Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

27 February 2014*

(Competition — Agreements, decisions and concerted practices — Worldwide market for liquid crystal display (LCD) panels — Agreements and concerted practices concerning prices and production capacity — Territorial jurisdiction — Internal sales — Sales of finished products incorporating cartelised products — Single and continuous infringement — Fines — Rounding method — Unlimited jurisdiction)

In Case T-91/11,

InnoLux Corp., formerly Chimei InnoLux Corp., established in Zhunan (Taiwan), represented by J.-F. Bellis, lawyer, and R. Burton, Solicitor,

applicant,

v

European Commission, represented by P. Van Nuffel, F. Ronkes Agerbeek and A. Biolan, acting as Agents,

defendant,

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

THE GENERAL COURT (Sixth Chamber),

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

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 24 April 2013,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

1. *The companies involved in the present case*

1 Chi Mei Optoelectronics Corp. ('CMO') was the company governed by Taiwanese law that controlled a group of companies established and operating worldwide in the production of liquid crystal display panels ('LCD panels').

2 On 20 November 2009, CMO entered into a merger agreement with InnoLux Display Corp. and TPO Displays Corp. By virtue of that agreement, from 18 March 2010, TPO Displays and CMO ceased to exist. The surviving legal entity changed its name twice, first from Innolux Display Corp. to Chimei InnoLux Corp. and then to InnoLux Corp., the applicant.

2. *Administrative procedure*

3 On [*confidential*],[1] Samsung Electronics Co. Ltd ('Samsung'), a company governed by Korean law, submitted to the Commission of the European Communities an application for immunity from fines pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice').

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

5 On 23 November 2006, the Commission granted conditional immunity to Samsung, in accordance with point 15 of the 2002 Leniency Notice, whilst it refused such immunity to another cartel participant, LG Display Co. Ltd, formerly known as LG Philips LCD Co. Ltd ('LGD'), a company governed by Korean law.

6 On 27 May 2009, the Commission initiated the administrative proceedings and adopted a statement of objections, pursuant to Article 10 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 [EC] and 82 [EC] (OJ 2004 L 123, p. 18). The statement of objections was addressed to 16 companies, including CMO and two European subsidiaries which were wholly owned by it, namely Chi Mei Optoelectronics BV and Chi Mei Optoelectronics UK Ltd. In that regard, the Commission, in points 281 to 285 of the statement of objections, recalled inter alia that, according to the case-law, (i) European Union (EU) competition law recognises that different companies belonging to the same group form an economic unit, and therefore an undertaking within the meaning of Articles 81 EC and 82 EC, if the companies concerned do not determine independently their own conduct on the market (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290), and (ii) it is sufficient for the Commission to prove that the entire capital of a subsidiary is held by its parent company for the presumption that the parent company exercises decisive influence over the conduct of the subsidiary on the market to be established (Case T-405/06 *ArcelorMittal Luxembourg and Others* v *Commission* [2009] ECR II-771, paragraph 91). Next, in points 327 to 329 of the statement of objections, the Commission explained the reasons why, applying the case-law referred to, the two CMO subsidiaries mentioned above were to be held jointly and severally liable for the infringements committed by CMO.

1 — Confidential information omitted.

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

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

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

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

11 CMO replied to that letter on 23 April 2010.

3. *The contested decision*

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

13 The contested decision is addressed to 6 of the 16 companies to which the statement of objections was addressed, including the applicant. However, its subsidiaries, to which the statement of objections had been addressed, are no longer included as addressees.

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

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

16 Although the applicant had argued that the market for LCD-TV panels was separate from the market for LCD-IT panels and that a cartel existed only in respect of the latter, the Commission none the less held that there was a single and continuous infringement covering all those products (recitals 281 and 283 to 290 of the contested decision).

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

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

— 'direct EEA sales', namely sales of cartelised LCD panels to another undertaking within the European Economic Area (EEA);

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

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

19 However, the Commission took the view that it needed to examine only the first two categories mentioned in paragraph 18 above, as the inclusion of the third category was not necessary for the fines imposed to achieve a sufficient level of deterrence (recital 381 of the contested decision).

20 Instead of taking into account the value of sales made by an undertaking during the last full business year of its participation in the infringement, as it normally does under point 13 of the 2006 Guidelines, the Commission considered it more appropriate to use, in the present case, the average annual value of sales for the entire duration of the infringement, taking account in particular of the exponential growth of sales for the majority of the undertakings concerned over the years covered by the contested decision (recital 384 of the contested decision).

21 As regards the applicant, the Commission rejected its complaints (i) that the value of relevant sales should have been calculated without taking into account its 'direct EEA sales through transformed products' and its 'direct EEA sales' made to other addressees of the statement of objections, (ii) that the shipments of LCD panels which had not been invoiced to European undertakings should have been excluded, and (iii) that it was necessary to differentiate between sales of LCD-IT panels and those of LCD-TV panels. Thus, for the applicant, the total of relevant sales made in the infringement period was fixed at EUR 1 555 111 603, the yearly average of which, obtained by dividing that amount by the duration of the cartel (4.33 years), was equal to EUR 359 148 176 (recitals 388, 394, 398 to 401 and Table 4 of the contested decision).

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

23 Third, the Commission applied to the applicant a multiplier relating to the duration of the infringement of 4.25, on account of its participation in the infringement for the entire duration of the cartel found to exist by the contested decision, that is, four years and three months (recitals 417 and 418 and Table 5 of the contested decision).

24 Fourth, the Commission took the view that the facts of the case justified the application to all the cartel participants of an increase in the basic amount of the fine equal to 16% of the average value of the relevant sales (the 'entry fee') in order to ensure deterrence, in accordance with point 25 of the 2006 Guidelines (recitals 419 and 424 of the contested decision).

25 Fifth, the Commission did not consider that there were aggravating or mitigating circumstances, in terms of the 2006 Guidelines, in respect of any of the cartel participants. Thus, the Commission rejected, inter alia, the applicant's arguments alleging that it had played only a passive role in the

cartel, had participated in it through negligence and had cooperated with the Commission outside the scope of the 2002 Leniency Notice and had done so even though the Commission had not sent it as precise requests for information as it had sent to other participants in the cartel (recitals 426, 430, 433, 434, 438, 439 and 442 to 444 of the contested decision).

26 Sixth, pursuant to the 2002 Leniency Notice, the Commission, first of all, confirmed the total immunity granted to Samsung. Next, it took the view that the cooperation provided by the applicant did not entitle it to any reduction of the fine (recitals 455 to 458 and 472 of the contested decision).

27 On the basis of those considerations, the Commission, in Article 2 of the contested decision, ordered the applicant to pay a fine of EUR 300 000 000.

Procedure and forms of order sought

28 By application lodged at the Court Registry on 21 February 2011, the applicant brought the present action.

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

30 At the hearing on 24 April 2013, the parties presented oral argument and replied to oral questions put by the Court.

31 The applicant claims, in essence, that the Court should:

— annul the contested decision in as far as it concerns the applicant;

— reduce the amount of the fine imposed on it in the contested decision;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

33 In support of its action, the applicant puts forward three pleas in law:

— the first plea alleges that the Commission applied a legally flawed concept, that of ‘direct EEA sales through transformed products’, in determining the value of relevant sales for the calculation of the fine;

— the second plea in law alleges that the Commission infringed Article 101 TFEU and Article 53 of the EEA Agreement in finding that the infringement extended to LCD-TV panels;

— the third plea in law alleges that the value of relevant sales used by the Commission with regard to the applicant wrongly included sales other than those relating to cartelised LCD panels.

1. *First plea in law, alleging that the Commission applied a legally flawed concept, that of 'direct EEA sales through transformed products', in determining the value of relevant sales for the calculation of the fine*

34 The applicant's first plea in law is composed, in essence, of two parts alleging, in the case of the first part, that the concept of 'direct EEA sales through transformed products' is inconsistent with the fact that there is no finding of infringement in respect of finished products into which cartelised LCD panels are incorporated and, in the case of the second part, that inconsistencies are inherent in that concept.

The first part, alleging that the concept of 'direct EEA sales through transformed products' is inconsistent with the fact that there is no finding of infringement in respect of finished products into which cartelised LCD panels are incorporated

35 The applicant maintains, first, that the use of the concept of 'direct EEA sales through transformed products' is incompatible with point 13 of the 2006 Guidelines, since the Commission took into account sales of finished products, in respect of which no finding of infringement was made in the contested decision and to which the infringement established in the contested decision therefore does not relate, either directly or indirectly. Second, the applicant maintains that the prices of cartelised LCD panels do not represent reference prices for finished products incorporating those panels.

36 According to point 13 of the 2006 Guidelines, '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA'.

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

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

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

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

41 In the present case, it should be recalled that, in recital 380 of the contested decision, the Commission defined the sales categories described in paragraph 18 above.

42 As regards 'direct EEA sales', it is not disputed that they fulfil the conditions laid down in point 13 of the 2006 Guidelines, read in the light of the relevant case-law.

43 As regards 'direct EEA sales through transformed products', the applicant, by the first part of its first plea, submits that the infringement does not relate either directly or indirectly to those sales, since they concern sales of finished products in which cartelised LCD panels are incorporated rather than sales of the panels.

44 In that regard, it should first be observed that, although the footnote to point 13 of the 2006 Guidelines indicates that sales may be found to be indirectly related to an infringement where the price of a product covered by horizontal price-fixing arrangements serves as a basis for the price of lower or higher quality products, that footnote makes clear that that case is given by way of example. Thus, the applicant's argument that in the present case finished products into which cartelised LCD panels are incorporated are not lower or higher quality products than those panels is wholly irrelevant.

45 As to the fact, also put forward by the applicant, that the contested decision did not establish any infringement in respect of finished products into which cartelised LCD panels are incorporated, the Court observes that the Commission did not take into account the full value of sales of finished products, but only the proportion of that value which corresponded to the value of the cartelised LCD panels that were incorporated in the finished products, provided that the latter were sold by the applicant to third-party undertakings established in the EEA. Whilst it is obvious that the Commission could not have taken account of the full value without first having made a finding of infringement in respect of the finished products, such a finding cannot be regarded as necessary for it to be possible to take into account the proportion of that value represented by the value of the cartelised LCD panels incorporated in the finished products.

46 Moreover, if the Commission had not used the concept of 'direct EEA sales through transformed products', it would not have been able to take into account, in the calculation of the fine, a considerable proportion of the sales of cartelised LCD panels made by cartel participants belonging to vertically-integrated undertakings, although those sales were harmful to competition within the EEA.

47 Thus, in accordance with the case-law referred to in paragraphs 37 to 40 above, the Commission was required to take account of the extent of the infringement on the relevant market and, to that end, could use the applicant's turnover in the cartelised LCD panels as an objective criterion giving a proper measure of the harm which its participation in the cartel did to normal competition, provided that that turnover resulted from sales having a link with the EEA. Such a link exists where cartelised LCD panels are transferred by the applicant to its subsidiaries, wherever established, which incorporate them in finished products that are sold to third parties within the EEA.

48 The choice made by the Commission to take into account 'direct EEA sales through transformed products' is all the more justified in the present case given that it is clear from the evidence presented in the contested decision (see in particular recital 394 of the contested decision), which is not called in question by the applicant, that internal sales of cartelised LCD panels to undertakings participating in the cartel were made at prices affected by the cartel.

49 Moreover, as can be seen in particular from recitals 92 and 93 of the contested decision, the cartel participants were aware that the price of cartelised LCD panels affected the price of the finished products into which they were incorporated.

50 Finally, with regard to the applicant's argument that the judgment of 10 September 2008 in Case T-348/05 *JSC Kirovo-Chepetsky Khimichesky Kombinat* v *Council* (not published in the ECR, paragraph 62) precludes all assimilation between sales of finished products into which a component is incorporated and sales of those components as such, it should be observed that the context in which,

and the purpose for which, the Commission took into account the cartelised LCD panels that were incorporated into finished products are not comparable to those which characterised the case that gave rise to that judgment.

51 In *JSC Kirovo-Chepetsky Khimichesky Kombinat* v *Council* (paragraphs 54, 55, 57 and 58), the Council of the European Union, having adopted, on the basis of an anti-dumping investigation into certain products including ammonium nitrate, anti-dumping measures in relation to those products, extended the scope of those measures to other products, without opening a new investigation, on the ground that the other products were the same as those covered by the investigation, particularly in terms of their ammonium nitrate content.

52 In that regard, the Court found that extension to be unlawful, stating as follows:

> '62. … A component of a finished product may, of course, be the subject of anti-dumping measures but, in that event, it must be regarded as being a product [which is] as such [the object of dumping]. When that component is not considered in itself, but as an element of another product, it is that other product, with all its components, which constitutes the product concerned, and the anti-dumping investigation must accordingly relate to that product independently of those components. Only products which have been the subject of an anti-dumping investigation may be subject to anti-dumping measures, once it has been found that the products in question are exported to the Community at a price lower than the price of "like products" within the meaning of Article 1 of [Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1)]. Consequently, since it is established that the new product types referred to in the contested regulation differ from the product concerned within the meaning of the original regulations, it is impossible to impose an anti-dumping duty on them without, first, carrying out an investigation in order to ascertain whether those products are also being dumped on the Community market.'

53 Nothing comparable has taken place in the present case since, here, the Commission did not use the investigation that it carried out into cartelised LCD panels in order to make a finding of infringement in respect of finished products in which those LCD panels are incorporated. Far from equating cartelised LCD panels with the finished products of which they were a component, the Commission merely considered, purely for the purposes of calculating the fine, that, as regards vertically-integrated undertakings such as the applicant, the place of sale of the finished products corresponded to the place of sale of the cartelised component to a third party, which is thus not part of the same undertaking as the undertaking which produced that component.

54 It follows from all the foregoing considerations that the first part of the present plea must be rejected.

Second part of the plea, concerning the inconsistencies allegedly inherent in the concept of 'direct EEA sales through transformed products'

55 The second part of the first plea entails two complaints concerning the concept of 'direct EEA sales through transformed products': the applicant submits that the effect of that concept is that the Commission, first, exceeds the limits of its territorial jurisdiction and, second, exposes the applicant to less favourable and discriminatory treatment by comparison with other participants in the same cartel.

The Commission's territorial jurisdiction

56 The applicant maintains that, by taking into account 'direct EEA sales through transformed products', the Commission artificially shifted the place where those sales were actually made and thereby exceeded the limits of its territorial jurisdiction.

57 It is first of all appropriate to recall the principles laid down by the case-law so far as concerns the Commission's territorial jurisdiction to find infringements of competition law.

58 In that regard, the Court of Justice has held that, when undertakings established outside the EEA, but which produce goods that are sold within the EEA to third parties, concert on the prices they charge to their customers in the EEA and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the internal market within the meaning of Article 101 TFEU and which the Commission has territorial jurisdiction to proceed against (see, to that effect, Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1988] ECR 5193, '*Wood Pulp I*', paragraphs 13 and 14).

59 It is also stated in the case-law that an infringement of Article 101 TFEU consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. What counts is therefore the place where it is implemented. Moreover, in determining whether that place is in the EEA, it is immaterial whether or not the participants in the cartel had recourse to subsidiaries, agents, sub-agents, or branches within the EEA in order to make their contacts with purchasers established there (see, to that effect, *Wood Pulp I*, paragraphs 16 and 17).

60 Where the condition relating to implementation is satisfied, the Commission's jurisdiction to apply the EU competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law (*Wood Pulp I*, paragraph 18).

61 *Wood Pulp I* was followed by this Court in Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, which concerned a decision dealing with a concentration within the meaning of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13), replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

62 On that occasion, it is true that the Court stated that application of the EU rules on the control of concentrations is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the European Union (*Gencor* v *Commission*, paragraph 90).

63 However, in paragraph 87 of *Gencor* v *Commission*, the Court stated, in essence, that the criterion as to implementation of an agreement as a factor linking the latter to EU territory is satisfied by mere sale within the Union of the product that is the subject of the agreement, irrespective of the location of the sources of supply and the production plant. Accordingly, the Court rejected the argument which the applicant in *Gencor* v *Commission* sought to draw from the fact that the concentration in question in that case originated and was implemented not in the territory of the Union but in South Africa and thus did not meet the conditions pertaining to territorial jurisdiction defined in *Wood Pulp I* (*Gencor* v *Commission*, paragraphs 56, 61 and 87).

64 It follows that the Court's reasoning in *Gencor* v *Commission* does not cast doubt on the *Wood Pulp I* case-law.

65 It follows that, in the present case, it is sufficient to concentrate on the issue of whether the Commission could use the category of 'direct EEA sales through transformed products' without breaching the principles stated in *Wood Pulp I*.

66 In that regard, it must be observed, first, that, when a worldwide cartel has an anti-competitive object, it is implemented in the internal market, within the meaning of *Wood Pulp I*, merely because the cartelised products are sold on that market.

67 The fact that a cartel is implemented does not necessarily mean that it has an actual impact (judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 110; see also, to that effect, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraphs 116 and 117). In fact, the question whether the cartel has had an actual impact on the prices charged by the participants is relevant only in the context of determining the gravity of the cartel, for the purpose of calculating the fine, provided that the Commission decides to use that criterion (see, to that effect, Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 31), which is among the criteria that it may take into consideration in that context. That was not the case here (see recital 416 of the contested decision).

68 Similarly, it is immaterial that the cartel participants did not always adhere to the decisions taken on prices. The fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants in a cartel to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be. More generally, such cartels entail direct interference with the essential parameters of competition on the relevant market. Indeed, by expressing the common intention to apply a given price level to their products, the producers concerned no longer independently determine their policy in the market, thus undermining the concept inherent in the provisions of the Treaty relating to competition (see Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 120 and the case-law cited).

69 Secondly, it should be observed that the notion of implementation within the meaning of *Wood Pulp I* is based in essence on the concept of an undertaking in competition law, as it has been developed in the case-law referred to in paragraph 6 above (see also, to that effect, Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11, and Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 95); the latter concept has to be regarded as having a decisive role in establishing the limits of the Commission's territorial jurisdiction to apply competition law.

70 In particular, although the undertaking to which the applicant belongs took part in a cartel conceived outside the EEA, the Commission must be able to take proceedings in respect of the repercussions which that undertaking's conduct has had on competition within the internal market and to impose a fine on it that is proportionate to the harm which the cartel represents for competition in that market. Accordingly, when the cartelised LCD panels made by the applicant were incorporated into finished products by companies belonging to the same undertaking as the applicant and those finished products were sold in the EEA by that undertaking, the cartel must be considered to have affected the transactions which took place up to and including the moment of that sale.

71 In that context, the question whether or not sales internal to that undertaking were made at higher prices because of the cartel is not decisive. If they were, the harmfulness of the cartel is reflected in those higher prices. If they were not, the harmfulness resides in the competitive advantage enjoyed by the undertaking participating in the cartel by comparison with the other undertakings which make finished products incorporating cartelised LCD panels but which purchase those panels at a price that does not result from normal market conditions. In that regard, it is clear from the case-law that to ignore the value of an undertaking's internal deliveries would inevitably give an unjustified advantage to vertically-integrated companies, since, in such a case, the benefit derived from the cartel might not be taken into account, with the result that the undertaking in question would avoid the imposition of a

fine proportionate to its importance on the product market to which the infringement relates (see, to that effect, Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869 ('*Europa Carton*'), paragraphs 127 and 128).

72 The applicant does not challenge that case-law but submits that simply applying it to the present case would have permitted the Commission to achieve the aim of not treating vertically-integrated undertakings more favourably. Thus, the applicant submits that it was not necessary for that purpose to use the concept of 'direct EEA sales through transformed products', contrary to what is maintained by the Commission in the contested decision. According to the applicant, the Commission cannot rely on *Europa Carton* in order to take into account the value of cartelised LCD panels incorporated outside the EEA into finished products sold within the EEA. In the applicant's view, sales of a finished product cannot be treated as sales of cartelised LCD panels. However, internal sales within vertically-integrated undertakings should be treated as sales to third parties and thus be taken into account if they are made in the EEA.

73 It must be stated that, as the Commission has pointed out, nothing in the *Europa Carton* case-law can be interpreted as meaning that the Commission does not have territorial jurisdiction when the products to which a cartel relates are – before they reach the internal market – first the subject of a transaction between two companies which are established outside the EEA and are part of the undertaking that has participated in the cartel.

74 In the present case, the cartel participants which (like the applicant) were vertically-integrated undertakings incorporated, outside the EEA, cartelised LCD panels into finished products sold in the EEA. Thus, the case with which the Commission was dealing did not lend itself to a straightforward application of the *Europa Carton* case-law. Consequently, the Commission was entitled to adapt that case-law to the circumstances of the present case in order to achieve the aim, to which that case-law refers, of not affording more favourable treatment to vertically-integrated undertakings which have taken part in a cartel.

75 In view of the foregoing, the Court concludes that, in taking into account 'direct EEA sales through transformed products', the Commission did not unlawfully extend its territorial jurisdiction to proceed against infringements of the competition rules laid down in the Treaties.

The alleged discrimination arising from the concept of 'direct EEA sales through transformed products'

76 The applicant maintains that the unlawful nature of the concept of 'direct EEA sales through transformed products' is shown by the fact that use of that concept exposed it to discriminatory and less favourable treatment by comparison with other participants in the same cartel.

– Preliminary observations

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

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

79 When the amount of the fine is determined, the principle of equal treatment means that the Commission cannot, by the application of different methods of calculation, discriminate between the undertakings which have participated in an agreement or a concerted practice contrary to

Article 101(1) TFEU (see Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others* [2012] ECR, paragraph 58 and the case-law cited).

80 In the present case the Commission calculated the fines to be imposed on each of the cartel participants on the basis of the three categories of sales set out in paragraph 18 above. The fact that the category 'direct EEA sales through transformed products' was applicable only in the case of some of those participants does not amount to discrimination, since the Commission assessed the applicability of that category to each of the participants on the basis of the same objective criteria. Similarly, the fact that the non-inclusion of 'indirect sales' may have been of greater benefit to certain participants than it was to the applicant does not in itself amount to discrimination (see, to that effect, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, paragraphs 135 and 138, and the Opinion of Advocate General Kokott in that case, point 87).

– Alleged discrimination compared with Samsung

81 The applicant maintains that the Commission treated it less favourably than Samsung, even though the two undertakings were in allegedly comparable situations. In that regard, the applicant points out that deliveries of cartelised LCD panels made by Samsung to its subsidiaries within the EEA, which incorporated them into finished products, were taken into account as 'direct EEA sales through transformed products' only when the finished products were sold in the EEA. By contrast, the cartelised LCD panels sold by the applicant to the same Samsung European subsidiaries were all taken into account as 'direct EEA sales', even when the finished products were sold by those subsidiaries outside the EEA. In the light of those circumstances, the applicant points out that when it sells cartelised LCD panels to Samsung, those panels remain within the circle of cartel members and there is thus no entry into the market.

82 It should be noted at the outset that the Commission applied the same criteria with regard to Samsung and the applicant. First, sales of cartelised LCD panels made by the applicant, or by Samsung, to independent third parties established in the EEA were included among 'direct EEA sales'. Second, situations in which the applicant or Samsung first transferred cartelised LCD panels to other companies within the same undertaking, which incorporated them into finished products sold to independent third parties, were taken into account as 'direct EEA sales through transformed products', if those sales to third parties took place in the EEA.

83 Next, the Commission was perfectly entitled to include the applicant's sales to Samsung's European subsidiaries among 'direct EEA sales', since the cartelised LCD panels in question were sold to customers within the EEA, which necessarily distorted competition in the internal market. The measure of any harm must be assessed on the basis of the applicant's turnover from, inter alia, those sales, in accordance with the case-law referred to in paragraph 37 above.

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

85 Furthermore, although it is true that some of the cartelised LCD panels which Samsung's European subsidiaries purchased from the applicant may have been incorporated into finished products sold outside the EEA, that does not affect the fact that a sale between two separate undertakings did in fact take place in the EEA when the applicant's LCD panels were purchased by Samsung's European subsidiaries. Thus, the Commission was entitled to conclude that these were sales affecting competition in the internal market.

86 As regards the fact that, in the case of Samsung, the Commission took into account only sales of cartelised LCD panels that were incorporated, by Samsung's European subsidiaries, into finished products sold in the EEA, the Court notes that the first sale of those cartelised LCD panels to a third party undertaking occurred at the time of the sale of the finished product. Therefore, in order to take into consideration solely sales having a link with the EEA, the Commission was entitled, or even obliged, to confine itself to taking into account sales of cartelised LCD panels which had been incorporated into finished products sold in the EEA.

87 As regards the applicant's argument that the fact of drawing a distinction based on the destination of the finished product is contrary to the case-law arising from the judgment of the Court of Justice in Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 33, it should be noted that the question which arose in that case was different from the question in the present case. There it was a question as to whether the prohibition of abuse of a dominant position, laid down in Article 102 TFEU, was applicable where the holder of such a position, who was established in the internal market, sought, by abusing that position, to eliminate a competitor also established in that market. It was only in regard to that issue that the Court of Justice held that it did not matter whether the conduct in question related to the competitor's exports or its trade within the internal market. The Court of Justice did not fail to point out that it was the actual elimination of the competitor concerned which would have repercussions on the structure of competition within the internal market (*Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, paragraph 33). In the present case, however, the Commission was entitled to define the category of 'direct EEA sales through transformed products' by restricting that category solely to sales of cartelised LCD panels which were incorporated in finished products sold in the EEA. Indeed, if that first sale of the cartelised products to a third party had not taken place in the EEA, the link between the internal market and the infringement would have been too weak.

88 Lastly, although it cannot be ruled out that even the LCD panels incorporated in other finished products sold by Samsung to third parties established outside the EEA may subsequently have come back into the EEA and thus have distorted competition there, it should be recalled that it is settled case-law that the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the 2006 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (see, to that effect, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 112, and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 271). Furthermore, the Commission is not obliged to find and penalise all anti-competitive conduct (judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 369). Moreover, since the Commission applied to all the vertically-integrated undertakings the concept of 'direct EEA sales through transformed products', which excludes sales of cartelised LCD panels that were incorporated in finished products sold outside the EEA, regardless of the place where the finished products were made, there has been no unjustified discrimination.

– Alleged discrimination compared with two other addressees of the contested decision

89 The applicant submits that it was discriminated against as compared with two other cartel participants, namely LGD and the company governed by Taiwan law AU Optronics Corp. ('AUO'), both of which, in the applicant's view, belonged to groups whose degree of vertical integration was comparable to that of the applicant. According to the applicant, since the Commission applied to those participants only the concept of 'direct EEA sales', their sales of cartelised LCD panels to related companies were taken into account solely when the purchaser was located in the EEA. By contrast, because of the use of the concept of 'direct EEA sales through transformed products', the applicant's internal sales were taken into account even when they were made to subsidiaries established outside the EEA, provided that the finished products, assembled by those subsidiaries using cartelised LCD panels, were sold in the EEA. The applicant argues that the discriminatory nature of the distinction drawn by the Commission is all the more blatant given that, as can be seen from recitals 394 and 396 of the contested decision, it used in substance the same evidence to establish the effect of the cartel, on the one hand, on the applicant's sales to its subsidiaries and, on the other, on the sales of LGD and AUO to their related companies.

90 In the first place, the Court observes that, in the contested decision, the Commission did not conclude that LGD constituted a single undertaking, within the meaning of the case-law referred to in paragraphs 6 and 69 above, with the company governed by Korean law, LG Electronics, Inc. ('LGE'), and the company governed by Netherlands law, Koninklijke Philips Electronics NV ('Philips'). Nor did the Commission consider that AUO and the company governed by Taiwan law, BenQ Corp. ('BenQ'), formed a single undertaking. Accordingly, LGD's sales to LGE and Philips and AUO's sales to BenQ were regarded as 'direct EEA sales' and not as 'direct EEA sales through transformed products'. The different treatment applied to the applicant's sales is justified by the fact that the applicant transferred cartelised LCD panels first, within the same undertaking, to companies established outside the EEA, which then incorporated those panels into finished products which were sold – by the same undertaking – to third parties established within the EEA. That objective difference justifies including the applicant's sales in a different category from the category applied in the case of LGD's sales to LGE and Philips.

91 In the second place, inasmuch as the applicant's complaint summarised in paragraph 89 above may be interpreted as taking issue with the Commission for finding no single undertaking to exist either as between LGD, LGE and Philips or as between AUO and BenQ, it should be recalled, first of all, that, according to the case-law, a complaint pertaining to a plea for annulment is inadmissible on the ground of lack of interest in bringing proceedings where, even if it were well founded, annulment of the contested act on the basis of that plea would not give the applicant satisfaction (Case C-401/09 P *Evropaïki Dynamiki* v *ECB* [2011] ECR I-4911, paragraph 49; see also to that effect, Case 37/72 *Marcato* v *Commission* [1973] ECR 361, paragraphs 2 to 8, and Case C-46/98 P *EFMA* v *Council* [2000] ECR I-7079, paragraph 38).

92 In the present case, the applicant's complaint is inadmissible on the ground that, even if the Commission were wrong to have concluded that neither LGD, LGE and Philips, nor AUO and BenQ, formed a single undertaking, that would be of no benefit at all to the applicant. Indeed, contrary to what it maintains, those alleged errors on the Commission's part – even if they were established – would not show that the concept of 'direct EEA sales through transformed products' is in turn erroneous, since the definition of that concept is distinct from the cases to which it has or has not been applied. Thus, if the Commission had found that the groups of companies mentioned above formed single undertakings, it would quite simply not have been able to take transfers of cartelised LCD panels within the same undertaking into account as 'direct EEA sales'. However, the Commission would have ascertained which of those sales met the conditions for being regarded as 'direct EEA sales through transformed products'; those conditions would have been exactly those applied to the applicant's sales which were included in that category.

93 In any event, even if it were open to the applicant to advance the complaint summarised in paragraph 89 above, it should be recalled that, according to the case-law, the principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party; moreover, where an undertaking has acted in breach of Article 101(1) TFEU, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, where, as in the present case, those undertakings' circumstances are not the subject of proceedings before the Courts of the European Union (see Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 77 and the case-law cited).

94 For the same reasons the applicant can derive no advantage from any errors the Commission may have made regarding the existence of a single undertaking as between LGD, LGE and Philips and as between AUO and BenQ.

95 As to the fact, put forward by the applicant, that in the statement of objections the Commission had considered that LGD, LGE and Philips formed a single undertaking, it must be borne in mind that, according to the case-law, it is inherent in the nature of the statement of objections that it is 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. The Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains. Thus, the statement of objections does not prevent the Commission from altering its standpoint in favour of the undertakings concerned (see Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 63 and the case-law cited).

96 It follows that the Commission is not obliged to maintain the factual or legal assessments set forth in that document. Rather, it must give as reasons for its ultimate decision its final assessments based on the results of the whole of its investigation as they stand at the time the administrative proceedings are closed. Furthermore, the Commission is not obliged to explain any differences between its final assessments and its provisional assessments set out in the statement of objections (see *Bertelsmann and Sony Corporation of America* v *Impala*, paragraphs 64 and 65 and the case-law cited).

97 Accordingly, the Commission was not required to explain in the contested decision why it had ultimately taken the view that LGD did not form a single undertaking with LGE and Philips.

98 Finally, the Court rejects as ineffective the applicant's argument concerning the fact that the reasoning followed and the evidence relied on by the Commission with regard to both sales of cartelised LCD panels made within undertakings and sales made to undertakings with a particular relationship to the participants are in essence the same. That circumstance does not alter the fact that whether there is or is not a single undertaking within the meaning of the case-law referred to in paragraphs 6 and 69 above is a sufficient ground to justify the Commission classifying, for the purposes of the fine, sales made in one case differently from sales made in the other.

99 In view of the foregoing considerations, the Court rejects the second part of the first plea; consequently, the first plea in its entirety must be rejected.

2. *Second plea in law, alleging that the Commission infringed Article 101 TFEU and Article 53 of the EEA Agreement in concluding that the infringement extended to LCD-TV panels*

100 By the present plea, the applicant disputes, in essence, that its anti-competitive conduct relating to LCD-TV panels and LCD-IT panels may be regarded as giving rise to a single and continuous infringement. It also complains that the Commission failed to take account of the fact that the Korean participants in the infringement established in the contested decision had acted in concert with the Japanese suppliers of LCD-TV panels in respect of the latter products.

Preliminary observations

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

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

103 It must also be made clear that the single objective to which the overall plan characterising a single and continuous infringement is directed cannot be determined by a general reference to the distortion of competition in the market concerned by the infringement, since an impact on competition, whether it is the object or the effect of the conduct in question, is an inherent element of any conduct covered by Article 101(1) TFEU. Such a definition of the concept of a single objective is likely to deprive the concept of a single and continuous infringement of part of its meaning, since it would have the consequence that different instances of conduct which relate to a particular economic sector and are prohibited under Article 101(1) TFEU would have to be systematically characterised as constituent elements of a single infringement. Thus, for the purposes of characterising various instances of conduct as a single and continuous infringement, it is necessary to establish whether they display a link of complementarity, in that each of them is intended to deal with one or more consequences of the normal pattern of competition, and, through that interaction, contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of an overall plan having a single objective. In that regard, it will be necessary to take into account any circumstance capable of establishing or casting doubt on that link, such as the period of application, the content (including the methods used) and, correlatively, the objective of the various instances of conduct concerned (see *Amann & Söhne and Cousin Filterie* v *Commission*, paragraph 92 and the case-law cited).

104 The applicant's arguments must be considered in the light of those principles, once the Court has summarised the findings made by the Commission in the contested decision which are relevant in that regard.

Findings made in the contested decision

105 It should first of all be observed that the infringement alleged by the Commission against the addressees of the contested decision resides in the fact that they participated (i) in the 'Crystal Meetings', during which they fixed minimum prices for cartelised LCD panels, discussed future prices in order to avoid price reductions and coordinated their price increases as well as their levels of production, and (ii) in bilateral meetings concerning the matters discussed at the 'Crystal Meetings' (see paragraph 15 above).

106 A more detailed description is given in the contested decision when the Commission, first, considered that the cartel participants had engaged in a single, complex and continuous cartel infringement in respect of LCD-IT panels and LCD-TV panels by a series of linked and interacting actions which lasted throughout the whole infringement period, with the objective of increasing and maintaining prices of those LCD panels at worldwide and EEA level (recital 283).

107 Second, according to the contested decision, price fixing, achieved though price increases, the setting up of price ranges and the setting of minimum or target prices, and the adoption of a common understanding and future strategy on the parameters which determine prices, such as production, capacity, shipments and demand, together with a monitoring system to ensure compliance with the arrangements concluded, were all part of an overall plan, the common aim of which was to control prices for worldwide, and thus also EEA, sales of LCD-IT and LCD-TV panels (recital 284).

108 Third, the Commission noted that the characteristics of the infringement, the lines of action and the organisation followed the same pattern throughout the whole infringement period. Although the *modus operandi* changed over time, that was, according to the contested decision, to be considered normal in a long-lasting cartel in which the participants had adapted to changing circumstances, in particular to avoid detection. Thus, in the contested decision, it was noted that the presence at cartel meetings held from May 2005 onwards of lower-level staff, instead of higher-level managers, did not bring about a change in the nature of the meetings, which continued to be concerned with price fixing and the control of parameters such as the production of cartelised LCD panels (recital 287).

109 Fourth, the Commission acknowledged that the discussions which had taken place in the first year of the cartel had concentrated on LCD-IT panels and noted that LCD-TV panels had become part of those discussions as of September 2002. It observed, however, that as more participants in the cartel had started LCD-TV-panel production, they had begun to share their data relating thereto with the others. In that regard, the Commission pointed out (i) that, from then onwards, LCD-TV panels had systematically been discussed at the same meetings as those at which LCD-IT panels were discussed and (ii) that the participants were in a position to reallocate capacities among the different cartelised LCD panel applications in order to influence the demand for, and thereby also the price of, those products. On that basis the Commission concluded that the same undertakings were pursuing, in respect of LCD-TV panels, the same objective and were following the same *modus operandi*, within the framework of the same overall plan, as was the case with the discussions on LCD-IT panels which had been taking place since 2001 (recitals 288 and 289).

Assessment of the arguments challenging the findings made in the contested decision

110 It is apparent from the many documents gathered by the Commission that the cartel participants were in a position to reallocate production capacities among LCD-IT and LCD-TV panels in order to influence the demand for, and thereby the price of, those products.

111 In that regard, in the first place, recital 154 of the contested decision refers to the notes of a participant at the 'Crystal Meeting' on 11 June 2003, which the applicant attended, in which a statement of [*confidential*] was included in the following terms:

'… If current monitor/[notebook] clients reduce orders, the production capacity will be shifted to produce LCD-TVs in response …'

112 In the second place, it can be seen from an e-mail relating to the 'Crystal Meeting' of 9 July 2003, referred to in recital 155 of the contested decision, that the applicant based its priorities as regards the allocation of production capacity for LCD panels as between LCD-TV panels and LCD-IT panels on the expected profit margins. The same e-mail mentions a reallocation of production capacity from LCD-IT panels towards LCD-TV panels by [*confidential*]. Furthermore, the notes drawn up by one of the participants at that meeting mention the fact, referred to in recital 156 of the contested decision, that, for the applicant, the production of monitors was a way to absorb any available production capacity.

113 In the third place, in an internal e-mail of [*confidential*], relating to the minutes of the 'Crystal Meeting' on 5 February 2004, which had been held at the applicant's premises, it is stated that [*confidential*] was reallocating its production capacity inter alia towards LCD-TV panels.

114 In the fourth place, in recital 187 of the contested decision, the Commission referred to the notes of a participant at the 'Crystal Meeting' on 4 November 2004, which mentioned discussions concerning the reallocation of production capacities between the different cartelised LCD panel applications in order to influence demand. In particular, [*confidential*] '[claimed] that it [would] only turn to starting 17" FPM production if the TV market demand [was] limited and it [had] no other alternative'. According to those notes, the applicant's supply for certain LCD-TV panels had become insufficient because it had redirected its production capacity to other LCD panels [*confidential*], which were LCD-IT panels, as the applicant confirmed in response to a written question put by the Court.

115 In the fifth place, in recital 192 of the contested decision, the Commission cites notes relating to the 'Crystal Meeting' on 7 January 2005, at which the applicant participated, from which it can be seen that another cartel participant was reallocating production capacity from monitors to notebooks and televisions.

116 In the sixth place, in recital 220 of the contested decision, the Commission mentions the fact that, according to a report from [*confidential*] on the 'Crystal Meeting' of 4 November 2005, the applicant, on that occasion, presented its sales volumes and production capacities. In that regard, it should be pointed out that the report in question mentions the fact that the applicant, during November 2005, was using almost 100% of its capacity on certain production lines for making LCD-TV panels.

117 In the seventh place, in recital 223 of the contested decision, the Commission refers to documents relating to the 'Crystal Meeting' on 6 December 2005, which the applicant attended, in which it is mentioned that one of the cartel participants was reallocating part of its production capacity to televisions and notebooks.

118 That evidence shows that the cartel participants, including the applicant, were in a position to reallocate, and did in fact reallocate on a number of occasions, their production capacity from LCD-IT panels to LCD-TV panels and vice versa, with a view to maintaining prices for each of those products at the agreed levels or, at the least, in order to limit price reductions. That evidence therefore supports the conclusion that there was a link of complementarity, within the meaning of the case-law set out in paragraph 103 above, between the decisions taken and the information exchanged with regard to the two categories of cartelised LCD panels.

119 As regards the applicant's reliance on the allegedly superficial and episodic nature of the information exchanges between the cartel participants concerning LCD-TV panels, it should be observed that the evidence in the contested decision shows, first, that on several occasions the participants at the cartel meetings agreed to maintain the prices of LCD-TV panels. As was stated in recital 154 of the contested decision, at the 'Crystal Meeting' of 11 June 2003, information was exchanged about, amongst other things, price policies which one of the cartel participants was considering, inter alia, for LCD-TV panels. Similarly, tables were examined which concerned price trends for various types of cartelised LCD panels for May, June and July 2003. One of those tables contains data concerning LCD-TV panels. Next, in recital 165 of the contested decision, the Commission describes documents relating to the 'Crystal Meeting' on 7 November 2003, from which it can be seen that the participants set themselves the targets of increasing prices for LCD panels for notebooks and of maintaining price levels for other cartelised LCD panels, with LCD-TV panels being expressly mentioned. Attached to the minutes of that meeting are tables presenting the prices for many categories of cartelised LCD panels, including LCD-TV panels, during 2003. Other examples of the fact that discussions at the cartel meetings covered data, in particular prices and production capacity, concerning not only LCD-IT panels, but also LCD-TV panels, are included in recitals 167, 171, 173, 174, 202 and 214 of the contested decision and in the documents on the Commission's case file to which those recitals refer.

120 Even assuming that the cartel participants exchanged more information, or more sensitive information, with regard to LCD-IT panels than with regard to LCD-TV panels, the fact remains that the evidence gathered by the Commission shows that all that information was exchanged at the same time, often by means of the same documents and, above all, in pursuit of the same aim. Moreover, the sensitive and detailed nature of the information provided by the applicant is apparent from recital 202 of the contested decision, in which the Commission refers to a document relating to the 'Crystal Meeting' of 5 May 2005, from which it is apparent that, so far as the applicant is concerned, in view of the tight capacity, the price of one category of LCD-TV panel increased from USD 5 to USD 10 in May, which brought the price to USD 230.

121 As regards the fact, relied on by the applicant, that in its view discussions concerning LCD-TV panels illustrate a continuous downward trend in prices for those products, it should be noted that a number of documents on which the Commission relied in the contested decision show the cartel participants' intention to maintain price levels for those LCD panels and show that price reductions were unlikely in the short term (see recitals 165, 167, 173 and 207 of the contested decision). In any event, even if the cartel discussions had often led only to decisions to lower prices, that coordinated conduct would none the less have distorted competition, since price reductions were coordinated and could have been larger in the absence of concerted action. Moreover, the possibility of reallocating production capacity, which was discussed within the cartel, enabled the participants to react to LCD-TV-panel price reductions in a coordinated manner within the framework of an overall plan.

122 As regards the fact, also invoked by the applicant, that the employees sent by the cartel participants to the cartel meetings were specialists in LCD-IT panels, rather than LCD-TV panels, the Court notes that, although that fact may be interpreted as meaning that LCD-IT panels were more important in the eyes of the undertakings concerned, it nevertheless does not mean that discussions about LCD-TV panels were merely episodic and superficial. Indeed, as the Commission rightly points out, the fact in question shows that the exchanges of information concerning LCD-TV panels were planned in advance, since the personnel who attended the meetings had to prepare themselves on that subject, which was not part of their principal sphere of activity.

123 It can be seen from the foregoing that the exchanges of data concerning LCD-TV panels were part of the same overall plan as the exchanges relating to LCD-IT panels and, consequently, part of the same single and continuous infringement.

124 The applicant's other arguments do not call in question the finding that there was indeed a single and continuous infringement, which related both to LCD-IT panels and to LCD-TV panels and which the Commission was entitled to penalise by an overall fine.

125 First, it is wholly irrelevant that the cartel participants began to discuss data relating to LCD-TV panels after a first phase in which the cartel had concerned only LCD-IT panels. Once it has been proved that the exchanges of information and the decisions taken at the cartel meetings with regard to LCD-TV panels were part of the same overall plan as that put in place for LCD-IT panels, the point at which that extension of the cartel took place, for each of the participants, has no relevance. The point should also be made that, for the purposes of calculating the fine, the Commission took into account the average value of the relevant sales of each addressee of the contested decision throughout the infringement period. That average is affected – favourably in the applicant's case – by the fact that the applicant was not producing LCD-TV panels at the start of the infringement period.

126 Moreover, the fact that the applicant was not producing LCD-TV panels when data relating to the latter began to be exchanged at the 'Crystal Meetings' in no way detracts from the ability it had, once it expanded its business to LCD-TV panels, to take advantage of the information available to it concerning the prices and production capacity of the other cartel participants that had preceded it in that sector. In that regard, it is clear from the case-law that an undertaking may be held liable for a concerted practice even though its participation is limited to simply receiving information about the future conduct of its competitors (see, to that effect, judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraphs 459 and 460 and the case-law cited). Thus, an undertaking may have participated directly in only some of the anti-competitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is entitled to attribute liability to that undertaking in relation to all the anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (C-441/11 P *Commission* v *Verhuizingen Coppens* [2012] ECR, paragraph 43).

127 In those circumstances it is not necessary to consider the probative value, disputed by the applicant, of the document on which the Commission relied in concluding that the extension of the cartel to LCD-TV panels began in September 2002.

128 Second, it is immaterial that LCD-IT panels and LCD-TV panels may belong to different markets, as the applicant maintains. In that regard, the Court observes first of all that a single infringement does not necessarily have to relate to one product or to substitutable products. Other criteria are also relevant in that regard, such as whether the objectives of the practices at issue are the same or different, whether the undertakings which participated in them are the same, whether the detailed rules for the implementation of those practices are the same, whether the natural persons involved on behalf of the undertakings are the same and whether the geographical scope of the practices at issue is the same (see, to that effect, judgment of 12 December 2012 in Case T-410/09 *Almamet* v *Commission*, not published in the ECR, paragraphs 172 and 174 and the case-law cited). Those criteria are met in the present case, as can be seen from paragraphs 110 to 127 above.

129 Furthermore, it is settled case-law that for the purposes of applying Article 101(1) TFEU, the reason for defining the relevant market is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the internal market. Consequently, there is an obligation on the Commission to define the market in a decision applying Article 101(1) TFEU only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the internal market (Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 99, and Case T-48/02

Brouwerij Haacht v *Commission* [2005] ECR II-5259, paragraph 58; see also, to that effect, order of 16 February 2006 in Case C-111/04 P *Adriatica di Navigazione* v *Commission*, not published in the ECR, paragraph 31).

130 In the present case the applicant does not dispute that the cartel was liable to affect trade between Member States and had as its object the restriction or distortion of competition within the internal market.

131 Moreover, the case-law has also made clear that the market covered by a Commission decision finding an infringement of Article 101 TFEU is determined by the agreements and the activities of the cartel (Case T-384/06 *IBP and International Building Products France* v *Commission* [2011] ECR II-1177, paragraph 118 and the case-law cited). In the present case, as the Commission has rightly pointed out, it was the members of the cartel who deliberately concentrated their anti-competitive conduct on both LCD-IT panels and LCD-TV panels.

132 Next, it is necessary to consider the argument which the applicant seeks to draw from the judgment in Case T-61/99 *Adriatica di Navigazione* v *Commission* [2003] ECR II-5349, paragraph 36, to support its contention that the Commission's definition of the markets concerned was inadequate and that it thus misunderstood the exact nature and extent of the infringement established in the contested decision.

133 In that regard, it is true that in paragraph 30 of *Adriatica di Navigazione* v *Commission*, the Court observed that objections to the Commission's definition of the relevant market may relate to factors having a bearing upon the application of Article 101(1) TFEU other than the existence of a restriction of competition in the internal market or an effect on trade between Member States, such as the scope of the cartel in question, the question whether it is a specific or general cartel, or the extent of the individual participation of each of the undertakings concerned. Likewise, in paragraphs 31 and 32 of the judgment, the Court pointed out that a Commission decision finding there to have been participation in a cartel may have consequences for the relations of the addressees of that decision with third parties. Thus it is desirable that, when it adopts a decision in which it finds that an undertaking has participated in a complex, collective and continuous infringement, the Commission, in addition to ensuring that the specific conditions for applying Article 101(1) TFEU are satisfied, take into consideration the fact that, whilst the decision will entail the personal liability of each of its addressees, that liability is limited to their particular involvement in the collective conduct penalised, as properly defined.

134 However, even if read in the light of that case-law, the applicant's argument in the present case cannot succeed. It is apparent from paragraphs 110 to 127 above that the Commission held the applicant liable solely for the infringement which consisted specifically in participation in the 'Crystal Meetings' and in the bilateral meetings related thereto, which had the aim of coordinating prices and production capacity for both LCD-IT panels and LCD-TV panels. Thus, the lack of a more precise definition of the markets concerned by the cartel did not expose the applicant to the risks to which the Court drew attention in *Adriatica di Navigazione* v *Commission*, which are mentioned in paragraph 133 above.

Failure to take account of contacts with Japanese suppliers

135 The applicant complains that the Commission failed to take account of the fact that the Korean participants in the infringement established in the contested decision were allegedly acting in concert with the Japanese suppliers of LCD-TV panels, who, together with those Korean participants, were the major players on that market, whilst the applicant played only a secondary role. According to the applicant, the real infringement which the Commission should have proceeded against in relation to

those LCD panels lay in the concerted action among the major players in that market. It submits that the Commission therefore failed to comply with its obligation to state reasons and infringed the principle of equal treatment and the principle of proportionality.

Preliminary observations

136 Whilst the case-law relating to the concept of a single and continuous infringement permits the Commission to proceed, by means of a single set of proceedings and a single decision, against several instances of conduct which could have been proceeded against individually, that does not mean that the Commission is obliged to act in that way. Thus, even if the alleged concerted action between the Japanese suppliers of LCD-TV panels and the Korean participants in the cartel covered by the contested decision amounted to an infringement of Article 101 TFEU and even if that infringement were part of the same single and continuous infringement as that identified in the contested decision, the Commission would not have been obliged to proceed against all those instances of conduct.

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

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

139 In the present case, the Commission considered that it did not have – or did not yet have – sufficient evidence against the Japanese suppliers and thus chose not to proceed against them at the same time as against the applicant and the other addressees of the contested decision, in respect of whom it had, by contrast, a good deal of evidence of the existence of an infringement, both for LCD-IT panels and for LCD-TV panels, as has been found above (paragraphs 110 to 134). That situation constitutes an objective reason which justifies the Commission's choice. However, it should be noted that, in proceedings brought against the Japanese suppliers, the Commission will be obliged to observe inter alia the principle *ne bis in idem* with regard to the applicant.

The alleged infringement of the obligation to state reasons

140 The applicant maintains that the Commission should have explained in the contested decision the reasons why it excluded the Japanese suppliers of LCD-TV panels from the proceedings that culminated in adoption of the contested decision.

141 In that regard, it should be observed that the Commission was under no obligation to set out, in the contested decision, the reasons why no action was being taken against the Japanese suppliers in the context of those proceedings. It has been held that the obligation to state the reasons on which a measure is based cannot encompass an obligation for the institution from which it emanates to give reasons for the fact that it did not adopt other measures of a similar kind addressed to third parties (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 414, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 63).

The alleged infringement of the principle of equal treatment

142 The Court recalls that, according to the case-law set out in paragraph 93 above, where an undertaking has acted in breach of Article 101(1) TFEU, it cannot escape being penalised altogether on the ground that other undertakings have not been fined, even where, as in the present case, those undertakings' circumstances are not the subject of proceedings before the Courts of the European Union. In that regard, whilst it is true that the Commission may not discriminate between the undertakings which have taken part in the same cartel, the fact remains that the infringement alleged against the applicant resides in the concerted action which took place at the 'Crystal Meetings' and the bilateral meetings related thereto between the Taiwanese and Korean suppliers of cartelised LCD panels. Since the Japanese suppliers were not involved in that concerted action, the contested decision is not vitiated by any inequality of treatment in that regard.

143 As regards the applicant's argument that the only significant discussions concerning LCD-TV panels were those involving the Japanese suppliers, in which the applicant did not take part, it need only be observed that the Commission produced sufficient evidence to establish that the addressees of the contested decision acted in concert with each other, in the framework of an overall plan, in respect of both LCD-IT panels and LCD-TV panels (see paragraphs 105 to 134 above). That concerted action constitutes an infringement against which the Commission was entitled to proceed, irrespective of the possible existence of other infringements concerning LCD-TV panels in which certain addressees of the contested decision, other than the applicant, might have been involved.

144 In response to the argument which the applicant bases on the Commission's administrative practice, in particular from Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article 81 [EC] (Case COMP/39.188 – Bananas) ('the Bananas decision'), it should be recalled that it is settled case-law that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 92 and the case-law cited).

145 In order to make clear the differences between the facts in issue in the Bananas decision and those of the present case, the Court notes that one of the participants in the infringement with which the Bananas decision was concerned was granted a 10% reduction of the fine on account of mitigating circumstances on the ground that it did not appear from the case file that that participant was aware of certain aspects of that infringement, aspects in which it was not directly participating, or that it could reasonably have foreseen them (see recitals 465 and 466 of the Bananas decision).

146 By contrast, the circumstances of the present case are not comparable since the applicant, which actually participated in all the aspects of the infringement established in the contested decision, seeks to rely on the fact that it did not participate in an infringement involving other undertakings.

147 In any event, as the Commission correctly points out, even assuming that the bilateral contacts between the Korean and Japanese producers formed a single and continuous infringement with the infringement established in the contested decision and that the applicant was unaware of the existence of those bilateral contacts, that would not mean that the objections raised against the applicant because of its participation in the infringement established in the contested decision would be unfounded or that the fine imposed on the applicant should be reduced. Indeed, nothing makes it possible to assert that the fine imposed in the case of a larger cartel, including the Japanese suppliers, would ultimately have been lower for the applicant. In that regard, any reduction which the Commission might have granted the applicant by way of a mitigating circumstance could have been offset, or even exceeded, by the application of higher percentages as regards the gravity of the infringement and the 'entry fee'.

The alleged infringement of the principle of proportionality

148 The applicant alleges that there has been an infringement of the principle of proportionality in that the Commission failed to take into account that the anti-competitive conduct relating to LCD-TV panels was less serious than the conduct relating to LCD-IT panels.

149 In response to that argument, the first point to make is that the Commission, correctly, considered there to be a single and continuous infringement. In that regard, it is clear from the case-law that the Commission is not obliged to carry out a separate assessment for each aspect of a single infringement, on account, inter alia, of the existence of an overall strategy shared by all the members of the cartel (see, to that effect, *Carbone-Lorraine* v *Commission*, paragraph 49).

150 In the second place, as regards more particularly the proportionate nature of the multipliers used by the Commission with regard to the gravity of the infringement and as the 'entry fee' (see paragraph 24 above), it should be observed that the 2006 Guidelines and the case-law on which they draw provide that the gravity of the infringement is initially assessed on the basis of the particular characteristics of the infringement, such as its nature, the cumulative market share of all the undertakings involved, the geographical scope of the infringement and whether it was implemented. That assessment is subsequently adjusted on the basis of aggravating and mitigating circumstances specific to each of the undertakings which participated in the infringement (see, to that effect, Case T-348/08 *Aragonesas Industrias y Energía* v *Commission* [2011] ECR II-7583, paragraph 264 and the case-law cited).

151 The purpose of the initial stage is to determine the basic amount of the fine to be imposed on each undertaking concerned, by applying to the value of the sales of the goods and services concerned on the relevant geographical market of each of the undertakings an initial multiplier reflecting the gravity of the infringement, and a second multiplier aimed at deterring them from undertaking such unlawful conduct in the future. Each of those multipliers is determined in the light of factors which reflect the characteristics of the infringement as a whole, that is to say, inasmuch as it combines all of the anti-competitive conduct of all of the participants (see, to that effect, *Aragonesas Industrias y Energía* v *Commission*, paragraph 265).

152 Accordingly, even assuming that the anti-competitive conduct relating to LCD-TV panels was less serious than that relating to LCD-IT panels, the Commission was entitled to set the multiplier for gravity and that for the 'entry fee' in the light of the overall plan related to the single and continuous infringement in which all of that conduct was subsumed.

153 Moreover, concerning the fact that in the Bananas decision the Commission applied lower percentages than those in the contested decision and granted a high reduction on account of a mitigating circumstance, it is sufficient to refer to the case-law mentioned in paragraph 144 above and to point out that in the Bananas decision the Commission granted a reduction in the light of the particular situation to which the regulatory framework in the bananas sector gave rise (see recital 460 of the Bananas decision and the reference made therein, and recital 467).

154 In view of all the considerations set out above, the second plea must be rejected.

3. *Third plea in law, alleging that the value of relevant sales used by the Commission with regard to the applicant wrongly included sales other than sales of cartelised LCD panels*

155 In support of its claim that the Court should reduce the fine imposed on it in the contested decision, the applicant raises the third plea in law, which alleges, in essence, that the value of sales which was used to calculated the fine was inaccurate, as the applicant mistakenly included sales relating to categories of LCD panels other than those covered by the contested decision.

156 It should be recalled that the review of legality of decisions adopted by the Commission is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.

157 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the applicant received a fine whose amount properly reflects the gravity of the infringement in question (see Case T-343/06 *Shell Petroleum and Others* v *Commission* [2012] ECR, paragraph 117 and the case-law cited).

158 In the present case, it is common ground between the parties that, because of the applicant's mistakes, the basic amount of the fine imposed on it was, before rounding down, EUR 301 684 468 and that the portion of that amount arising from the mistakes in question was EUR 13 246 618. However, the parties disagree on the way in which those amounts should be rounded.

159 In the application, the applicant has asked that EUR 13 250 000 be deducted from the fine which was imposed on it in the contested decision, namely EUR 300 000 000. The new amount should thus be EUR 286 750 000.

160 In the defence the Commission explained that, for all the addressees of the contested decision, it rounded the basic amount down to the two first digits, unless this led to a reduction of more than 2% of the amount before rounding, in which case the Commission rounded down to the first three digits.

161 In that regard, the Court notes that in the contested decision the applicant had the benefit of rounding to the first two digits. The basic amount without rounding was EUR 301 684 468, whilst the rounded amount, as is indicated in Table 6 in the contested decision, was EUR 300 000 000.

162 According to the Commission, the applicant's suggested calculation is incorrect since it involves double rounding: the rounding already applied by the Commission to the basic amount set out in the contested decision and the rounding as a result of which the amount to be deducted following the exclusion of sales of products other than cartelised LCD panels rises from EUR 13 246 618 to EUR 13 250 000.

163 However, as the Commission points out, if the method followed in the contested decision is applied to the basic amount resulting from the corrected sales figures, namely EUR 288 437 850, that gives a rounded down amount of EUR 288 000 000. Rounding to the first two digits would give rise to a reduction of EUR 8 437 850, which is more than 2% (2.9%) of the full basic amount.

164 In the reply, the applicant argues that rounding the new amount of its fine to the first three digits, instead of to the first two, would result in it being the addressee of the contested decision to benefit least from rounding down. It thus requests a more significant reduction.

165 In that regard, it should be observed that although it is for the Court to assess for itself the circumstances of the case in order to determine the amount of the fine, the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in discrimination between undertakings which have participated in an agreement or concerted practice, contrary to Article 101(1) TFEU (see, to that effect, *Commission* v *Verhuizingen Coppens*, paragraph 80).

166 In the present case, the Commission, in the contested decision, applied the rounding method described in paragraph 160 above to all the cartel participants. That method is objective and affords all those participants the benefit of a reduction, within the 2% limit. Whilst it is true that some reductions are

larger than others and that the applicant's reduction would be the lowest percentage reduction if the Court followed the same method, the fact remains that any rounding method entails adjustments which will vary for each undertaking and will result in varying levels of reductions. Therefore, since the method chosen by the Commission benefits, admittedly to a differing degree, all the addressees of the contested decision and since that degree is subject to the 2% limitation, it is appropriate to adhere to that method in order to avoid any unequal treatment (see, to that effect, Case T-299/08 *Elf Aquitaine* v *Commission* [2011] ECR II-2149, paragraphs 307 and 308).

167 It should however be borne in mind that, in order to ensure the effectiveness of Article 18(2) and (3) of Regulation No 1/2003, the Commission is entitled to compel undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, on condition only that an undertaking is not compelled to provide the Commission with answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraphs 34 and 35). An undertaking to which the Commission addresses a request for information pursuant to Article 18 of Regulation No 1/2003 is therefore bound by an obligation to cooperate actively and may be punished by a specific fine, as laid down in Article 23(1) of that regulation, which may represent up to 1% of total turnover if it provides, intentionally or negligently, incorrect or misleading information (*Shell Petroleum and Others* v *Commission*, paragraph 118).

168 It follows that, in the exercise of its unlimited jurisdiction, the Court may take account, where relevant, of an undertaking's lack of cooperation and consequently increase the fine imposed on it for infringement of Articles 101 TFEU or 102 TFEU, on condition that that undertaking has not been punished in respect of that same conduct by a specific fine based on Article 23(1) of Regulation No 1/2003 (*Shell Petroleum and Others* v *Commission*, paragraph 118).

169 That could for example be the case where, in reply to a request to that effect from the Commission, an undertaking has failed to submit, intentionally or negligently, during the administrative procedure, decisive evidence for the setting of the fine which was available to it, or which it could have obtained, at the time of adoption of the contested decision. Although the Court is not prevented from taking such evidence into consideration, the fact remains that an undertaking which relies on such evidence only at the judicial stage of the proceedings, thus undermining the purpose and the proper conduct of the administrative procedure, exposes itself to the risk that that factor will be taken into consideration when the Court determines the appropriate amount of the fine (*Shell Petroleum and Others* v *Commission*, paragraph 119).

170 In the present case, the applicant admits that it made errors when it provided the Commission with the data necessary for calculating the value of relevant sales, since it included sales relating to products other than cartelised LCD panels. The Commission confirms that those products should not have been included in the calculation.

171 It is also apparent from the file that those errors arose from the fact that the applicant had not made the specifications of certain LCD panels clear to the undertaking that it had chosen to compile the data to be provided to the Commission.

172 The Court does not consider that that circumstance gives grounds for holding that the applicant's breach of its obligation to cooperate under Article 18 of Regulation No 1/2003 was such that account must be taken of it in setting the fine. The applicant did not seek to mislead the Commission; nor did it supply it with raw data on the basis of which the Commission would have had to calculate the value of relevant sales, without providing it at the same time with the explanations necessary to extract the net figures. The applicant appointed external specialist consultants in order to be in a position to provide the Commission with the necessary data but was negligent in failing to explain to those consultants the differences between certain types of LCD panels. In that regard, the applicant clearly

had no interest in the Commission receiving incorrect data that included sales of products other than cartelised LCD panels, since those inaccuracies could only be detrimental to it in that the amount of the fine which the Commission would impose on it would be increased.

173 Accordingly, the Court considers it fair, having regard to the circumstances of the case, to calculate the fine to be imposed on the applicant on the basis of the value of sales as corrected and to apply to that value of sales the same method as that followed by the Commission in the contested decision, including with regard to rounding. The amount thus established is EUR 288 000 000 (see paragraph 163 above).

174 In view of all the foregoing, the Court reduces the fine to EUR 288 000 000 and dismisses the remainder of the applicant's heads of claim.

Costs

175 Under Article 87(2) 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. Under the first subparagraph of Article 87(3), where each party succeeds on some and fails on other heads, the Court may order that the costs be shared.

176 In the present case, the Commission has failed only as regards the fact that it included sales relating to products other than cartelised LCD panels in the value of relevant sales for the purpose of calculating the basic amount of the fine to be imposed on the applicant. That error is due solely to negligence on the part of the applicant, which provided the Commission with incorrect data. On the other hand, the applicant has been unsuccessful on all the other heads of claim it put forward. In such a situation, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to pay the costs in accordance with the form of order sought by the Commission (see, to that effect, Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraphs 338 and 339).

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Sets at EUR 288 000 000 the fine imposed on InnoLux Corp., formerly Chimei InnoLux Corp., in Article 2 of Commission Decision C(2010) 8761 final of 8 December 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/39.309 – LCD – Liquid Crystal Displays);**

2. **Dismisses the action as to the remainder;**

3. **Orders InnoLux to pay the costs.**

Kanninen Berardis Wetter

Delivered in open court in Luxembourg on 27 February 2014.

[Signatures]