover, the significance of that technology for the other iPads which Apple intended to launch in 2014 cannot be called into question by the Commission's arguments based on the statements of Apple employees concerning the '[*confidential*]' model or relating to the prevailing situation when that technology had not become important, since such arguments are irrelevant.

473 Second, as regards the models allegedly concerned which were 'to be launched' in 2015, as the applicant points out, it is apparent from the documents in the file that the chipsets of the applicant's competitors, and in particular Intel's chipsets which Apple had contemplated for possible use in the iPads which it planned to launch in 2015, did not satisfy Apple's technical and scheduling requirements.

474 First, the applicant relied on the table entitled [*confidential*] concerning 2015, which was annexed to an internal Apple email of [*confidential*]. That table shows that Intel's chipsets did not satisfy fully Apple's technical and scheduling requirements, as is apparent from [*confidential*].

475 Second, it should be noted that, in the exchange of internal Apple emails dated 18 February 2014 which followed the internal Apple email referred to in recital 436 of the contested decision and the content of which was disclosed as part of the further evidence of 26 July 2019, two Apple engineers stated that the Intel chipset envisaged for an iPad to be launched in autumn 2015 was 'not quite' at feature parity with the applicant's chipset. It should be observed that those two engineers stated that that difference resulted from the absence, for Intel's chipset, of technology [*confidential*], which was regarded as being [*confidential*].

476 It follows from the foregoing that a number of factual elements which were available to the Commission, which were confirmed, moreover, by the evidence submitted, give rise to doubts as to the ability of Intel's chipsets, or those of other competitors of the applicant, to comply with Apple's technical and scheduling requirements for the models allegedly concerned and, where relevant, for the other iPad models which Apple intended to launch over that period.

477 The Commission could not legitimately come to the conclusion that the payments concerned had actually reduced Apple's incentives to switch to competing LTE chipset suppliers without taking account of the fact that, for Apple's requirements for the models allegedly concerned, there was no technical or schedule-related alternative to the applicant's chipsets.

478 It is true that, in recital 464 of the contested decision, the Commission stated that Apple had envisaged using Intel's chipsets for the 'iPads to be launched in 2014 and 2015 taking into account all parameters, not just technical superiority, and including the specific requirements for those devices' and thus found that Intel was not less attractive than the applicant, at least for those models. However, the scope of that assertion by the Commission is not clear from its wording, as regards, in particular, that 'technical superiority'.

479 In addition, even if that assertion were to be understood as meaning that, according to the Commission, Intel's LTE chipsets were a viable alternative for the models allegedly concerned, both technically and as regards scheduling, it must be observed that, in support of that assessment, in footnote 612 to the contested decision relating to recital 464 of that decision, the Commission merely referred, by way of example, to three internal Apple documents which did not, however, make it possible to conclude that Intel's chipsets satisfied Apple's technical or scheduling requirements for the models allegedly concerned. The first document, to which the Commission refers, mentioning only its cover page, is a presentation by Apple [*confidential*] referring rather to the [*confidential*] of Intel's chipsets (see also, in that regard, paragraph 469 above); the second document is an internal Apple email of October 2012, also referred to in recital 433 of the contested decision, although admittedly stating that Intel would have been a 'good plan' for the '[*confidential*]' model, but contains no indication as to the feasibility of such a 'plan' in terms of timing; and the third document is an internal Apple email of June 2012, also referred to in recital 428 of the contested decision, referring to an Intel proposal which was not

satisfactory in terms of price. Accordingly, not only is the Commission's assertion that Intel was no less attractive than the applicant for the models allegedly concerned not supported by those three documents, but it does not make it possible to conclude that Apple could actually have obtained supplies from the applicant's competitors for the models allegedly concerned given its technical and scheduling requirements.

480 It must therefore be held that, in Section 11.4.2 of the contested decision, the Commission did not carry out a true examination of the existence of competing LTE chipset suppliers from whom Apple could have obtained supplies for the models allegedly concerned given its technical requirements, including scheduling requirements.

481 It follows that the Commission's assessment in Section 11.4.2 of the contested decision of the actual anticompetitive effects of the payments concerned, that is to say, having reduced Apple's incentives to switch to competing LTE chipset suppliers for the models allegedly concerned, was not carried out in the light of all the relevant evidence which had to be taken into consideration.

(d) The second sub-complaint, concerning the evidence taken into account in the demonstration in Section 11.4.2 of the contested decision

482 The applicant submits, in essence, that the Commission has not proved that, for the devices covered by its analysis, the payments concerned reduced Apple's incentives to obtain supplies from its competitors.

483 In that regard, while the contested decision already suffers from a lack of consistency noted in relation to the first sub-complaint (see paragraph 463 above) and a failure to take account of all the relevant factors noted in relation to the third sub-complaint (see paragraph 481 above), it is necessary to examine whether, additionally, the evidence relied on by the Commission is capable of substantiating the conclusions drawn from it regarding the models allegedly concerned.

484 As a preliminary point, first, it should be noted that, with the exception of the '[*confidential*]' model, none of the models allegedly concerned is mentioned expressly in Section 11.4.2 of the contested decision. It is apparent from that section that the Commission did not carry out a specific demonstration for each model concerned, but rather provided a general demonstration designed to cover all iPads 'launched' or 'to be launched' in 2014 and 2015, on some occasions examining the two years together.

485 Second, it must be observed that, in Section 11.4.2 of the contested decision, the Commission relied, in essence, on evidence from Apple, since Section 11.4.2.1 of that decision is founded exclusively on Apple's response to question [*confidential*] of the information request of [*confidential*] and on internal Apple documents annexed to that response.

486 In the first place, as regards the model concerned which was 'to be launched' in 2014, namely, according to the Commission, the model identified by the acronym '[*confidential*]' (or '[*confidential*]'), as is apparent from the contested decision and as the Commission explained in its defence, recitals 428 to 435 of the decision contain the demonstration of the alleged effects of the payments concerned on Apple's decision to purchase LTE chipsets.

487 First, in that regard, it must be stated that in recitals 425 to 433 of the contested decision the Commission, in essence, highlighted the evidence demonstrating, in its view, that, before concluding the first amendment to the transition agreement, Apple had envisaged switching to

the applicant's competitors for the models allegedly concerned and that that could be of interest to Apple from an economic point of view since 'the long-term savings opportunity outweigh[ed] the [transition agreement] payment'.

488 Accordingly, while it is true that the assessments in recitals 425 to 433 of the contested decision show that Apple had taken account of the existence of payments stemming from the transition agreement, they do not indicate that the payments concerned resulting from the transition agreement had actually reduced Apple's incentives to switch to the applicant's competitors for the models allegedly concerned, and in particular for the '[*confidential*]' model.

489 As is apparent from recitals 434 and 435 of the contested decision, the Commission found that the first amendment to the transition agreement explained why Apple had ceased to take competing suppliers into consideration for the models allegedly concerned which it planned to launch in 2014 and 2015.

490 Consequently, contrary to the Commission's assertion, it is not apparent from the contested decision that the transition agreement had, in itself, actually reduced Apple's incentives to switch to the applicant's competitors for the models allegedly concerned.

491 Second, it must be noted that the assessment in recital 435 of the contested decision that, 'as a result of the [first amendment to the transition agreement], Apple "ceased all consideration of alternative baseband chipset vendors to Qualcomm for 2014 and 2015 mobile devices"', is founded exclusively on a statement in Apple's response to question [*confidential*] of the information request of [*confidential*].

492 It must be stated that that response does not concern the '[*confidential*]' model (or '[*confidential*]'), which, according to the Commission, is the only model allegedly concerned for 2014 referred to in Section 11.4.2 of the contested decision. As regards the 2014 non-CDMA models, that response refers only to the [*confidential*] models. In addition, Apple's statement reproduced in recital 435 of the contested decision comes from the part of its response concerning those two latter models. That statement therefore appears to be of no relevance from the point of view of the demonstration in the contested decision concerning the '[*confidential*]' model.

493 Third, it should be noted that, in recital 465 of the contested decision, in the context of Section 11.4.2.4 of that decision, the Commission stated [*confidential*] and, to that end, relied on two statements made by Apple, taken from the third indent of paragraph 52 of its comments on the applicant's response to the statement of objections.

494 However, as the applicant correctly points out, those statements do not indicate [*confidential*] because of the payments concerned. In particular, those statements provide no indication as to why [*confidential*]. In the absence of conclusive evidence adduced by the Commission in the contested decision, it is not for the Court to determine the reasons which resulted in [*confidential*].

495 In the second place, as regards the models allegedly concerned which Apple planned to launch in 2015, namely, according to the Commission, the '[*confidential*]' and '[*confidential*]' models, as is apparent from the contested decision and as the Commission explained in its defence, the demonstration of the alleged effects of the payments concerned is founded on the evidence referred to in recitals 436 and 437 of the contested decision.

496 As a preliminary point, in so far as Apple's statement reproduced in recital 435 of the contested decision generally refers to '2014 and 2015 mobile devices' jointly, it is sufficient to recall that that statement was made in relation to certain 2014 iPad models other than '[*confidential*]' (paragraph 492 above). The relevance of that statement to the 2015 models allegedly concerned has therefore also not been established.

497 First, in recital 436 of the contested decision, the Commission relied on an internal Apple document containing an internal email exchange dated 18 February 2014, stating that an Apple engineer had suggested using Intel's chipset for an iPad 'fall 2015' model since it had 'feature parity' with the applicant's chipset.

498 On the one hand, neither recital 436 of the contested decision nor that exchange of internal emails specify the iPad model which Apple planned to launch in 2015 and which is covered by the Apple engineer's assertion. On the other hand, in the context of the further evidence of 26 July 2019, the applicant produced another exchange of internal Apple emails of the same date, which show that the assertion by the Apple employee set out in recital 436 of the contested decision had in fact been challenged by the head of Apple's engineering team. The latter, in response, had stated that Intel's chipset '[was] not quite at feature parity' with the applicant's chipset, the word 'not' being written in capital letters in that internal email. In addition, that assessment was confirmed by another Apple employee in the same email exchange.

499 Those factors therefore call into question the substance of the assessment in recital 436 of the contested decision, since that assessment is founded on a single internal Apple email which is contradicted by two others.

500 Second, in recital 437 of the contested decision, the Commission refers to an exchange of internal Apple emails dated 20 February 2014, responding to the internal email referred to in recital 436 of that decision, in which (i) an Apple employee states that another employee had 'some commercial penalty concerns regarding timing' concerning the launch of an iPad incorporating another supplier's chipset and (ii) the latter employee confirms that such a launch was 'commercially untenable'.

501 However, it must be stated that those emails and recital 437 of the contested decision make no specific reference to any iPad model or to the payments and agreements concerned. There is therefore no basis for concluding with certainty that those internal emails referred to the loss and reimbursement of the payments concerned.

502 Furthermore, in so far as the Commission, in its defence, relied on a statement made by Apple in its comments on the applicant's reply to the statement of objections in order to establish a link between those internal emails and the payments concerned, it must be stated that that statement does not appear in recital 437 of the contested decision and, moreover, does not relate to the internal emails referred to in that recital.

503 Third, moreover, in recital 438 of the contested decision, the Commission referred to an economic analysis by Apple's procurement team dated 29 January 2014, concerning the economic impact of a switch of supplier in 2015 for non-CDMA chipset requirements, submitted by Apple in its reply to question [*confidential*] of the information request of [*confidential*].

504 In that regard, suffice it to state that, as Apple explains in its reply to question [*confidential*] of the information request of [*confidential*], that economic analysis 'did not form the basis for any procurement decisions by Apple management', with the result that, regardless of the reasons why Apple's management did not rely on such an analysis, which it is not for the Court to establish, that economic analysis does not make it possible to draw any conclusion regarding the effects which the payments concerned actually had on Apple's LTE chipset sourcing decisions.

505 It follows that the Commission, in Section 11.4.2 of the contested decision, in the context of a general analysis mixing models and years, relied on evidence which is not relevant, which is contradicted by other evidence or which is not capable of substantiating its conclusions in relation to the models allegedly concerned and which, therefore, does not make it possible to demonstrate that the payments concerned actually reduced Apple's incentives to switch to the applicant's competitors to obtain supplies of LTE chipsets for those models.

506 It follows from all of the foregoing, first, that Section 11.4.2 of the contested decision cannot remedy the unlawfulness found as a result of the examination of the first complaint in the third part of the third plea (paragraphs 442 and 443 above) and, second, that, in any event, in Section 11.4.2 of the contested decision, the Commission did not provide an analysis which makes it possible to support the finding that the payments concerned had actually reduced Apple's incentives to switch to the applicant's competitors in order to obtain supplies of LTE chipsets for the non-CDMA iPad models allegedly concerned which Apple intended to launch in 2014 and 2015.

507 The Commission reached such a conclusion following reasoning which (i) is vitiated by a lack of consistency in the evidence relied on in support of its findings (paragraph 463 above); (ii) was, moreover, carried out without taking account of all the relevant factors for that purpose (paragraph 481 above); and (iii) was, in addition, carried out relying on evidence which did not make it possible to support its findings (paragraph 505 above).

508 Consequently, the Commission's finding that the payments concerned actually had anticompetitive effects bearing out their capability to produce such effects is unlawful.

509 Moreover, for those same reasons, and contrary to the Commission's assertions, the reasoning in Section 11.4.2 of the contested decision also fails to demonstrate, in the alternative, that the payments concerned were capable of having anticompetitive effects in relation to the models allegedly concerned. In any event, even if that were the case, it should be recalled that the theory of harm adopted in the contested decision does not relate to the anticompetitive capability of the payments concerned being limited to Apple's requirements for solely the models allegedly concerned, but rather covers all of Apple's requirements during the period concerned for both iPhones and iPads (see paragraphs 420, 442 and 443 above).

510 In the light of all of the foregoing, the second and third complaints in the third part of the third plea in the action must be upheld.

4. Conclusion

511 It follows from the examination of the first, second and third complaints in the third part of the third plea, there being no need to examine the other complaints in that part of the plea, that characterising the payments concerned as constituting an abuse of a dominant position is unlawful, in that, first, the examination of the capability of the payments concerned to have

anticompetitive effects is founded on an analysis which was not carried out in the light of all the relevant factual circumstances and, second, the examination of the actual effects of the payments concerned is founded on an analysis which does not make it possible to support the findings made by the Commission.

512 On those grounds, in view of the unlawfulness established in the examination of the third part of the third plea, and there being no need to give a ruling on the other parts raised by the applicant, the third plea in the action must be upheld and, on that basis also, the contested decision must be set aside.

D. Overall conclusion

513 Since the first plea (first and third parts) and the third plea in the action (third part) have been upheld, the contested decision must be set aside, there being no need to give a ruling on the other pleas in the action, or on the requests for measures of organisation of procedure or measures of inquiry submitted by the applicant in so far as those requests go beyond the measures decided upon or ordered by the Court, or on additional evidence other than the further evidence of 26 July 2019.

IV. Costs

514 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.

515 Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Sets aside Commission Decision C(2018) 240 final of 24 January 2018 relating to proceedings under Article 102 [TFEU] and Article 54 of the [EEA Agreement] (Case AT.40220 – Qualcomm (Exclusivity payments));**

2. **Orders the European Commission to pay the costs.**

Marcoulli Frimodt Nielsen Schwarcz

Iliopoulos Norkus

Delivered in open court in Luxembourg on 15 June 2022.

[Signatures]

Table of contents