ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

CVRIA
LUXEMBOURG

- 948395 -

REPORT FOR THE HEARING *

(Competition — Agreements, decisions and concerted practices — Truck manufacturers' market — Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement — Agreements and concerted practices in relation to truck pricing, the timing for the introduction of emission technologies and the passing on to customers of the costs relating to those technologies — 'Hybrid' procedure staggered over time — Presumption of innocence — Principle of impartiality — Charter of Fundamental Rights — Single and continuous infringement — Restriction of competition by object — Geographic scope of the infringement — Fine — Proportionality — Equal treatment — Unlimited jurisdiction)

In Case T-799/17,

Scania AB, established in Södertälje (Sweden),

Scania CV AB, established in Södertälje,

Scania Deutschland GmbH, established in Koblenz (Germany),

represented by D. Arts, F. Miotto, C. Pommiès, K. Schillemans, C. Langenius, L. Ulrichs and P. Hammarskiöld, lawyers,

applicants,

v

European Commission, represented by M. Farley and T. Vecchi and L. Wildpanner, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for the annulment of Commission Decision C(2017) 6467 final of 27 September 2017 relating to a proceeding under Article 101 TFEU and Article 53 of the Agreement on the European Economic

* Language of the case: English.

Area (EEA) (Case AT.39824 — Trucks) ('the contested decision') and/or, in the alternative, a reduction of the fines imposed on the applicants in that decision.

I. Background to the dispute

1 The applicants in the present case are three legal entities of the undertaking Scania, namely Scania AB (publ), Scania CV AB (publ) and Scania Deutschland GmbH ('the applicants' or 'Scania'). Scania is active in the production and sales of heavy trucks (above 16 tonnes) which are used for long-haulage transport, distribution, construction haulage and specialised purposes.

2 In the contested decision, the Commission found that the applicants had participated for 14 years (from 17 January 1997 until 18 January 2011), together with legal entities of the undertakings *[confidential]* [1], in an EEA-wide *[confidential]*, in the context of which they had colluded on pricing and gross price increases in the EEA for medium and heavy trucks and on the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards (Article 1 of the contested decision). The Commission imposed a fine of EUR 880 523 000 jointly and severally on Scania AB (publ) and Scania CV AB (publ), of which Scania Deutschland GmbH ('Scania DE') is held jointly and severally responsible for the amount of EUR 440 003 282 (Article 2 of the contested decision).

A. Administrative procedure which led to the contested decision

3 On 20 September 2010 *[confidential]* applied for immunity from fines in accordance with point 14 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17, 'the Leniency Notice'). On 17 December 2010, the Commission granted conditional immunity from fines to *[confidential]*.

4 Between 18 and 21 January 2011, the Commission carried out inspections at the premises of, inter alia, the applicants.

5 On 28 January 2011, *[confidential]* applied for immunity from fines in accordance with point 14 of the Leniency Notice and, in the alternative, for a reduction of fines in accordance with point 27 of the Leniency Notice. *[confidential]* followed suit on 10 February 2011, at 10 a.m., as did *[confidential]* on 10 February 2011, at 22:22 p.m.

6 In the course of the investigation, the Commission sent several requests for information, inter alia, to the applicants, pursuant to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the

[1] Confidential information omitted.

rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

7 On 20 November 2014, the Commission initiated proceedings pursuant to Article 11(6) of Regulation No 1/2003 against the applicants and the legal entities of the undertakings referred to in paragraph 2 above and adopted a statement of objections which it notified to all those entities (including the applicants).

8 After notification of the statement of objections, the addressees had access to the Commission's investigative file.

9 In *[confidential]*, the addressees of that statement of objections approached the Commission informally and asked it to continue the case under the settlement procedure provided for in Article 10a of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18). The Commission decided to launch settlement proceedings after each of the addressees of the statement of objections confirmed its willingness to engage in settlement discussions.

10 Between *[confidential]* and *[confidential]*, settlement discussions took place between each addressee of the statement of objections and the Commission. Following those discussions, certain addressees of the statement of objections individually submitted to the Commission a formal request to settle pursuant to Article 10a(2) of Regulation No 773/2004 ('the settling parties'). The applicants did not make such a request.

11 On 19 July 2016, the Commission adopted, on the basis of Article 7 and Article 23(2) of Regulation No 1/2003, Decision C(2016) 4673 final relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39824 — Trucks) addressed to the settling parties ('the settlement decision').

12 Since the applicants chose not to submit a formal settlement proposal, the Commission continued the investigation relating to them under the standard (non-settlement) procedure.

13 On 23 September 2016, the applicants, having had access to the file, submitted their written reply to the statement of objections.

14 On 18 October 2016, the applicants attended an oral hearing.

15 On 27 September 2017, the Commission adopted the contested decision.

B. Contested decision

1. Collusive contacts between Scania and the settling parties

16 In the contested decision, the Commission found that Scania participated in collusive meetings and contacts with the settling parties in different forums and on different levels which evolved over time while the participating undertakings, the objectives and the products concerned remained the same (recital 75 of the contested decision).

17 *[confidential]* collusive contacts were identified by the Commission.

18 In the first place, the Commission found that in the early years of the infringement, the top management of the parties to the *[confidential]* discussed their pricing intentions, the future gross price increases, *[confidential],* and occasionally agreed their respective gross price increases ('the top management meetings'). At the top management meetings, the parties to the *[confidential]* agreed on the timing and the passing on of the costs relating to the introduction of emission technologies complying with EURO 3 to EURO *[confidential]* (recital 75 of the contested decision). The Commission found that *[confidential]* (recital 327(a) of the contested decision). After 23 September 2004, those meetings were not resumed (recitals 81 and 138 of the contested decision).

19 In the second place, *[confidential]* (recital 75 of the contested decision). *[confidential]* (recital 327(a) of the contested decision).

20 In the third place, the Commission found that, after the introduction of the Euro currency and the introduction of European-wide gross price lists for almost all truck manufacturers, *[confidential]* continued *[confidential]* through their German subsidiaries ('the German level meetings'). Representatives of the German subsidiaries discussed the future gross price increases as well as the timing and the passing on of costs related to the introduction of emission technologies for medium and heavy trucks required by the EURO 5 and EURO 6 standards. They also exchanged other commercially sensitive information (recital 76 of the contested decision). The Commission found that the German level meetings took place from 2004 onwards (recital 327(a) of the contested decision).

2. Application of Article 101 TFEU and Article 53 of the EEA Agreement

(a) Agreements and concerted practices

21 The Commission considered that the documentary evidence in the file showed that the above-mentioned contacts, first, concerned the *[confidential]* intended changes of gross prices and gross price lists as well as the respective timing of such changes, secondly, concerned the timing of the introduction of emission technologies for medium and heavy trucks required by the EURO 3 to 6 standards, as well as the passing on of costs for the introduction of those technologies, and,

thirdly, were used to share other sensitive information such as *[confidential]*, current net prices *[confidential]*, truck configurators, orders and stock levels (recital 212 of the contested decision).

22 The Commission considered that those activities constituted a form of coordination and cooperation by which the parties knowingly substituted practical cooperation between them for the risks of competition. According to the Commission, the conduct in question took the form of either an agreement or a concerted practice in which the competing undertakings refrained from determining independently the commercial policy which they intended to adopt on the market but instead coordinated their pricing behaviour through direct contacts and engaged in coordinated delay of the introduction of the technologies (recital 214 of the contested decision).

23 *[confidential]* (recital 219 of the contested decision).

24 The Commission noted that Scania regularly participated in the various forms of collusion throughout the entire infringement period and found that the infringement in which Scania participated took the form of an agreement and/or a concerted practice within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement (recital 229 of the contested decision).

(b) Restriction of competition

25 The Commission noted that the anti-competitive behaviour in the present case had the object of restricting competition (recital 236 of the contested decision).

26 The principal aspect of the *[confidential]* and concerted practices, which could be characterised as a restriction of competition, was the coordination of prices and gross price increases through contacts on pricing, the coordination of the date and additional costs of the introduction of technologies complying with environmental standards and the exchange of competitively sensitive information (recital 237 of the contested decision).

(c) Single and continuous infringement

27 The Commission considered that the agreements and/or concerted practices between Scania and the settling parties constituted a single and continuous infringement of Article 101(1) TFEU and Article 53 of the EEA Agreement *[confidential]*. The infringement consisted of collusion with respect to pricing and gross price increases in the EEA for medium and heavy trucks and the timing and passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to EURO 6 standards (recital 315 of the contested decision).

28 More specifically, the Commission considered that, through the anti-competitive contacts, the parties pursued a common plan with a single anti-competitive aim

and that Scania was aware or should have been aware of the general scope and the essential characteristics of the network of collusive contacts and intended to contribute *[confidential]* through its actions (recital 316 of the contested decision).

29 The Commission relied on five elements to conclude that there was a common plan with a single anti-competitive aim.

30 In the first place, all the anti-competitive contacts concerned the same products, namely medium and heavy trucks (recital 319 of the contested decision).

31 In the second place, the nature of the information shared — price information, gross price increase information, anticipated launch dates of trucks complying with the new environmental standards and competitors' intentions as to whether to pass the associated costs on to customers — stayed the same over the entire duration of the infringement (recital 320 of the contested decision).

32 In the third place, the anti-competitive contacts took place frequently and involved the same group of truck producers, namely Scania and the settling parties. The individuals involved in the contacts belonged to the same manufacturers and arranged the exchanges in small groups of employees within the manufacturers (recital 323 of the contested decision).

33 In the fourth place, the Commission found that, while the level and internal responsibilities of the employees involved in the conduct evolved during *[confidential]*, the nature, aim and scope of the contacts and meetings remained the same throughout the duration of *[confidential]* (recital 325 of the contested decision).

34 In the fifth place, the Commission considered that, while the manner in which the information was exchanged evolved over the 14-year duration of the infringement, it did so in a gradual manner and the fundamental nature of the exchanges remained the same (recital 329 of the contested decision).

35 On the basis of those five elements, the Commission concluded that the collusive contacts were interlinked and complementary in nature (recital 330 of the contested decision).

(d) Geographic scope of the infringement

36 The Commission considered that the geographic scope of the infringement was EEA-wide for the entire period of the infringement (recital 386 of the contested decision).

3. Addressees

37 In the first place, the Commission addressed the contested decision to Scania CV AB (publ) and Scania DE, which it considered to be directly liable for the infringement during the following periods:

– as regards Scania CV AB (publ), from 17 January 1997 until 27 February 2009;

– as regards Scania DE, from 20 January 2004 until 18 January 2011 (recital 410 of the contested decision).

38 The Commission also found that, during the period from 17 January 1997 until 18 January 2011, Scania AB (publ) directly or indirectly held all shares in Scania CV AB (publ), which in turn directly or indirectly held all shares in Scania DE (recital 411 of the contested decision). Consequently, the Commission stated, in the second place, that it was also addressing the contested decision to the following entities, which are held jointly and severally liable in their capacity as parent companies:

– Scania AB (publ) for the conduct of Scania CV AB (publ) from 17 January 1997 until 27 February 2009, on the one hand, and the conduct of Scania DE from 20 January 2004 until 18 January 2011, on the other;

– Scania CV AB (publ) for the conduct of Scania DE from 20 January 2004 until 18 January 2011 (recital 412 of the contested decision).

39 The Commission concluded that the addressees of the contested decision were the entities Scania AB (publ), Scania CV AB (publ) and Scania DE (recital 413 of the contested decision).

4. Calculation of the fine

40 In the present case, the Commission applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2).

(a) Basic amount of the fine

41 As regards, in the first place, the value of sales, this was calculated on the basis of the applicants' sales of heavy trucks in the EEA (adjusted to take into account the evolution of the EEA territory) in 2010 — which is the last full year of the infringement (recitals 429 to 431 of the contested decision). The Commission calculated that value to be EUR *[confidential]*.

42 The Commission took the view that, given the magnitude of the value of the applicants' sales, the deterrent objectives underlying Article 23(2)(a) of Regulation No 1/2003 could be achieved without having recourse to the total

weighted value of the applicants' sales of trucks in 2010. Consequently, and pursuant to point 37 of the Guidelines on the method of setting fines, the Commission retained EUR *[confidential]* as the value of sales for the purposes of calculating the fine (recitals 432 and 433 of the contested decision). The Commission pointed out that the proportion of the value of sales which it retained for Scania was the same as that retained for the settling parties in the settlement decision (recital 432 *in fine* of the contested decision).

43 As regards, in the second place, the gravity of the infringement, the Commission took the view that, given, first, the fact that price coordination agreements are by their very nature among the most serious infringements of Article 101 TFEU and Article 53 of the EEA Agreement, secondly, the fact that the *[confidential]* covered *[confidential]* the entire EEA and, thirdly, the high combined market share of the undertakings involved in the *[confidential]* (which was over 90%), the coefficient for seriousness used in the present case (that is to say the proportion of the retained value of sales) amounted to *[confidential]* (recitals 434 to 437 of the contested decision).

44 In the third place, the Commission, taking into account the duration of Scania's participation in the infringement, multiplied the amount arrived at in paragraph 43 above by 14 (recitals 438 and 439 of the contested decision).

45 In the fourth place, the Commission, in accordance with point 25 of the Guidelines on the method of setting fines, increased the basic amount by an additional amount ('entry fee') of *[confidential]* of the retained value of sales (recitals 440 and 441 of the contested decision).

46 On the basis of those calculations, the Commission concluded that the basic amount of the fine was EUR 880 523 000 (recital 442 of the contested decision).

(b) Final amount of the fine

47 The Commission considered that there were in the present case no aggravating or mitigating circumstances which could alter the basic amount of the fine imposed on Scania (recital 444 of the contested decision). It therefore concluded that the final amount of the fine was EUR 880 523 000 and that this amount did not exceed the legal maximum of 10% of Scania's turnover (recitals 445 to 447 of the contested decision).

5. Operative part of the contested decision

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

'Article 1

By colluding on pricing and gross price increases in the EEA for medium and heavy trucks; and the timing and the passing on of costs for the introduction of

emission technologies for medium and heavy trucks required by EURO 3 to 6 standards, the following legal entities of Scania infringed Article 101 of the Treaty and Article 53 of the EEA Agreement during the periods indicated:

(a) Scania AB (publ) from 17 January 1997 until 18 January 2011;

(b) Scania CV AB (publ) from 17 January 1997 until 18 January 2011;

(c) Scania Deutschland GmbH from 20 January 2004 until 18 January 2011.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

EUR 880 523 000 jointly and severally on Scania AB (publ) and Scania CV AB (publ) of which Scania Deutschland GmbH is held jointly and severally responsible for the amount of EUR 440 003 282.

…’

II. Procedure and forms of order sought by the parties

49 By application lodged at the Registry of the General Court on 11 December 2017, the applicants brought the present action.

50 The applicants claim that the Court should:

– adopt a measure of organisation of procedure pursuant to Article 88(1) and Article 89(3)(d) of the Rules of Procedure of the General Court, requesting the Commission to produce the written replies of DAF and Iveco to the statement of objections;

– annul the contested decision;

– failing that, partially annul the contested decision and reduce the fine imposed on the applicants under to Article 261 TFEU and Article 31 of Regulation No 1/2003;

– in any event, substitute its own appraisal for the Commission’s as regards the amount of the fine and reduce the fine imposed on the applicants under Article 261 TFEU and Article 31 of Regulation No 1/2003;

– order the Commission to pay the costs.

51 The Commission contends that the Court should:

– dismiss the application;

– order the applicants to pay the costs.

III. Pleas in law and arguments of the parties

A. The first plea in law, alleging infringement of the rights of the defence, the principle of good administration and the presumption of innocence

52 The *applicants* submit, as a preliminary point, that the settlement decision and the contested decision, which were adopted on the basis of the same objections as those raised in the statement of objections addressed both to the settling parties and to the applicants, concern the same alleged *[confidential]* and are each based on the same facts and evidence. Since, in the settlement decision, the Commission legally characterised those facts relating to the settling parties' conduct, but necessarily involving Scania, the circle of undertakings whose conduct was thus legally characterised is not limited to the addressees of that decision but also includes Scania.

53 The clear link between the settlement decision and the contested decision is supported by the fact that, on the one hand, the Commission considered it necessary to consult the settling parties in the context of the preparation for publication of the non-confidential version of the contested decision, even though they were not the addressees of that decision, and, on the other hand, there was a link to the settlement decision on the Commission's website, in the section relating to the contested decision.

54 Starting from that premiss, the applicants claim, in the first place, that the contested decision was adopted in breach of their rights of defence as enshrined in Article 48(2) of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 27(1) and (2) of Regulation No 1/2003, since the Commission had, in the settlement decision, legally characterised the facts and classified as an infringement the conduct in which Scania had participated before Scania had had the opportunity effectively to exercise its rights of defence. As is apparent from the judgment of 10 November 2017 in *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795), it was for the Commission, in the context of such a 'hybrid' procedure, to take the necessary measures to ensure compliance with the higher rules of EU law, in particular the applicants' rights of defence, which, in adopting the settlement decision before the contested decision, the Commission had failed to do.

55 In the second place, the applicants submit that the Commission failed to fulfil its obligation to conduct a diligent and impartial examination stemming from the principle of good administration enshrined in Article 41(1) of the Charter, in so far as, having adopted the settlement decision prior to the adoption of the contested decision, the Commission was no longer in a position to demonstrate impartiality and to assess objectively the evidence and the arguments put forward by Scania in the procedure leading to the adoption of the contested decision.

56 In support of that claim, the applicants submit, first, that it is not reasonably conceivable that the Commission, after having adopted the settlement decision,

would alter its position and come to the conclusion that the same facts did not constitute an infringement, regardless of the content of Scania's defence.

57 Secondly, the doubt as to the Commission's impartiality is strengthened by the fact that the settlement decision was notified to its addressees soon after it was adopted and was announced to the public by Commissioner Vestager at a press conference widely covered by the media, with the result that the Commission could not deviate from the settlement decision in the context of the contested decision.

58 Thirdly, the doubt as to the Commission's impartiality is supported by a structural element: the adoption of the settlement decision involved the same competent services that participated in the adoption of the contested decision.

59 Fourthly, the settlement decision influenced the Commission's investigation strategy and, ultimately, the content of the evidence on which the Commission based the contested decision. According to the applicants, in the exercise of its discretionary investigative powers, the Commission was not inclined to adopt new investigative measures which might have led it to call into question or weaken its position as determined in the settlement decision. It is thus impossible to determine what the scope of the Commission's file and, ultimately, the content of the contested decision would have been, if the settlement decision had not been adopted prior to the contested decision.

60 The applicants add that, in those circumstances, even a comprehensive review by the Court of the evidence relied on by the Commission and contained in its file cannot remedy that infringement of Article 41(1) of the Charter.

61 In the third place, the applicants submit that the contested decision is vitiated by an infringement of the presumption of innocence, compliance with which is guaranteed by Article 48(1) of the Charter. More specifically, they argue that the settlement decision determined the Commission's final position with regard to the same facts as those set out in the statement of objections and found that those facts, in which Scania also participated, constitute an infringement. That statement goes further than simply alluding to Scania's potential liability and therefore constitutes an infringement of the presumption of Scania's innocence. The same applies as regards a statement to the press by Commissioner Vestager, which referred to Scania as an addressee of the same statement of objections on which the settlement decision is based.

62 The fact that the Commission did not act independently is confirmed by the fact that, as regards the alleged cartels, it is the investigating, prosecuting and decision-making authority

63 Relying on a legal opinion attached to the application and on the case-law of the European Court of Human Rights, the applicants, recalling that both the settlement procedure and the ordinary procedure presuppose an assessment of the same facts, challenge the Court's finding in the judgment in *Icap and Others* v

Commission (T-180/15, EU:T:2017:795) that breach of the presumption of innocence cannot have a direct impact on the legality of the contested decision.

64 The applicants conclude that, because the settlement decision was adopted prior to the adoption of the contested decision, the Commission could not adopt the contested decision against Scania impartially and without irreparably infringing Scania's right to be heard and the presumption of its innocence.

65 The *Commission* contends, as a preliminary point, that the applicants' claims are based solely on the fact that the Commission adopted the settlement decision against the other *[confidential]* participants before adopting the contested decision and had therefore 'made up its mind' with respect to Scania's participation in and liability for the infringement at issue. However, according to the Commission, the applicants do not specifically identify any aspect of the settlement decision which reveals that it prejudged Scania's liability under Article 101 TFEU or which had a definite impact on Scania's ability to defend itself.

66 Next, the Commission maintains, in the first place, that it has respected the principle of the presumption of innocence.

67 In that regard, it recalls, inter alia, that, in the judgment in *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795), the Court held that procedures staggered over time in the context of the application of Article 101 TFEU and investigations under Regulation No 1/2003 did not automatically infringe the presumption of innocence.

68 In order to show that the principle of the presumption of Scania's innocence has been observed in the present case, the Commission recalls, first, that the settlement procedure is provided for by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004 as regards the conduct of settlement procedures in cartel cases (OJ 2008 L 171, p. 3). The purpose of that procedure is to enable the Commission to deal with cases more quickly and efficiently by following a simplified procedure in respect of parties who are prepared to settle.

69 Secondly, the Commission submits that the settlement decision contains no adverse findings against Scania, and in particular no reference or allusion to Scania's involvement in, or liability for, the conduct described in the settlement decision, but that, on the contrary, that decision refers to the fact that a procedure brought against Scania was still ongoing. The applicants do not refer to any aspect of that decision suggesting that, in the context of adopting that decision, the Commission reached a conclusion as to Scania's liability under Article 101 TFEU, but based their claims solely on the premise that the Commission 'assessed the same facts' in both procedures. However, the applicants do not specify the facts to which they refer.

70 The Commission also points out that the settlement decision describes facts accepted by the settling parties and their conduct too and on that basis ascribes

liability only to them. Thus, the Commission emphasises that the settlement decision was based not directly on the statement of objections but on the common understanding of the objections between the settling parties and the Commission following the settlement meetings.

71 In addition, the applicants had the opportunity to challenge, in the administrative procedure brought against them, the findings regarding Scania's role or liability under Article 101 TFEU as set out in the statement of objections, and, where appropriate, the evidence on which the Commission based both the settlement decision and the contested decision.

72 According to the Commission, the contested decision contains an exhaustive examination of the arguments put forward by Scania and intended to refute the preliminary findings set out in the statement of objections. To the extent that Scania disputes the correctness of the Commission's conclusions, this is a substantive and not a procedural question.

73 Thirdly, the Commission submits that Scania was granted a fair hearing during the procedure which preceded the adoption of the contested decision. Even if the indirect reference to Scania in recital 4 of the settlement decision or the fact that there was an overlap between the evidence relied on by the Commission in both procedures could be construed as reflecting a suspicion of guilt, *quod non*, the procedural guarantees afforded to Scania in the procedure leading to the adoption of the contested decision ensured that the principle of the presumption of innocence was observed.

74 Fourthly, the Commission argues, relying on the judgment in *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795), that, in any event, even if the Court were to consider that the Commission disregarded the principle of the presumption of innocence with respect to Scania, *quod non*, that conclusion could not result in the annulment of the contested decision.

75 In the second place, the Commission contends that it has respected Scania's rights of defence.

76 In that regard, it argues, first, that Scania was afforded the opportunity properly to make known its views on the documents used by the Commission to support its allegation of an infringement and, therefore, enjoyed all the usual guarantees required for the effective exercise of its rights of defence.

77 Secondly, according to the Commission, to accept Scania's argument, in so far as it is based on the fact that the Commission adopted the settlement decision prior to receiving Scania's reply to the statement of objections, would be to conflate two 'separate and independent' proceedings, in the words of the judgment in *Icap and Others* v *Commission* (T-180/15, EU:T:2017:795).

78 Thirdly, even if a breach of Scania's rights of defence could be established, *quod non*, such a breach would not affect the legality of the contested decision in so far

as the Commission established to the requisite legal standard that Scania had participated in the infringements.

79 In the third place, the Commission states that it has respected the principle of good administration. In view of the fact that the applicants' arguments that the adoption of the settlement decision prior to the contested decision undermined the objective impartiality of the Commission do not differ from the applicants' claims concerning the alleged infringement of the presumption of innocence, those arguments should be rejected for the same reasons as those set out in paragraphs 67 to 74 above.

80 In particular, the Commission considers that, contrary to what the applicants claim, simply announcing publicly the existence and the general content of the settlement decision does not in any way indicate a lack of integrity on the part of the Commission or its employees.

81 Similarly, the guarantees resulting from the judgment of 11 July 2013, *Ziegler* v *Commission* (C-439/11 P, EU:C:2013:513) were respected in the present case in the procedure leading to the adoption of the contested decision, so that there can be no legitimate doubt as to the Commission's impartiality.

82 Moreover, the applicants have confused the plea alleging infringement of the principle of good administration with the substantive pleas concerning the correctness of the conclusions which the Commission drew from the body of evidence at its disposal.

83 In that regard, the Commission points out that, in any event, a procedural irregularity may lead to the annulment of a contested decision only if it is established that the content of the decision would have been different in the absence of the irregularity. However, it is apparent from the case-law of the Court that that condition is not satisfied where, following a comprehensive review of the complaints put forward by an applicant, the Court finds that the infringement identified in the decision has been established on the evidence.

84 Finally, the Commission contests the applicants' claim that the Commission's alleged lack of impartiality is demonstrated by the fact that it did not adopt further investigative measures in the context of the examination of the arguments submitted by the applicants. In that regard, the Commission relies, in essence, on the discretion it enjoys as regards the manner of conducting the investigation of a case and, in particular, as regards the advisability of adopting further investigative measures.

85 With regard to the conclusions drawn by the applicants from the additional evidence submitted to the Court by letter of 23 October 2018, the Commission maintains that, by consulting the settling parties concerning the non-confidential version of the contested decision, it gave effect to the case-law resulting from the judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* (T-474/04, EU:T:2007:306), by giving the settling parties the

opportunity to argue that certain data relating to them was confidential in view of the fact that, although they are not the addressees of the contested decision, they are nevertheless referred to in it. As regards the link to the settlement decision in the section of its website concerning the contested decision, this is nothing more than a technical oversight which, although regrettable, could not have any bearing on the question of the existence of a substantial link between the settlement decision and the contested decision or in itself demonstrate an infringement of the presumption of the applicants' innocence, the principle of good administration or their rights of defence.

B. The second plea in law, alleging infringement of Article 27(1) and (2) of Regulation No 1/2003 and Article 48(2) of the Charter

86 The *applicants* claim, in essence, that the Commission infringed their rights of defence, in breach of Article 48(2) of the Charter and Article 27(1) and (2) of Regulation No 1/2003, by refusing them access to the full replies to the statement of objections submitted by *[confidential]*, although it is, according to the applicants, likely that those replies contain exculpatory evidence in relation to them other than the evidence contained in the excerpts from those replies to which access was granted by the Hearing Officer.

87 *[confidential]* used their replies to the statement of objections to contest the Commission's allegations against them, as is shown by the extracts which Scania was allowed to review. The applicants consider that the fact that the Commission partially changed its stance on the question whether the replies of *[confidential]* are incriminating or exculpatory casts doubt on the validity of denying full access to those replies.

88 For that reason, the applicants invite the Court to request the Commission, pursuant to Articles 88(1) and 89(3)(d) of the Rules of Procedure of the General Court, to produce the replies of *[confidential]* to the statement of objections.

89 The *Commission* argues that the applicants' claims demonstrate a misunderstanding of their rights and of the Commission's obligations regarding access to the evidence gathered after the adoption of the statement of objections.

90 It emphasises that the applicants do not claim that the access to the file guaranteed by Article 27(2) of Regulation 1/2003 should automatically apply to the replies of *[confidential]* but rely on the 'procedural peculiarities of the case'. However, even if *[confidential]* relied on the same arguments as Scania, none of the arguments put forward by Scania is capable of showing that their replies to the statement of objections were likely to contain exculpatory evidence for Scania other than that to which access has already been granted by the Hearing Officer.

91 Furthermore, the claim that it is possible that *[confidential]* may have submitted additional information in the form of annexes is not supported by any explanation

as to why the applicants were led to consider that those annexes might contain exculpatory evidence in relation to them.

92 More generally, the Commission submits that, in the context of the second plea, the applicants make general, vague and purely speculative claims that *[confidential]*'s replies to the statement of objections could contain more evidence which might be useful from their point of view without, however, providing even a prima facie case to support those claims.

93 For those reasons, the Commission concludes that it is necessary to reject the request for a measure of organisation of procedure, which is nothing more than an unjustified 'fishing expedition' on the part of the applicants.

C. The third plea in law, alleging misapplication of Article 101 TFEU and Article 53 of the EEA Agreement in that the exchanges of information *[confidential]* were found to constitute an infringement

94 The *applicants* refer to the *[confidential]* contacts identified in the contested decision as the 'Small *[confidential]* circle', involving the top management of the undertakings in question, *[confidential]* and the 'German circle', involving employees from the German subsidiaries of the undertakings in question.

95 The applicants maintain that *[confidential]* operated separately without any connection between them.

96 Accordingly, the applicants state, in the first place, *[confidential]*.

97 In the second place, the applicants argue that, contrary to what is stated in recital 94 of the contested decision, *[confidential]*.

98 In the third place, the applicants note that the contested decision does not make any reference to the existence of 'contacts or meetings' between the Small *[confidential]* circle and the German circle.

99 The applicants conclude that the Commission committed a manifest error of assessment by referring in recital 213 of the contested decision to 'joint contacts and meetings'.

100 Similarly, the applicants, referring in particular to their arguments in the context of the seventh plea in law, challenge the statement in recital 213 of the contested decision that the contacts at different levels were 'linked' to each other by their 'subject matter and timing, through open references to each other and by the transmission of the information collected'.

101 The applicants state that the manifest errors of assessment committed by the Commission affect the soundness of its legal characterisation of the facts. By consistently confusing the contacts *[confidential]*, the Commission failed properly to characterise the facts relating to each circle considered separately.

102 More specifically, the applicants submit that the exchange of information *[confidential]*.

103 The *Commission* argues, primarily, that the applicants' plea is based on an erroneous premise. *[confidential]*. As is clear from recital 315 of the contested decision, Scania had participated in a single and continuous infringement *[confidential]*

104 In the alternative, the Commission submits that, even if it were assumed that the Commission had concluded, in the contested decision, that *[confidential]*, that conclusion would not be erroneous.

105 With regard to the applicants' arguments relating to the links between the different levels of contacts, the Commission argues, first of all, that it does not understand the relevance of the applicants' reliance on those arguments in the context of the third plea.

106 So far as this point is relevant, the Commission states that, contrary to what the applicants suggest, it claimed *[confidential]* nor that there were joint meetings between the top management level and the German level. While the Commission considered that those *[confidential]* meetings formed part of the same single and continuous infringement, *[confidential]* The various contacts constituted one single infringement because they concerned the same product, the same information was shared during the contacts, the same undertakings participated in them and the nature, aim and scope of the contacts remained unchanged throughout the duration of the *[confidential]*.

107 The Commission also states that it noted in the contested decision that *[confidential]*. Nevertheless, according to the Commission, while that element strengthens its finding of a single and continuous infringement, it is not the sole basis for that finding.

D. The fourth plea in law, alleging infringement of the obligation to state reasons and misapplication of Article 101 TFEU and Article 53 of the EEA Agreement in that the Commission found that the applicants had entered into an agreement or engaged in a concerted practice relating to the timing of the introduction of emission technologies

1. The first part of the plea in law, alleging infringement of the obligation to state reasons

108 The *applicants* argue that the reasoning in the contested decision does not enable them to understand the nature and scope of the infringement attributed to them. On the one hand, it is apparent from Article 1 of the contested decision that the Commission found that the applicants committed an infringement, inter alia, by colluding on the timing of the introduction of emission technologies required by EURO 3 to 6 standards and that that conduct constituted an infringement in its

own right. On the other hand, *[confidential]* thereby suggesting that the mere exchange of information on the dates of introduction of the technologies does not in itself constitute an infringement.

109 The applicants conclude that that inconsistency in the Commission's reasoning constitutes an infringement of Article 296 TFEU and that, on that basis, the contested decision must be annulled.

110 The *Commission* contends that the contested decision is consistent and that the applicants have clearly understood the scope of the infringement. It points out that the collusion concerning the timing and passing on of the costs for the introduction of emission technologies is an aspect of the collusion constituting the single and continuous infringement, as set out in recitals 317(b), 320 and 321 of the contested decision. The Commission explains that it did not (and was not required to) specify in the contested decision whether that aspect of collusion constituted an infringement in itself.

111 The Commission also recalls that it stated that the conduct related to the timing and passing on of costs for the introduction of emission technologies *[confidential]* which had as their object the restriction of competition. As stated in recital 243 of the contested decision, Scania and *[confidential]*.

112 The Commission further submits that Article 1 of the contested decision in no way contradicts its recitals and that it must be interpreted in the light of those recitals.

113 In the reply, the *applicants* argue that the Commission adopts contradictory reasoning, in so far as, on the one hand, it acknowledges that it has not found that the alleged collusion on the timing of the introduction of the emission technologies constitutes an infringement in its own right and, on the other hand, it submits that that 'aspect' is part of a single and continuous infringement, which presupposes, according to the applicants, that it constitutes an infringement in its own right.

114 The applicants conclude that the contested decision is vitiated by a failure to state adequate reasons on account of the abovementioned contradictory reasoning and, also, a failure to explain why the exchange of information on the timing of the introduction of emission technologies constitutes an infringement by object.

115 The *Commission* challenges, in the rejoinder, the applicants' argument that it should have examined whether the meetings concerning the timing of the introduction of emission technologies constituted an infringement in their own right and refers, in that regard, to its line of argument concerning *[confidential]*. The Commission submits that, as regards the discussions on the timing of the introduction of emission technologies, the question is whether the Commission has demonstrated that the anti-competitive behaviour in the form of a single and continuous infringement continued throughout the duration of the infringement. The Commission considers that it was not required to state whether several selected meetings, which took place at different times during the infringement,

constituted an infringement (in a hypothetical scenario where no other meetings took place).

116 The Commission adds that it is clear from Article 1 of the contested decision that the discussions relating to the introduction of the technologies formed part of the infringement. The reasons explaining why collusion on the timing formed part of the infringement by object are set out, inter alia, in recital 243 of the contested decision.

2. The second part of the plea in law, alleging misapplication of Article 101 TFEU and Article 53 of the EEA Agreement in that the Commission found that the applicants had entered into an agreement or engaged in a concerted practice relating to the timing of the introduction of emission technologies

117 The *applicants* state that the second part of this plea is raised 'without prejudice and on the assumption that the [contested] decision finds that the alleged information exchange on the timing of new emission technologies constitutes an infringement in its own right'.

118 The applicants challenge the assessment in the contested decision that they *[confidential]* engaged in a concerted practice relating to the timing of the introduction of emission technologies. They claim not to have participated in those forms of collusion within any of the *[confidential]* circles.

119 They argue that, at most, the evidence in the file suggests that there were rare instances in which the parties shared information on the timing of the introduction of their emission technologies. However, those rare exchanges do not amount to an infringement 'by object'. According to the applicants, the contested decision fails to demonstrate that those exchanges of information are of such a nature that they can be regarded as harmful to the proper functioning of normal competition without examining their effects.

120 According to the applicants, it is difficult to understand how the exchanges of information on the dates of introduction of technologies could lead to any delay or dampening of competition in the offering of a new technology, in so far as, first, the technical development of any new emission control technology takes about six or seven years, secondly, all manufacturers were obliged to develop new engines complying with the EURO standards and launched the technologies concerned before the deadlines laid down in the European legislation and, thirdly, there was hardly any demand for trucks complying with a EURO standard before that standard became mandatory. Therefore, the objective of the information exchange was not to 'delay' the introduction of emission technologies.

121 The applicants conclude that the contested decision wrongly assumes that the exchanges of information on the timing of the introduction of emission technologies constitute a restriction of competition and that the Commission

misapplied Article 101 TFEU and Article 53 of the EEA Agreement by finding that those exchanges constituted an infringement 'by object'. The contested decision should be annulled on that basis.

122 The *Commission* contends, as a preliminary point, that, although the obligation to introduce the various emission technologies and the deadlines for their introduction were imposed by European directives, those directives did not oblige competitors to agree on the timetable for their introduction. The collusive contacts between the truck manufacturers enabled them to find out what their competitors' plans were as regards that timetable.

123 Moreover, according to the Commission, even assuming that Scania introduced a product before the deadlines laid down or that the dates of introduction of the various products differed among manufacturers, this does not prove that there was no anti-competitive exchange on that topic. In the case of an infringement 'by object', as in the present case, the Commission is not required to show that the conduct in question leads to effects on the market.

124 Next, the Commission contests the applicants' claim that the exchange concerning the timing of the introduction of the technologies cannot constitute an infringement by object.

125 In that regard, the Commission submits, in the first place, that the case-law expressly considers that the removal of uncertainties as regards the timing of modifications in conduct on the market constitutes an infringement by object (judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraphs 41 and 43).

126 In the second place, the Commission recalls that, in the contested decision (recitals 212(b) and 238(b)), it had considered that the *[confidential]* and the resulting restriction of competition consisted, inter alia, in '*[confidential]* coordinating on the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards'. Together with other practices, *[confidential]* had as its object the restriction of competition' (recital 239 of the contested decision). The applicants' arguments that the Commission had stated that the coordination of the timing alone constituted a restriction by object are thus based on an incorrect premise.

127 In the third place, the Commission notes that the applicants do not dispute the fact that they *[confidential]* not only on the timing but also on the passing on of the costs for the introduction of the technologies. As stated in recital 243 of the contested decision, *[confidential]*

128 The Commission also contests the applicants' claim that there was no collusive behaviour in relation to the timing of the introduction of the technologies. In that context, it argues that the question of which of the *[confidential]* levels the collusion occurred at is irrelevant.

E. The fifth plea in law, alleging misapplication of Article 101 TFEU and Article 53 of the EEA Agreement in that the Commission characterised the exchanges of information within the German circle as an infringement 'by object'

1. Arguments of the applicants

129 The applicants claim that the Commission failed to present precise and consistent evidence supporting the argument that the exchanges of information within the German circle constituted a restriction of competition 'by object' within the meaning of the judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204).

130 The applicants contend that an analysis of the content, objectives and economic and legal context of the information exchanged within the German circle demonstrates that the Commission's 'by object' assessment is vitiated by an error of law or a manifest error of assessment.

(a) Content of the exchanges of information

131 The applicants do not dispute the fact that competitive information was exchanged within the German circle, including information on gross prices charged in Germany. Nonetheless, they argue that those exchanges of information were unrelated to any initial collusive arrangement and, moreover, the information exchanged within the German circle was not by its nature sufficiently harmful to the proper functioning of competition to justify a finding of a serious infringement 'by object'.

132 The applicants examine, in the first place, the exchange of information relating to gross prices.

133 In that regard, they argue, first, that the price information exchanged concerned current prices which were already public and did not concern future prices or pricing intentions. The applicants state, inter alia, that the exchange of price information between manufacturers took place after that information began to apply to orders and deliveries or after that information was communicated to the dealer networks. The fact that the price lists communicated to competitors were already applied in transactions meant that those price lists were current rather than future.

134 The applicants also claim that Scania DE did not revise its prices as a result of information received from its competitors, which supports their argument that the exchanges of information between manufacturers within the German circle concerned current gross prices, not future prices.

135 Secondly, the applicants claim that the information exchanged regarding gross prices was incapable of reducing 'strategic' uncertainty between competitors.

136 In that regard, the applicants explain that, on account of the number and complexity of the factors affecting the pricing of trucks, gross prices and gross price lists have no information value as regards the prices actually applied in market transactions.

137 The applicants further submit that the exchange of German gross prices (including engine prices) had no material impact on the overall level of transparency in the market. The thousands of possible configuration options have a major impact on truck pricing and engine costs represent only a small proportion of the overall price of a truck. Moreover, there are multiple levels in the supply chain with price differences between each level. Those facts call into question the Commission's position, expressed in recital 285 of the contested decision, that *[confidential]*.

138 The applicants also state that, in view of the relatively long lead time between the order and delivery of a truck, the information exchanged (on gross prices) within the German circle was already at that time referred to in negotiations with customers and was therefore in the public domain. The applicants complain that the Commission failed to take into account the business-to-business (B2B) nature of the marketplace when assessing the public nature of the information exchanged. They argue that, contrary to the Commission's argument, the question of the public nature of such information could not depend solely on whether the information is available through public sources, in particular where the customers are professionals who regularly communicate with dealers.

139 In the second place, the applicants consider *[confidential]*. In that regard, they dispute that such an exchange took place, since the net selling price of a truck is the result of commercial negotiations and is different for each customer, in so far as the truck delivered is tailor made. The applicants also dispute that the documentary evidence, referred to by the Commission in recital 212(a) of the contested decision, supports its argument.

140 In the third place, the applicants consider the exchange of information relating to the introduction of emission technologies. They dispute that they colluded within the German circle as regards the passing on of costs (gross price increases) relating to the introduction of the abovementioned technologies. While they do not deny that price information was exchanged within the German circle, they dispute that *[confidential]*.

141 In the fourth place, the applicants contest the finding in recital 212(c) of the contested decision that the sharing of other commercially sensitive information had the object of restricting competition within the EEA. According to the applicants, the alleged 'other commercially sensitive information' that was occasionally exchanged within the German circle was of a technical nature and incapable of removing strategic uncertainty between participants as regards their conduct on the market. That information cannot be characterised, in isolation or in combination with the other information listed in recital 238 of the contested decision, as forming part of an infringement 'by object', without disregarding the

judgment of 11 September 2014 in Case C-67/13 P *CB* v *Commission* (EU:C:2014:2204).

(b) Objectives of the exchanges of information

142 The applicants submit that the exchanges of information within the German circle focused primarily on technical product information. The aim of the participants in those exchanges was to keep abreast of the technical evolution of the trucks.

143 According to the applicants, Scania DE's participants were trainers of sales persons and were not involved in Scania DE's decision-making concerning prices.

(c) Economic and legal context of the exchanges of information

144 The applicants argue that an examination of the economic and legal context, in particular the nature and structure of the trucks market and the conditions under which it operates, calls into question the 'by object' nature of the infringement found by the Commission.

145 In that regard, the applicants state that, because of the complexity of the trucks and the multitude of factors influencing the final price charged to the customer (which becomes an individual price), the gross prices and gross price lists exchanged between competitors have no information value on any parameters of competition (that is to say on the prices to be charged or actually paid in market transactions) and the Commission did not adequately take that context into account when determining the nature of the exchanges of information.

146 The applicants also argue that Scania uses a price setting mechanism which is complex and in which pricing decisions are taken at several trade levels independent of each other and on the basis of arm's length negotiations between Scania's headquarters, national distributors, local dealers and end customers. Price variation down the supply chain, brought about by the arm's length nature of the negotiations at all levels, creates a disconnect between the factory-to-distributor prices and distributor-to-dealer gross list prices and the actual transaction prices charged by independent dealers to end customers.

2. Arguments of the Commission

147 The Commission argues that the applicants incorrectly assess the information exchanged at the level of the German subsidiaries and the evidence thereof, *[confidential]*. The Commission states that it did not conclude in the contested decision that the German level meetings constituted an infringement on their own. On the contrary, it characterised the conduct under scrutiny as a single and continuous infringement. According to the Commission, the assessment of the 'by object' nature of the infringement, which included the information exchanged at the level of the German subsidiaries, cannot therefore be based on a selective reading of the evidence and must be carried out in the light of the nature of the

single and continuous infringement and, therefore, taking into account the overall context of the conduct examined and all the evidence in the file.

148 The Commission states that, in any event, it could have considered that the German level meetings constituted an infringement in themselves, since anti-competitive behaviour took place at those meetings.

149 The Commission also argues that this plea must be rejected in so far as it is based on the erroneous assumption that the exchange of price information at the level of the German subsidiaries was not such as to reduce strategic uncertainty on the market, since the prices in question were current and publicly available.

(a) Nature of the information exchanged

150 As a preliminary point, the Commission notes that the applicants participated in a wide-ranging *[confidential]*, which included discussions not only on pricing intentions, *[confidential]* gross *[confidential]* prices, but also on recently adopted gross price lists, the timing and the costs for the introduction of emission technologies and other competitively sensitive information (recital 212 of the contested decision). According to recital 215 of the contested decision, Scania and the other *[confidential]* participants 'disclosed to one another factors relevant for their future pricing behaviour through regular contacts'. Such behaviour, by its very nature, has the object of restricting competition and contributed to removing future strategic uncertainty between competitors *[confidential]* (recital 215 of the decision). Such discussions run counter to the case-law, which requires each economic operator to determine independently the policy it intends to adopt in the market.

151 The Commission further submits that the applicants' argument that the information exchanged was not strategically important, since it was current and public, is ineffective and irrelevant. According to settled case-law, the fact that price increases communicated to and discussed with competitors might be current and public does not preclude the Commission from finding that such exchanges constitute an infringement of competition by object. This is the case when such price increases are still strategically relevant. In the present case, this is demonstrated by the fact that competitors regularly exchanged current rather than historical, detailed rather than aggregated and confidential rather than public pricing information.

152 According to the Commission, the exchanges of information which took place, even if they concerned current prices, *[confidential]* (recital 211 of the contested decision).

153 Similarly, according to the Commission, even if one were to accept the applicants' claim that those prices were public, the simple fact that competitors received information concerning, inter alia, price increases (information which an independent operator would preserve as business secrets) is sufficient to

demonstrate the existence of the anti-competitive object of the exchanges, since every economic operator must determine independently the policy which it intends to adopt on the market.

(1) Gross price increases

154 As regards the applicants' arguments concerning the exchanges of information on gross prices, the Commission states, in the first place, that the contested decision is based on the finding that the *[confidential]* participants exchanged information concerning the increases applicable to gross price lists.

155 In the second place, the Commission contests the applicants' argument that the price information exchanged was current and public because it concerned 'price lists which had already served as a reference for making significant sales in the markets'. That argument is flawed since *[confidential]*.

156 In any event, according to the Commission, that information was not in the public domain since competitors could not obtain it from accessible public sources (recital 241 of the contested decision).

157 The Commission further notes that, as regards the information on price increases provided by other competitors and received by Scania at the same meetings, the applicants do not even attempt to show that it was current.

158 In the third place, the Commission challenges the applicants' argument that the price setting information exchanged was current and public because it concerned information that 'had already been widely communicated within the dealership network'.

159 In that regard, the Commission argues that such information was not available to competitors through sources other than direct competitor contacts, and information received from competitors was often still only at a planning stage (recital 274 of the contested decision). Consequently, the exchanges 'gave information on future price evolution of the market in the months ahead at a level of accuracy which could not be obtained from the market through any other sources than the collusive contacts with competitors' (recital 280 of the contested decision).

160 In any event, according to the Commission, even if it were true that price information could be collected on the market, this does not mean that it already constituted objective market data that was readily accessible and that the exchanges of such information among competitors were not anti-competitive.

161 In the fourth place, the Commission contests as irrelevant the applicants' claim that the Scania DE employees participating in the German level meetings 'were not involved in and did not bear any responsibility for price setting'. In that regard, the Commission relies on the case-law according to which the attribution of liability to an undertaking involved in anti-competitive behaviour does not

require there to have been knowledge on the part of the employees of the undertaking concerned by that infringement; action by a person who is authorised to act on behalf of the undertaking suffices (judgment of 14 March 2013, *Dole Food and Dole Germany* v *Commission*, T-588/08, EU:T:2013:130, paragraph 581).

162 In the fifth place, the Commission challenges the applicants' argument that Scania did not revise its prices in the light of information allegedly received from its competitors, which demonstrates that the prices discussed were current. The Commission notes that there are no indications that Scania did not take account of information exchanged with competitors over a period of 14 years in determining its future market behaviour and its claim that it did not use that information is not sufficient to rebut the presumption, established by the case-law (judgment of 8 July 1999, *Commission* v *Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 121), that it took account of the information received from competitors (recitals 216 and 217 of the contested decision).

163 In the sixth place, in order to support its conclusion relating to an anti-competitive object of the exchanges of information between Scania and its competitors, the Commission emphasises *[confidential]* (recital 246 of the contested decision).

(2) Net prices and discounts

164 The Commission, providing documentary evidence in support, contests the applicants' claim that *[confidential]*.

(3) Introduction of emissions technologies

165 The Commission contests the applicants' claim that coordination between competitors regarding the passing on of costs relating to the introduction of emission technologies did not take place at the level of the German subsidiaries.

(4) Other commercially sensitive information

166 The Commission contests the applicants' argument that the other commercial information exchanged, taken individually, was not strategically sensitive and did not fall within the scope of a 'by object' infringement.

167 In that regard, the Commission submits that the applicants' argument is based on an erroneous approach to the assessment of the evidence and the scope of the infringement. In so far as the infringement involved wide-ranging conduct, which included discussions not only on pricing intentions, *[confidential]* gross *[confidential]* prices, but also on recently adopted gross price lists, the timing and the costs for the introduction of emission technologies and other competitively sensitive information (see recital 212 of the contested decision), the Commission considers that each element of such wide-ranging conduct must be assessed not in isolation but in the light of the overall context of the collusion.

(b) Purpose of the exchange of information

168 The Commission contests the applicants' claim that the 'primary' purpose of the information exchange at the level of the German subsidiaries was technical information on products. In that context, the Commission points out that, according to the case-law of the Court of Justice, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim, but also pursues other legitimate objectives.

169 The Commission adds that, in any event, the existence of the legitimate objective relied on by the applicants has not been established.

(c) Context of the relevant market

170 The Commission contests the applicants' claim that it did not take due account of the market context in which the price of the trucks is determined.

171 In particular, the Commission submits that it was right to conclude in the contested decision that *[confidential]* (recital 39 of the contested decision). *[confidential]* (recital 285 of the contested decision).

172 The Commission also contests the applicants' argument that each commercial level determined prices autonomously on the basis of negotiations conducted under normal market conditions between Scania's headquarters, national distributors, local dealers and end customers. The Commission argues, in particular, that even if prices between national distributors and Scania's headquarters actually complied with the 'arm's length principle', this would not prove that national distributors had an independent negotiating position. The Commission recalls in that regard that Scania's national distributors in the EEA are almost all wholly owned by Scania's headquarters. Therefore, the negotiating position of the national distributors, as wholly owned subsidiaries, could not be compared to that of independent undertakings.

F. The sixth plea in law, alleging misapplication of Article 101 TFEU and Article 53 of the EEA Agreement in that the Commission considered that the geographic scope of the infringement relating to the German circle extended to the whole of the EEA territory

1. Arguments of the applicants

173 The applicants contest the Commission's finding in recital 386 of the contested decision that the geographic scope of the infringement was EEA-wide for the entire period of the infringement, thus covering, according to the applicants' understanding, the conduct of competitors within the German circle.

(a) The contested decision contains a manifest error of assessment of the facts

174 In the first place, the applicants submit that the information exchanged within the German circle was not of EEA-wide relevance, but relevant only to the German market.

175 In that regard, the applicants submit that the price lists exchanged in Germany related only to German gross distributor-to-dealer prices, applicable in Germany. As far as Scania is concerned, the gross distributor-to-dealer price lists for the German market are set independently by Scania DE, Scania's distributor in Germany.

176 To the same effect, the applicants submit that the information on general price increases independently set by Scania DE and shared with the German subsidiaries of the other manufacturers related only to the German market.

177 Likewise to the same effect, the applicants argue that the price information relating to the introduction of the emission technologies shared by Scania DE concerned only the German market. That information was already included in the current distributor-to-dealer price lists, which were applicable solely to the German market.

178 That analysis by the applicants is supported by the fact that the Scania DE employees involved in the information exchanges within the German circle were attached to the pre-sales department of Scania DE and were not involved in the pricing process.

179 In the second place, the applicants submit that Scania's headquarters in Sweden did not have a decisive influence on the information shared by Scania's representatives in Germany and that this information could not reduce the uncertainty as to Scania's pricing strategy in another EEA country. The applicants contest the Commission's finding in the contested decision that Scania's headquarters exercises 'decisive influence' over Scania's prices throughout the EEA through the Factory Gross Price List (FGPL). The applicants argue that Scania uses a decentralised and multi-layered price setting mechanism in which pricing decisions are taken at several independent trade levels on a country-by-country basis according to local market conditions. Scania has never had a European or global gross price list containing harmonised prices.

180 The applicants state that the gross distributor-to-dealer prices, that is to say the prices exchanged within the German circle, were set by Scania DE. Moreover, according to the applicants, due to the specific conditions of each national market, Scania DE's prices in Germany were not representative of Scania's prices in other European countries and did not make it possible for competitors to infer Scania's pricing policy in another country. Consequently, the Commission could not, in principle, establish that the German pricing information had any European-wide relevance.

181 In the third place, the applicants contest the Commission's analysis, contained in recital 394 of the contested decision, that even if the price information shared by Scania DE was not of EEA-wide relevance, this is an insufficient basis on which to conclude that the scope of the infringement was not EEA-wide, since Scania had been informed of the gross price lists and price increases applicable throughout the EEA territory and had obtained the configurators from other parties.

182 In that regard, the applicants note, first, that almost no other manufacturer had a European price list at the time of the contacts within the German circle.

183 The applicants note, secondly, that there is no evidence that Scania DE ever assumed that the information received from the representatives of the subsidiaries of other truck manufacturers related to European prices or could reduce uncertainty as to its competitors' European pricing strategy, if any such strategy existed.

184 Thirdly, the applicants draw the Court's attention to the fact that, in an attempt to establish Scania DE's participation in collusion allegedly covering the entire EEA territory, the Commission invokes factual elements which are not related to the involvement of Scania DE's representatives in the alleged *[confidential]*. In that context, the applicants state that Scania DE never forwarded the information received to its headquarters and that the purely national relevance of the information exchanged did not give it reason to believe that other manufacturers could have intended to use Scania's information in determining their prices in EEA countries other than Germany.

185 In the fourth place, the applicants submit that the contested decision fails to establish that Scania DE gave its competitors the impression that it provided information of EEA-wide relevance.

186 In the same vein, the applicants add that the evidence in the file shows that the other truck manufacturers were aware that the information exchanged by Scania DE in the context of contacts at the level of the German subsidiaries concerned only the German market.

(b) The Commission wrongly characterises the exchange of information within the German circle as an EEA-wide infringement

187 The applicants submit that, in the present case, the evidence in the file does not indicate that the participants in the exchanges within the German circle intended to participate in an EEA-wide *[confidential]*, but rather confirms that their common intention was limited to an exchange of information relating only to the German market.

188 The applicants also argue that, having regard to the causal connection which must exist between the concerted practice and the conduct on the market, the

Commission unlawfully considered that the geographic scope of the alleged concerted practice within the German circle extended to the whole of the EEA.

189 According to the applicants, the market conduct to be taken into account is that which results from and is explained by the concerted action. Consequently, the market conduct should logically be determined by the extent of the concerted action, which follows from the tacit intent of the concerting parties. In the present case, as the concerted action concerns only Germany, it can be presumed that the participants took into account the information exchanged within the German circle to determine their conduct only on the German market, since they were all representatives of German subsidiaries operating on the German market.

2. Arguments of the Commission

190 The Commission notes, as a preliminary point, that the applicants' line of argument is based on an erroneous attempt to assess Scania DE's contacts separately without taking into account the fact that those exchanges formed part of an overall single and continuous infringement which extended across different levels of Scania. The Commission adds that the applicants' arguments do not take into account the factual context and the way in which the infringement evolved over time.

191 In the first place, the Commission maintains that, for the purposes of assessing the behaviour of Scania DE, the context in which the exchanges at the level of the German subsidiaries took place must be taken into account, *[confidential]*.

192 In that regard, the Commission argues that a review of the evidence presented in Section 6.2 of the contested decision clearly demonstrates that the purpose of the *[confidential]* was related to pricing collusion *[confidential]*.

193 The Commission points out that the cessation, in September 2004, of the top management meetings — although it indicated a change in the intensity *[confidential]* (*[confidential]* (recital 322 of the contested decision)) *[confidential]* — did not signal an end to the collusion or a change in its nature.

194 The Commission adds that *[confidential]* as the main *[confidential]* transitioned, after September 2004, to the level of the German subsidiaries.

195 The Commission concludes that *[confidential]*.

196 In the second place, the Commission maintains that *[confidential]*.

197 In that regard, the Commission states, first of all, that, although the term 'German level' is used throughout the contested decision, *[confidential]*.

198 The Commission notes that nowhere in the contested decision is it stated that *[confidential]* (recital 388 of the contested decision).

199 Therefore, according to the Commission, *[confidential]*.

200 In the third place, the Commission maintains that the *[confidential]*.

201 In that regard, the Commission notes, first, that irrespective of the territorial application of Scania DE's price list, *[confidential]* That fact alone is sufficient to justify the conclusion that the infringement was EEA-wide.

202 Secondly, the Commission notes that, *[confidential]*.

203 Thirdly, the Commission maintains that Scania DE provided to its competitors, during the German level meetings, *[confidential]*.

G. The seventh plea in law, alleging misapplication of Article 101 TFEU and Article 53 of the EEA Agreement in that the Commission considered that the identified behaviour constituted a single and continuous infringement and that the applicants were liable in that regard

1. Arguments of the applicants

204 In the first place, the applicants claim that the contested decision fails to adduce any evidence to demonstrate that, as regards the representatives of Scania participating within the *[confidential]* circles, the cumulative criteria of intention, awareness and acceptance of risk (the 'mental element' of the single and continuous infringement) are met.

205 In the present case, according to the applicants, the key question is whether the individuals representing Scania who participated in one of the *[confidential]* circles were aware of the existence of the others. According to the applicants, it had to be established that at least one person within Scania had some knowledge of each of the *[confidential]* circles. Otherwise, there can be no single and continuous infringement imputed to the applicants. The contested decision does not answer that question.

206 In the second place, the applicants contest recital 339 of the contested decision, which refers to the 'shift' or 'migration' of discussions from the level of the headquarters to the level of the German subsidiaries. According to the applicants, the 'shift' is a mere theoretical construction which has no factual basis and is fraught with contradictions.

207 According to the applicants, for a 'shift' to be regarded as a continuation of previous practices (which is the very essence of a single and continuous infringement), a mechanism should have been put in place to ensure continuity. However, the contested decision has not established the existence of such a mechanism.

208 In the third place, the applicants submit that the contested decision fails to demonstrate that the various circles constituted a common plan serving a single anti-competitive aim. In that context, the applicants refer to the differences between the *[confidential]* circles and, in particular, to the fact that the information exchanged within those circles was of a different nature.

209 In the reply, the applicants argue that the concept of a single and continuous infringement requires the Commission to identify several infringements, which are clearly interrelated. That concept cannot encompass instances of conduct which do not amount to an infringement in their own right.

210 The applicants also criticise the Commission's reasoning as being circular. They submit that the Commission should have, first, assessed the evidence relating to each circle separately for the purposes of establishing whether each circle amounts to an infringement, and, if so, its scope and the anti-competitive aim it pursues, secondly, assessed whether the relevant infringements should be treated as a single overall infringement on the basis that they pursue a global plan serving a single anti-competitive aim and, only as a final step, assessed the temporal and geographic scope of the single and continuous infringement on the basis of the evidence as a whole.

211 According to the applicants, the Commission disregarded the first two steps and, *[confidential]*. By doing so, the Commission found that there was a single and continuous infringement where none existed.

212 The applicants submit that the *[confidential]* circles had to be assessed separately by the Commission.

213 In that regard, they maintain, on the one hand, that the nature and extent of an alleged infringement are defined by the actions and intentions of the employees who participate in the conduct at issue. The actions and intentions of individuals who, whilst employed by the same undertaking, have not participated in the conduct at issue are irrelevant. The applicants state that they do not dispute the essential role of the concept of undertaking in EU competition law but submit that that concept cannot constitute a legal means for artificially determining the nature and scope of an infringement or for creating a link (which is in fact absent) between separate (possible) infringements.

214 On the other hand, the applicants submit that the Commission has failed to identify any relevant link between the *[confidential]* circles which would allow it to conclude that the nature and the scope of the alleged collusive behaviour by one circle is affected by the nature and scope of the alleged collusive behaviour by another circle or that the *[confidential]* circles may have pursued an overall plan serving a single anti-competitive aim. According to the applicants, the *[confidential]* circles are in no way 'interwoven' or 'interrelated'.

2. Arguments of the Commission

215 In the first place, the Commission maintains that there was a common plan pursuing a single anti-competitive objective. In that regard, the Commission recalls that it relied on several elements to demonstrate that the behaviour of Scania and its competitors constituted a common plan pursuing a single anti-competitive objective, as required by the case-law. Moreover, the Commission contests, inter alia, the applicants' claim that the nature of the information exchanged was different at the *[confidential]* levels of contacts.

216 In the second place, the Commission maintains that Scania participated in all the anti-competitive behaviour and therefore it was not even necessary to show that it had knowledge of the infringement.

217 The Commission argues that even if it had to demonstrate Scania's knowledge of the *[confidential]* levels of contacts, that knowledge must be assessed at the level of the undertaking. The Commission notes that, in the present case, the applicants have not contested the fact that they constitute an undertaking.

218 In any event, according to the Commission, even assuming that the level of knowledge is linked to the employees and not to the undertakings, there are several indications that, in the present case, the participating natural persons were or should have been aware of the other levels of coordination.

219 In the third place, the Commission points out that there was no interruption in the *[confidential]*, which continued between the same undertakings and concerning the same product, through the same type of exchanges between competitors. The Commission explains that it used the terms 'shift' or 'migration' simply to indicate that there had been a change in the natural persons participating in the *[confidential]*, without implying any 'disruption'.

220 In the rejoinder, the Commission submits, in the first place, that the case-law does not support the applicants' argument that it had first to establish separate infringements before concluding that there was a single and continuous infringement.

221 In the second place, the Commission points out that it was entitled to consider the evidence as a whole and that it was not required to distinguish between the three levels of coordination. In that context, the Commission rejects the applicants' complaint that its reasoning is circular. The Commission states that it examined all the evidence relating to all the meetings and concluded that there is a single and continuous infringement. At no time did the Commission conclude in the contested decision that the various forms of anti-competitive behaviour were lawful; on the contrary, the anti-competitive conduct continued for *[confidential]* 14 years and the Commission described the numerous anti-competitive meetings in Section 6 of the contested decision.

222 In the third place, the Commission maintains that there is a link between the three levels of coordination. The finding of a single and continuous infringement in the present case is based on the fact that the various contacts concerned the same product, that the same information was shared during those contacts, that the same undertakings participated in those contacts, that the nature, aim and scope of the contacts remained unchanged throughout the duration of the *[confidential]*.

H. The eighth plea in law, alleging misapplication of Article 101 TFEU, Article 53 of the EEA Agreement and Article 25 of Regulation No 1/2003 in so far as the Commission imposed a fine in relation to conduct which is time-barred and, in any event, failed to take into account that the conduct was not continuous

223 The *applicants* submit, In the first place, that the facts concerning the Small *[confidential]* circle justifying the imposition of a fine are time-barred pursuant to Article 25 of Regulation No 1/2003, in so far as the meetings within that circle ended in September 2004. The applicants add that, in those circumstances, the Commission no longer has a legitimate interest, within the meaning of Article 7 of Regulation No 1/2003, in finding that there is an infringement in relation to the conduct within the Small *[confidential]* circle.

224 In the second place, the applicants submit that, even if the Court were to find that the facts at issue constitute a single and continuous infringement (*quod non*), the contested decision should be varied in so far as it does not take into account interruptions of the alleged infringement in relation to the Small *[confidential]* circle. In that context, the applicants claim that the contested decision does not contain sufficient evidence to establish that there were meetings within that circle in 1999.

225 Moreover, the applicants claim that, in view of the lack of evidence concerning Scania's participation in the meetings within the Small *[confidential]* circle in 1999 and 2002, the contested decision wrongly concluded that Scania had continuously participated in the meetings within that circle between 17 January 1997 and 24 September 2004. Instead, the Commission should have concluded that those meetings were interrupted, at least as far as Scania is concerned, between 3 September 1998 and 3 February 2000 (a 17-month interruption) and between 20 November 2001 and 10 April 2003 (another 17-month interruption).

226 The applicants conclude that the contested decision must be annulled and that, in any event, the imposition of a fine should be time-barred for any infringement prior to 10 April 2003. In the alternative, the imposition of a fine should be time-barred for any infringement prior to 3 February 2000. In any event, the calculation of any fine in relation to the Small *[confidential]* circle should reflect the long periods of lesser intensity of any infringement.

227 As regards the applicants' line of argument concerning the limitation period, the *Commission* maintains, primarily, that, since the infringement was single and

continuous, the Commission was entitled to impose a fine for a duration which also included the top management meetings.

228 In the alternative, the Commission submits that, even if the part of the infringement relating to the top management meetings could no longer result in the imposition of a fine because the limitation period had expired (*quod non*), it nevertheless had an interest in making a finding of an infringement.

229 The Commission also contests the applicants' claim that there was an interruption of the top management meetings in 1999. It also contests the claim that Scania did not participate in such meetings in 2002.

230 In any event, according to the Commission, even if there were interruptions or periods during which contacts were of lower intensity (*quod non*), it correctly established that the infringement was single and continuous. Consequently, even where it had no evidence of the infringement for certain periods, the case-law allowed it to presume that the infringement was not interrupted and therefore to impose a fine for the whole of the infringement period.

I. The ninth plea in law, alleging infringement of the principle of proportionality and of the principle of equal treatment as regards the amount of the fine and, in any event, that it is necessary to reduce the amount of the fine pursuant to Article 261 TFEU and Article 31 of Regulation No 1/2003

1. Arguments of the applicants

231 The applicants submit that the contested decision should be varied in so far as the imposition of the fine it provides for does not comply with the principle of proportionality or the principle of equal treatment. In any event, the Court should decide, under the unlimited jurisdiction conferred on it by Article 261 TFEU and Article 31 of Regulation No 1/2003, to substitute its own appraisal for that of the Commission and reduce the amount of the fine.

232 As regards the infringement of the principle of proportionality, the applicants submit, in the first place, that the contested decision failed to assess the gravity of the infringement in a proportionate manner, inasmuch as it failed to consider that Scania DE's employees could not have known that the information received from competitors could have a European dimension.

233 In the second place, the applicants submit that the contested decision infringes the principle of proportionality in so far as, in setting the amount of the fine, it fails to take into account the fact that the contacts between the truck manufacturers changed in nature and intensity during the period under consideration, as was found in recital 322 of the contested decision.

234 In the third place, the applicants note that the infringement described in the recitals of the contested decision is broader than the infringement for which a fine is imposed in the operative part of that decision. That description of the infringement has an impact on the calculation of the amount of the fine and, consequently, the fine set in the contested decision is not proportionate to the infringement as described.

235 As regards the infringement of the principle of equal treatment, the applicants submit that the contested decision infringes that principle in that, by construction, it overly emphasises the applicants' role in the infringement and disregards any possible differences in the involvement of the various truck manufacturers in the infringement.

236 In the second place, the applicants submit that the contested decision infringes the principle of equal treatment in so far as it fails to take into account the fact that their market share at European level was smaller than that of all other truck manufacturers and that the gap between the applicants and the market leaders was very significant, in particular, in Germany.

237 In the third place, the contested decision infringes the principle of equal treatment in so far as it fails to take into account the fact that the applicants do not manufacture medium trucks.

2. Arguments of the Commission

238 As a preliminary point, the Commission points out that the final amount of the fine imposed on the applicants represented 7.8% of their total turnover in the financial year preceding the adoption of the contested decision.

239 The Commission maintains that the fine imposed is consistent with the principle of proportionality.

240 In that regard, the Commission challenges, in the first place, the applicants' argument set out in paragraph 232 above, to the extent that that argument was raised in the context of the sixth plea in law and that plea was unfounded.

241 In the second place, the Commission submits that the applicants' argument concerning the alleged change in the nature and intensity of the collusion is based on a flawed and truncated reading of recital 322 of the contested decision.

242 In the third place, the Commission denies that there is any disparity between the description of the infringement in the recitals of the contested decision and the scope of the operative part of that decision. In any event, according to the Commission, the applicants do not demonstrate how the alleged disparity could have had an effect on the amount of the fine, still less how it could have made the fine disproportionate.

243 The Commission also argues that the fine is consistent with the principle of equal treatment. In that regard, the Commission points out, first of all, that the method of calculating the fines applied in the contested decision reflects that applied in the settlement decision.

244 The Commission next contests the applicants' claim that their role in the infringement was overstated in the contested decision. It maintains that that complaint is unfounded and, in any event, irrelevant for the purposes of determining the amount of the fine.

245 As regards the complaint based on Scania's size and position on the market, the Commission defends the legality of the calculation of the fine based on the value of Scania's heavy truck sales, relying on the principles set out in the judgment of 18 May 2006, *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* (C-397/03 P, EU:C:2006:328, paragraphs 100 and 101).

246 The Commission also challenges, as unfounded, the applicants' claim that their role in the *[confidential]* was passive, as well as the claim that it failed to take into account the fact that the applicants only manufacture heavy trucks.

E. Buttigieg
Judge-Rapporteur

Table of contents