Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 12 April 2018 [1]

Case C-99/17 P

Infineon Technologies AG
v

European Commission

(Appeal — Agreements, decisions and concerted practices — European market for smart card chips — Network of bilateral contacts with the aim of coordinating the response to clients seeking to obtain price reductions — Dispute over authenticity of evidence — Scope of judicial review — Unlimited jurisdiction)

1. By this appeal, Infineon Technologies AG ('the appellant') seeks the setting aside of the judgment of the General Court of the European Union of 15 December 2016, *Infineon Technologies* v *Commission* (T-758/14, not published, 'the judgment under appeal', EU:T:2016:737), by which the General Court dismissed the appellant's action which sought, primarily, the annulment of Commission Decision C(2014) 6250 final of 3 September 2014 relating to proceedings under Article 101 TFEU and Article 53 of the Agreement [on the European Economic Area (EEA)] (Case AT.39574 — Smart Card Chips) ('the decision at issue') and, in the alternative, a reduction in the fine imposed on the appellant.

2. As requested by the Court, this Opinion will focus on two questions of law raised by the appellant in support of its appeal. The first of those two questions relates to the conditions for the exercise of unlimited jurisdiction and the second to the dispute over the authenticity of evidence taken into account by the European Commission.

I. Legal context

A. Regulation No 1/2003

3. Under Article 31 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU], [2] 'the Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

1 Original language: French.

2 OJ 2003 L 1, p. 1.

B. Guidelines on the method of setting fines

4. The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003[3] ('the Guidelines on the method of setting fines') state, under the heading 'Adjustments to the basic amount [of the fine]', as follows:

'…

B. Mitigating circumstances

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

– …

– …

– where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

…'

II. Background to the dispute

5. The background to the dispute and the essential elements of the decision at issue were set out in paragraphs 1 to 40 of the judgment under appeal. They can be summarised as follows.

6. On 22 April 2008, Renesas Technology Corp. and its subsidiaries ('Renesas') informed the Commission of the existence of a cartel in the smart card chip sector and submitted an application for immunity from fines pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases[4] ('the Leniency Notice'). On 28 March 2011, after carrying out on-the-spot inspections at the premises of several companies in the sector and sending them requests for information, the Commission initiated proceedings, pursuant to Article 11(6) of Regulation No 1/2003, against Koninklijke Philips NV and Philips France ('Philips'), Renesas, and Samsung Electronics CO., Ltd and Samsung Semiconductor Europe GmbH (together 'Samsung').

7. In April 2011, the Commission initiated settlement discussions, in accordance with 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],[5] with Renesas, Samsung and Philips. Those discussions were discontinued in October 2012.

8. On 18 April 2013, the Commission sent a statement of objections to Renesas, Hitachi, Mitsubishi Electric Corp., Samsung, the appellant and Philips. The hearing was held on 20 November 2013.

3 OJ 2006 C 210, p. 2.

4 OJ 2006 C 298, p. 17.

5 OJ 2004 L 123, p. 18.

9. On 3 September 2014, the Commission adopted the decision at issue. By that decision, the Commission found that four undertakings, namely the appellant, Philips, Renesas and Samsung, had participated in a single and continuous infringement of Article 101(1) TFEU and of Article 53 of the EEA Agreement in the smart card chip sector for the whole EEA ('the infringement at issue'). That infringement, which, according to the Commission, took place between 24 September 2003 and 8 September 2005, related to smart card chips which are used in mobile telephone SIM cards, bank cards, identity cards and passports, pay TV cards and various other applications.

10. At the time of the infringement at issue, the market for smart card chips, which consisted of two segments — chips for SIM cards (mainly used for mobile telephones) and chips for non-SIM cards (used for banking, security and identification) — was characterised by a constant fall in prices, downstream pressure on pricing and margins from the largest customers of the smart card chip producers, imbalances in the ratio between demand and supply resulting from an increase in demand and constant and rapid technological development, and the structure of the contract negotiations with customers.

11. The infringement at issue was based on a network of bilateral contacts between the addresses of the decision at issue, in the form of meetings or telephone conversations, which took place weekly during 2003 and 2004. According to the Commission, the participants in the infringement coordinated their pricing behaviour for smart card chips through contacts on pricing, including specific prices offered to major customers, minimum price levels and target prices, the sharing of views on the price evolution for the coming semester and pricing intentions, but also on production capacity and capacity utilisation, future market conduct as well as on contract negotiations vis-à-vis common customers. The timing of the cartel contacts, a list of which in Table 4 of the decision at issue, follows the timing of the business cycle. The Commission found that the bilateral contacts were linked to each other by their subject matter and timing. In addition, when those contacts took place, the undertakings made open references to other bilateral contacts among the participants to the infringement at issue and the information gathered was transmitted to competitors.

12. The Commission classified the infringement at issue as a single and continuous infringement. The collusive contacts were linked and complementary in nature. By interacting, they contributed to the realisation of the set of anti-competitive effects within the framework of a global plan having a single objective.

13. According to the Commission, Samsung, Renesas and Philips were aware of the entire infringement. However, the appellant was held responsible for the infringement only in so far as it participated in collusive arrangements with Samsung and Renesas, as there was no evidence that it also had contacts with Philips or that it had the subjective perception of participating in the whole of the infringement at issue.

14. Finally, the Commission held that the behaviour of the undertakings in question had the object of restricting competition in the European Union and an appreciable effect upon trade between Member States and between contracting parties of the EEA Agreement.

15. For the purposes of calculating the fines imposed pursuant to Article 23(2) of Regulation No 1/2003 and the Guidelines on the method of setting fines, the Commission found that the infringement at issue had been committed intentionally. To calculate the basic amount, the Commission used a proxy for the annual value of sales, calculated on the basis of the total actual amount of sales of the cartelised products achieved by the undertakings during the months of their active participation in the infringement at issue and applied a gravity percentage of 16%. The Commission took account of a duration of 11 months and 17 days for Philips, 18 months and 7 days for the appellant, 23 months and 2 days for Renesas, and 23 months and 15 days for Samsung. It applied a factor of 16% of the value of sales by way of additional amount.

16. On account of mitigating circumstances, the Commission granted to the appellant a 20% reduction in the amount of the fine because the appellant was responsible for the infringement at issue only in so far as it participated in collusive arrangements with Samsung and Renesas, and not with Philips. On account of the Leniency Notice, the Commission granted to Renesas immunity from fines and granted to Samsung a 30% reduction in the amount of the fine.

17. In Article 1 of the decision at issue, the Commission held that the following undertakings participated in a single and continuous infringement of Article 101(1) TFEU and of Article 53 of the EEA Agreement in the smart card chip sector for the whole EEA:

– the appellant, from 24 September 2003 until 31 March 2005, for its 'coordination with Samsung and Renesas' (Article 1(a));

– Philips, from 26 September 2003 until 9 September 2004 (Article 1(b));

– Renesas, from 7 October 2003 until 8 September 2005 (Article 1(c)); and

– Samsung, from 24 September 2003 until 8 September 2005 (Article 1(d)).

18. In Article 2 of the decision at issue, the Commission imposed fines of EUR 82 784 000 on the appellant (Article 2(a)), EUR 20 148 000 on Philips (Article 2(b)), EUR 0 on Renesas (Article 2(c)) and EUR 35 116 000 on Samsung (Article 2(d)).

III. The procedure before the General Court and the judgment under appeal

19. By application lodged at the Registry of the General Court on 13 November 2014 ('the application for annulment'), the appellant brought an action, primarily for annulment of the decision at issue and, in the alternative, for a reduction of the fine imposed on it.

20. In support of its action, the appellant put forward six pleas in law. By the judgment under appeal, the General Court dismissed those pleas and, therefore, dismissed the appellant's action in its entirety.

21. By the first two pleas in law raised before the General Court, which related to its rights of defence and the principles of sound administration, the appellant complained about the procedural treatment of a piece of evidence produced by Samsung in 2012, namely an internal Samsung email dated 3 November 2003. The appellant also disputed the authenticity of that email.

22. In that regard, when assessing the second complaint raised in support of the first plea, the General Court held, in essence, in paragraphs 76 to 80 of the judgment under appeal, that the Commission should have provided the appellant, during the administrative procedure, with its own 'forensic assessments' of the authenticity of that email. The General Court stated that those assessments constituted inculpatory evidence since they led the Commission to find that the email constituted credible evidence of the applicant's participation in the infringement at issue. However, the General Court held, in paragraph 85 of that judgment, that failure to communicate those assessments to the appellant had no effect on the conclusion reached by the Commission in the decision at issue, and therefore, in paragraph 86 of the same judgment, it rejected the appellant's complaint.

23. To the extent that the appellant disputed the probative value of a statement made by a Samsung employee, on the basis that a false statement does not constitute a criminal offence in the Republic of Korea and that, following the failure to reach a settlement, Samsung had a specific interest in 'embellishing the facts', the General Court, found, in essence, at paragraph 93 of the judgment under appeal, that Samsung, as an applicant under the Leniency Notice, risked losing the benefit of that leniency if it made a false statement.

24. The General Court also rejected an argument raised by the appellant in the context of the second plea in law alleging that the Commission should have requested an independent expert's report on the electronic version of the email of 3 November 2003 in the absence of reliable evidence of the authenticity of that email. In paragraph 118 of the judgment under appeal, the General Court's response to that argument was based on the ground that the Commission has some latitude in deciding on additional steps to be taken and that, in the present case, the appellant had failed to establish, in the light of the expert reports provided to it and its own forensic assessments, that such a request was necessary.

25. In its assessment of the third plea in law, which alleged infringement of Article 101(1) TFEU and was subdivided into four parts, the General Court examined, inter alia, the appellant's claims relating to the lack of credibility of the evidence supplied by Samsung and to the evidence of an infringement committed by the appellant.

26. In that respect, in paragraphs 143 to 158 of the judgment under appeal, the General Court examined the appellant's arguments which, in the context of the second part of the third plea, sought to dispute the credibility of the evidence supplied by Samsung.

27. In the first place, the General Court, at paragraphs 143 and 144 of that judgment, rejected those arguments as unfounded on the ground that, even if the view should be taken that Samsung did not constitute a credible witness and that all its statements and the documentary evidence that it provided should be rejected, that still would not alter the Commission's findings, which were based on the statements and documentary evidence submitted by Renesas, that established that the applicant had anti-competitive contacts with Renesas, such as the contact that took place on 31 March 2005. In that regard, the General Court referred to paragraphs 193 to 201 of its judgment, and, at paragraphs 197 to 206 of the judgment, the General Court examined and rejected the appellant's arguments seeking to dispute the latter contact.

28. In the second place, 'and for the sake of completeness', in paragraphs 145 to 157 of the judgment under appeal, the General Court examined and rejected the appellant's complaints disputing the credibility of Samsung as a witness and the credibility of Samsung's statements and evidence.

29. In that context, first, the General Court observed that, as the appellant did not dispute the Commission's findings that Samsung's statements and evidence were corroborated by other members of the cartel, in particular by Renesas and NXP,[6] all arguments aimed at discrediting Samsung as a reliable witness had to be rejected as ineffective (paragraphs 146 to 149 of the judgment under appeal). Secondly, the General Court responded to the appellant's complaints relating to the reliability of the evidence taken into account by the Commission in establishing the contacts of 3 and 7 November 2003 (paragraphs 152 to 157 of the judgment under appeal).

30. In paragraphs 159 to 208 of the judgment under appeal, the General Court examined the third part of that plea which related to evidence of the existence of an infringement of Article 101 TFEU. The appellant claimed that none of the 11 contacts it had had with its competitors infringed that article. In that context, the General Court stated, in paragraph 160 of the judgment under appeal, that 'the [appellant did] not contest the Commission's finding that prices were determined, in principle, on an annual basis, which is apparent indeed from the discussions in which the [appellant] took part. In those circumstances, it [was] sufficient to examine, for 2003 to 2005, whether the [appellant] participated in one or, as the case may be, in two anti-competitive discussions, during each of those three years, with Samsung or Renesas, in order to find whether or not there was an infringement of Article 101 TFEU'.

6 The decision at issue shows that NXP took over the activities of Philips with effect from its creation on 29 September 2006. The Commission found that NXP had not participated in the infringement at issue.

31. In those circumstances, the General Court considered it appropriate to examine, as a preliminary point, five contacts between the appellant and Samsung or Renesas, namely the contacts of 24 September 2003 (first contact), of 3 November 2003 (second contact), of 18 March 2004 (sixth contact), of 1 to 8 June 2004 (seventh contact) and of 31 March 2005 (eleventh contact), the first and last of those contacts marking, according to the Commission, the beginning and the end respectively of the appellant's participation in the infringement at issue.

32. According to the General Court, it was therefore only in the event that those five contacts did not make it possible to establish the existence of the infringement at issue that the General Court would have to examine whether or not the other contacts (such as that of 17 November 2003), which the appellant submitted were not unlawful, contributed to establishing the existence of that infringement.

33. The General Court then examined, and rejected, all of the arguments put forward by the appellant in relation to those five contacts.

34. In particular, with regard to the first contact, of 24 September 2003, between the appellant and Samsung, examined in paragraphs 161 to 176 of the judgment under appeal, first, the General Court held, in paragraphs 164 to 166 of its judgment, that the exchange of information in question in relation to pricing, current and future capacities and envisaged technological developments was capable, in particular on a market where supply and demand are concentrated, of influencing directly the commercial strategy of competitors. The General Court stated, in paragraph 168 of that judgment, that none of the appellant's arguments could cast doubt on the finding that, at the very least, the appellant and Samsung exchanged information on price forecasts for the following year.

35. Secondly, in paragraphs 173 to 175 of the judgment under appeal, the General Court described that exchange of information, which it said was sensitive, as constituting an infringement by object, in the light of the economic and legal context of the market in question, which had been noted in recital 59 of the decision at issue and which the appellant had not contested before the General Court.

36. Turning more specifically to discussions about production capacity, the General Court added, in paragraph 176 of that same judgment, that, since the Commission had identified the reasons why it considered that the exchange of information on capacities was, in the light of the market characteristics, capable of restricting competition, it was not required to demonstrate the existence of anti-competitive effects on the market to categorise the practice at issue as an infringement. Moreover, even if the exchange of information on capacities was not on its own sufficient to make a finding of an infringement by object, the appellant nevertheless did not, according to the General Court, call into question the fact that the Commission was right to find that the exchange of information on future prices constituted an infringement by object.

37. With regard to the contact of 3 November 2003 between the appellant and Samsung, examined in paragraphs 177 to 185 of the judgment under appeal, the General Court noted, first, that the appellant had not proved that the objective reasons advanced by the Commission to justify the existence of several versions of the email of that date, the authenticity of which the appellant disputed, were incorrect. In any event, there was a body of evidence resulting from other evidence according to which the unlawful discussions mentioned in that email took place. The General Court examined the email from a Renesas employee of 7 October 2003 and the email from a Samsung employee of 7 November 2003 (paragraphs 181 to 183 of the judgment under appeal).

38. Secondly, in response to the argument that the contact of 3 November 2003 did not constitute a restriction of competition by object, the General Court held that it was sufficient to note that the Commission was not required to establish in respect of each unlawful discussion that the discussion constituted such a restriction, provided that it established that the practices in question, taken together, constituted a restriction of competition by object (paragraph 185 of the judgment under appeal).

39. With regard to the contact of 1 to 8 June 2004 between the appellant and Samsung, the General Court, in paragraphs 192 to 196 of the judgment under appeal, rejected the appellant's arguments. Referring to recital 216 of the decision at issue, the General Court relied upon a document originating from Samsung to find that there had been an exchange of sensitive information.

40. In its examination of the five contacts referred to above, the General Court found, in paragraph 207 of the judgment under appeal, 'that the Commission did not err in finding that the [appellant] had participated in anti-competitive discussions with Samsung and Renesas between 24 September 2003 and 31 March 2005'.

41. In response to the fourth part of the appellant's third plea, which alleged that, given the non-severable nature of the infringement at issue, the General Court had no choice but to annul the decision at issue in its entirety, if, in particular, it found that the contacts of 3 and 17 November 2003 were not anti-competitive, the General Court held, in paragraph 211 of the judgment under appeal: 'as was found in paragraph 160 [of the judgment under appeal], the [appellant] did not contest that prices on the relevant market were as a rule set annually. Since it was found … that the Commission had not erred in finding that the [appellant] participated in five unlawful contacts between 2003 and 2005, the fact that it was allegedly wrong to find that the other contacts that it relied upon, such as that of 17 November 2003, were not in actual fact [competitive], would not alter the finding that the [appellant] participated in a single and continuous infringement during those three years. Accordingly, contrary to the [appellant]'s submission at the hearing, even if the contacts other than the five ones mentioned above did not infringe Article 101 TFEU, the fact remains that the Commission proved to the requisite legal standard that it had participated in the infringement at issue.'

42. With regard to the fourth plea in law raised by the appellant in the alternative and alleging misapplication of the concept of a 'single and continuous infringement', the General Court, in paragraph 215 of the judgment under appeal, summarised recitals 285 to 315 of the decision at issue. It also recalled, in paragraphs 216 to 223 of the judgment under appeal, the case-law relating to the finding of a single infringement and the participation of an undertaking in a single infringement.

43. The General Court went on to examine the appellant's five complaints in the light of that case-law. In particular and in the first place, the General Court, at paragraphs 226 to 232 of the judgment under appeal, rejected a complaint that alleged that the decision at issue contained a contradiction. Following analysis of the grounds and the operative part of the decision at issue, the General Court found that 'although, in the operative part, the Commission found, without drawing any distinction between the four addressees of that decision, that they had all participated in the infringement at issue, the grounds of that decision unambiguously indicate that the Commission considered that those undertakings had participated in a single and continuous infringement, without prejudice to the fact that the [appellant] could not, unlike the three other undertakings punished, be held liable for the infringement at issue in its entirety' (paragraph 229 of the judgment under appeal). However, interpreting the operative part of the decision at issue in the light of its grounds, the General Court held, in paragraph 231 of the judgment under appeal, 'that the operative part must be understood as meaning that … [the Commission] does not impute to the [appellant] liability for the infringement at issue as a whole, unlike the other addressees of the [decision at issue], but imputes to it liability for that infringement to the extent that it engaged in unlawful contacts with Samsung and Renesas. Although the operative part of the [decision at issue] is admittedly worded awkwardly, … the fact remains that the operative part of that decision is not at odds with its grounds.'

44. Secondly, in paragraphs 236 to 240 of the judgment under appeal, the General Court also rejected a complaint that alleged that the principles of equal treatment and of proportionality had been infringed in the calculation of the fine. In paragraph 239 of the judgment under appeal, the General Court rejected the appellant's argument contesting the Commission's decision to grant it a 20% reduction in the amount of the fine due to mitigating circumstances, on the grounds that 'the [appellant] does not put forward any specific argument permitting the inference that a reduction of 20% in the amount of the fine is not proportionate, in the present case, to the fact that it had participated only partially in the infringement at issue.'

45. Calculation of the fine was also examined by the General Court in the context of the fifth and sixth pleas raised by the appellant.

46. In paragraphs 255 to 259 of the judgment under appeal, in the examination of the fifth plea alleging that the fine was miscalculated in that the appellant did not participate in contacts concerning non-SIM chips, the General Court found, first of all, that the price of those chips had been raised during the contact with Samsung on 24 September 2003 and that the appellant's arguments did nothing to establish otherwise (paragraphs 255 and 256 of the judgment under appeal). The General Court stated, secondly, 'and in any event … the [appellant] does not put forward any argument in its pleadings aimed at challenging the Commission's finding, in recital 221 of the [decision at issue] and in its observations, that there is a correlation between SIM chips and non-SIM chips' (paragraph 257 of the judgment under appeal) and rejected as ineffective the appellant's argument that the two types of chips were not part of the same market of products (paragraph 258 of the judgment under appeal).

47. In the context of the sixth plea, alleging infringement of the 2006 Guidelines on the method of setting fines and the principle of proportionality, the General Court found, at paragraph 270 of the judgment under appeal, that the fine imposed on the appellant did not infringe the principle of proportionality. In essence, the General Court based this finding on the ground that, as set out in paragraph 269 of that judgment, the amount of the fine imposed on the appellant can be explained by its turnover, which was much higher than that of the other undertakings punished and merely reflected the economic importance of its own participation in the infringement at issue, in so far as the proportion of the overall turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of that infringement.

IV. Forms of order sought and procedure before the Court of Justice

48. By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue in so far as the appellant is concerned;

– *in eventu*, reduce the fine in the amount of EUR 82 874 000 imposed on the appellant according to paragraph 457(a) of the decision at issue to a proportionate amount;

– *in eventu*, refer the case back to the General Court for reconsideration; and

– order the Commission to pay the costs.

49. The Commission contends that the Court should:

– dismiss the appeal;

– in the alternative, reject the request that the Court reduce the fine imposed on the appellant; and

– order the appellant to pay the costs.

V. The appeal

50. In support of its appeal, the appellant raises three grounds of appeal which correspond, in essence, to the 'three main questions of law' set out in paragraph 2 of its appeal. The first ground of appeal thus alleges infringement of Article 263 TFEU due to an incomplete and selective judicial review. A specific question is raised in the context of this ground of appeal as to the authenticity of certain evidence and the consequences thereof in terms of the burden of proof. The first ground of appeal is intrinsically linked to the third ground of appeal, which alleges errors of law in calculating the fine imposed on the appellant and a failure to have regard to unlimited jurisdiction. Finally, the second ground of appeal relates to the application of Article 101 TFEU and, more specifically, to the concepts of restriction of competition by object and of a single and continuous infringement.

51. The questions of law which the Court wishes to see dealt with in this Opinion are discussed under the first two parts of the first ground of appeal in conjunction with the third ground. As indicated in point 2 of this Opinion, those questions relate, first, to the requirements for effective judicial review, that question being linked, in the present case, to the exercise of unlimited jurisdiction and, secondly, to the dispute over the authenticity of evidence taken into account by the Commission.

A. Effective judicial review and unlimited jurisdiction (first part of the first ground of appeal in conjunction with the third ground of appeal)

1. Arguments of the parties

52. By the first part of its first ground of appeal, the appellant contests, in particular, the findings in paragraph 160 of the judgment under appeal, which form the foundation of what the appellant considers to be an insufficient judicial review.

53. In essence, the appellant criticises the General Court for having examined only 5 of the 11 contacts found by the Commission to be unlawful even though the appellant had disputed them all. A finding of unlawfulness of the Commission's assessments in relation to any one of the disputed contacts should have led to the corresponding findings of the Commission in the decision at issue being set aside.

54. The appellant is therefore of the view that the judicial review carried out by the General Court, in the circumstances stated in paragraph 160 of the judgment under appeal, is incomplete and selective and, therefore, in breach of Article 263 TFEU. That partial review also leads to the judgment under appeal being defective in respect of its statement of grounds.

55. In addition, the appellant alleges that the contacts examined are insufficient to substantiate a finding of a single and continuous infringement on the part of the appellant.

56. Finally, the appellant maintains that such a selective judicial review did not allow the General Court to fully assess the gravity of the alleged infringement nor to sufficiently review the fine imposed. The latter argument is repeated and elaborated upon in the context of the third ground of appeal relating to errors of law which the General Court is said to have committed in determining the amount of the fine.

57. The Commission disputes the merits of all of the arguments raised by the appellant.

58. More specifically in relation to the criticism of paragraph 160 of the judgment under appeal, the Commission considers that, because the appellant did not challenge the finding that prices of smart card chips were determined, on principle, on an annual basis, the General Court was entitled to limit itself to verifying that in each year between 2003 and 2005, the appellant participated in at least one anti-competitive contact. In fact, it is sufficient that the economic consequences of anti-competitive contacts continue to produce their effects beyond the date on which they took place. Accordingly, the General Court was not required to provide reasons why it selected the five contacts that it verified or why it did not verify whether the appellant participated in six other contacts. The appellant has no interest in obtaining such explanations.

59. In addition, despite the appellant's assertions to the contrary, the General Court's approach did not prevent it from responding properly to the appellant's arguments relating to the gravity of the infringement or the amount of the fine.

2. Analysis

(a) The dual nature of the judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU

60. In paragraph 160 of the judgment under appeal, the General Court noted that the appellant did not contest the Commission's finding that prices were determined, in principle, on an annual basis. On the basis of that finding, the General Court held that 'it [was] sufficient to examine, for 2003 to 2005, whether the [appellant] participated in one or, as the case may be, in two anti-competitive discussions, during each of those three years, with Samsung or Renesas, in order to find whether or not there was an infringement of Article 101 TFEU. In those circumstances, the [General] Court [considered] it appropriate to examine, as a preliminary point, five contacts between the [appellant] and Samsung or Renesas, … [the] first and last contacts marking, according to the Commission, the beginning and the end respectively of the [appellant]'s participation in the infringement at issue. It is therefore only in the event that those five contacts do not make it possible to establish the existence of the infringement at issue that the [General] Court will examine whether or not the other contacts, such as that of 17 November 2003, which — the [appellant] submits in its pleadings and at the hearing — were not unlawful, contribute to establishing the existence of that infringement.'

61. The General Court, having validated the Commission's findings in relation to the five contacts it had chosen to review, confirmed that the appellant had participated in the infringement at issue, without proceeding to examine the arguments raised in relation to the other contacts.

62. In paragraph 211 of the judgment under appeal, the General Court held that 'since … the Commission had not erred in finding that the [appellant] participated in five unlawful contacts between 2003 and 2005, the fact that it was allegedly wrong to find that the other contacts that it relied upon, such as that of 17 November 2003, were not in actual fact [competitive], would not alter the finding that the [appellant] participated in a single and continuous infringement during those three years. Accordingly, contrary to the [appellant]'s submission at the hearing, even if the contacts other than the five ones mentioned above did not infringe Article 101 TFEU, the fact remains that the Commission proved to the requisite legal standard that it had participated in the infringement at issue.'

63. Paragraph 160 of the judgment under appeal therefore forms the crux of the complaints made by the appellant, which maintains that, rather than relying on a 'selection' in that paragraph, the General Court should have carried out an exhaustive review of all the contacts disputed by the appellant.

64. There are two components to the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU. First, there is the 'classic' review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by a review exercising powers of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission.[7]

(b) The scope of the judicial review

65. In the present case, the Commission held, in the decision at issue, that there had been a single and continuous infringement. Such an infringement can be defined as the result of continuous conduct formed of different actions which form part of an 'overall plan' because their identical object distorts competition within the common market, even if one or several elements could also constitute in themselves and taken in isolation an infringement of Article 101 TFEU. In the event of such an infringement, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[8]

66. Furthermore, the Court has stated that 'an undertaking which has participated in such a single and complex infringement through its own conduct, which fell within the definition of an agreement or a concerted practice having an anti-competitive object for the purposes of Article [101(1) TFEU] and was intended to help bring about the infringement as a whole, may accordingly be liable also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement.'[9]

67. It was in the context of such a single and continuous infringement that the General Court felt able to review the legality of the decision at issue by limiting its examination to verifying the appellant's participation 'in one or, as the case may be, in two anti-competitive discussions, during each of those three years [(that is to say, from 2003 to 2005)]',[10] which included the contacts marking, according to the Commission, the beginning and the end of the infringement committed by the appellant.

68. Since, as a premise for doing so, the General Court had observed that the appellant did not contest the Commission's finding that prices were determined, in principle, on an annual basis, I see no reason to consider that the characteristics of the infringement at issue were misrepresented.

69. The fact that an undertaking did not take part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate is not material to the establishment of the existence of an infringement on its part; those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine.[11] In its judicial review, the General Court therefore did not commit any error of law in limiting its examination to five anti-competitive discussions spread over the three years of the infringement period.

7 See, to that effect, judgments of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 42); of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 71); and of 26 January 2017, *Aloys F. Dornbracht* v *Commission* (C-604/13 P, EU:C:2017:45, paragraph 52).

8 See, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258); of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 41); and of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, not published, EU:C:2013:464, paragraph 49).

9 Judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 42), and of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, not published, EU:C:2013:464, paragraph 50).

10 Paragraph 160 of the judgment under appeal.

11 See, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 86), and of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 45).

70. It is true that, in the fifth part of the first ground of appeal, the appellant disputes the General Court's preliminary finding of an annual price-setting.[12] However, that argument seems to me to be inadmissible since the supposedly erroneous nature of that proposition was not raised before the General Court, despite the fact that the Commission had expressly based the decision at issue on the fact that the price of smart card chips was determined, in principle, on an annual basis.[13] The argument is, in any event, unfounded since the appellant has not proved any distortion in that regard. In specifying, in paragraph 160 of the judgment under appeal, that 'prices were determined, *in principle*, on an annual basis',[14] the General Court did not limit price-setting exclusively to an annual frequency.

(c) The extent of a review exercising powers of unlimited jurisdiction

71. By contrast, the second component of judicial review by the General Court of Commission decisions relating to proceedings under Articles 101 and 102 TFEU seems to me to pose a very different question in relation to the extent of the review that should be carried out by the General Court.

72. As I pointed out in point 64 of this Opinion, a review of legality under Article 263 TFEU may be supplemented by a review exercising powers of unlimited jurisdiction, on the basis of Article 261 TFEU and at the request of applicants, with regard to the penalties imposed under competition law by the Commission.[15]

73. Even though a review exercising unlimited jurisdiction is not an independent remedy, it must nevertheless be exercised in a manner separate from the review of legality.[16] In other words, the mere fact that a review of legality has not revealed any illegality does not mean that a specific review should not be carried out, exercising powers of unlimited jurisdiction.[17] As I recalled in point 69 of this Opinion, it is during that second review that the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration.

12 See paragraphs 57 and 58 of the appeal.

13 See, in the description of the facts, paragraphs 38 to 41 of the decision at issue; in the description of events (basic principles of organisation of the cartel), paragraphs 68, 76 and 77 of the decision at issue; in the application of Article 101 TFEU to the case in hand, paragraphs 246 and 297 of the decision at issue. On the inadmissibility of a new plea, see judgment of 12 May 2016, *Bank of Industry and Mine* v *Council* (C-358/15 P, not published, EU:C:2016:338, paragraph 91).

14 Emphasis added.

15 In the present case, there does not seem to me to be any doubt that such a request was made. By asking the General Court to annul or reduce the fine imposed on it, the appellant undeniably asked the General Court to exercise its unlimited jurisdiction (see, in particular, paragraphs 189 and 192 of its application for annulment). See, to that effect, judgment of 27 April 2017, *FSL and Others* v *Commission* (C-469/15 P, EU:C:2017:308, paragraph 72), together with the Opinion of Advocate General Sharpston in *KME Germany and Others* v *Commission* (C-272/09 P, EU:C:2011:63, point 78).

16 See, to that effect, Muguet-Poullennec, G., 'Sanctions prévues par le règlement No 1/2003 et droit à une protection juridictionnelle effective: les leçons des arrêts *KME* et *Chalkor* de la CJUE', *Revue Lamy de la Concurrence: droit, économie, régulation*, 2012, No 32, p. 57 to 78.

17 See, to that effect, Van Cleynenbreugel, P., 'Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law', *The Columbia Journal of European Law*, 2012, p. 519 to 545, in particular p. 535 and 536; Forrester, I. S., 'A challenge for Europe's judges: the review of fines in competition cases', *European Law Review*, 2011, vol. 36, No 2, p. 185 to 207, in particular p. 195.

74. It is now firmly established that, 'in order to satisfy the requirements of conducting a review exercising its powers of unlimited jurisdiction for the purpose of Article 47 of the Charter with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 TFEU and 263 TFEU, to examine all complaints based on issues *of fact and law* which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement.'[18]

75. That requirement for a thorough review is also explained by the principles of individualisation and progressiveness of the 'penalty', which are, in the words of Advocate General Tizzano, two principles of cardinal importance in any punitive system, both in the criminal and the administrative spheres[19] and are implicit in the Court's case-law concerning the determination of the amount of fines in competition law.

76. The Court has consistently held that, in order to determine the amount of a fine, 'regard must be had to the duration of [the infringement] and *to all the factors capable of affecting the assessment of the gravity of the infringements, such as the conduct of each of the undertakings, the role played by each of them in the establishment of the concerted practices*, the profit which they were able to derive from those practices, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the [Union].'[20]

77. Not could it be otherwise, since, according to the Court, 'the gravity of the infringement must be assessed on an individual basis'.[21]

78. In my view, the General Court could dispense with the second component of judicial review only if the circumstances that were relied on in determining the amount of the fine were identical to those that formed the basis of the arguments put forward in relation to the review of legality *and if the General Court rejected all those arguments at that time*.[22]

79. In the present case, it does not seem to me that the second of those requirements was met since, in the context of its review of legality, the General Court chose to verify only 5 of the 11 contacts which were disputed in detail by the appellant.

80. Admittedly, in the part of its application relating to the reduction of the fine, the appellant relied on the Commission's finding that it had participated in 7 out of the 41 contacts listed.[23] However, it seems to me that the reason for that approach was that the plea was made in the alternative. Since the appellant was primarily seeking the annulment of the decision at issue on the basis of a lack of evidence of any conduct on its part constituting an infringement, the premise for its plea in the alternative was, implicitly but logically, that its primary arguments were not accepted.

18 Judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 200; emphasis added). See also, to that effect, judgment of 27 April 2017, *FSL and Others* v *Commission* (C-469/15 P, EU:C:2017:308, paragraph 75). Academic writers have not failed to point out that the need to carry out a thorough and comprehensive review of all the disputed facts was a requirement arising from Article 47 of the Charter of Fundamental Rights of the European Union and therefore incorporating the fundamental right to effective judicial protection (see, to that effect, Wesseling, R., and van der Woude, M., 'The Lawfulness and Acceptability of Enforcement of European Cartel Law', *World Competition*, 35, 2012/4, p. 573 to 598, in particular p. 582). On the requirements for the right to effective judicial protection in competition law, see, also, Van Cleynenbreugel, P., 'Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law', *The Columbia Journal of European Law*, 2012, p. 519 to 545, in particular p. 5; Bellis, J.-Fr., 'La charge de la preuve en matière de concurrence devant les juridictions de l'Union européenne', in Mahieu, St. (dir.), *Contentieux de l'Union européenne. Questions choisies*, Bruxelles, Larcier, coll. Europe(s), 2014, p. 217 to 233, in particular p. 217 and 218).

19 See Opinion of Advocate General Tizzano in *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, EU:C:2004:415, point 130).

20 Judgment of 7 June 1983, *Musique Diffusion française and Others* v *Commission* (100/80 to 103/80, EU:C:1983:158, paragraph 129; emphasis added). See, more recently, judgment of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 56).

21 Judgment of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, not published, EU:C:2013:464, paragraph 102).

22 See, to that effect, judgment of 26 January 2017, *Aloys F. Dornbracht* v *Commission* (C-604/13 P, EU:C:2017:45, paragraphs 55 and 56).

23 See paragraphs 167 and 191 of the application for annulment.

81. That method of proceeding does not alter the fact that the arguments as to whether the 11 contacts identified by the Commission in the decision at issue constituted an infringement could have a bearing on the calculation of the fine imposed if they appeared well founded, since the fact that an undertaking has played a minor role in the aspects of an infringement in which it participated is a factor which must be taken into account when assessing the gravity of the infringement and, where applicable, when calculating the fine.[24]

82. It is apparent that the General Court did not respond to all the arguments raised by appellant, either at the time of the review of legality — when it only verified the appellant's participation in five anti-competitive discussions, even though the appellant had disputed the unlawfulness of the 11 contacts identified by the Commission in the decision at issue and had provided reasons therefor — or at the time of exercising its power of unlimited jurisdiction, when it stated that the appellant 'merely … claims that it played a minor role in the infringement at issue'[25] and that 'the reason that [it] received the largest fine is that it had a much higher turnover than the other undertakings punished',[26] the amount of the fine reflecting the economic significance of its participation in the infringement at issue.

83. While I do not seek to question the relevance of that last statement, and cannot say whether the General Court would have reached a different conclusion had it examined all the complaints made by the appellant, it does appear that the General Court did not take into consideration, in a legally correct manner, all the essential factors to assess the gravity of the conduct of which the appellant is accused and that it did not respond to a sufficient legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced. That is precisely the purpose of review by the Court of Justice in the context of an appeal.[27]

3. Conclusions on the first part of the first ground of appeal in conjunction with the third ground of appeal

84. After my analysis of the first part of the first ground of appeal in conjunction with the third ground of appeal, I consider that the General Court committed an error of law by failing to examine each of the arguments that had been put forward by the appellant in order to establish the lawfulness of the contacts it was found by the Commission to have had.

B. The authenticity of the evidence

1. Arguments of the parties

85. By the second part of the first ground of appeal, the appellant complains that, in paragraph 118 of the judgment under appeal, the General Court put the burden of proof onto the appellant to show that an internal Samsung email of 3 November 2003 was inauthentic. The appellant claims that since the Commission, which is responsible for proving the infringement, failed to establish the authenticity of that email in accordance with the principle of good administration, and in view of the serious concerns raised by the appellant, that piece of evidence should have been declared inadmissible.

24 See, to that effect, judgments of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 86), and of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 45). The relative gravity of the participation of an undertaking in an infringement may, inter alia, be taken into account in the assessment of mitigating circumstances (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 104 and 106).

25 Paragraph 263 of the judgment under appeal.

26 Paragraph 269 of the judgment under appeal.

27 See, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 244).

86. The appellant maintains that, at the very least, in view of the observations made by itself and by Samsung, the Commission was under an obligation to appoint an independent professional expert to establish the authenticity of the email. That is all the more important in cartel proceedings because of their criminal nature.

87. The Commission disputes the stance taken by the appellant. It contends that, where the authenticity of a piece of evidence is challenged, credibility is the only relevant criterion and the probative value of the evidence is to be assessed in the light of all the circumstances of the case.

88. According to the Commission, the duty of good administration does not require it to demonstrate the authenticity of a piece of evidence and there was therefore no need for it to appoint an independent professional IT expert.

89. The Commission considers that, in the present case, the General Court complied with those requirements in assessing the credibility of the internal email in the light of all the circumstances of the case and in finding that the Samsung internal email of 3 November 2003 could be relied upon as part of the body of evidence. The Commission adds that, save where the clear sense of the evidence is distorted, such findings of fact by the General Court are not subject to review by the Court of Justice.

2. Analysis

(a) The distinction between the authenticity and the credibility of a piece of evidence

90. Where the Commission has been able to establish that an undertaking took part in meetings between undertakings of a manifestly anti-competitive nature, it is for that undertaking to provide another explanation of the tenor of those meetings. [28]

91. In that regard, 'it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of [the] evidence [on which the Commission relies] so that the Commission bears the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, on the one hand, the existence of the circumstance relied on by it and, on the other, that that circumstance calls in question the probative value of the evidence relied on by the Commission.' [29]

92. More generally speaking, the principle which prevails in EU law is that of the unfettered evaluation of evidence. It results from that principle that the only relevant criterion for the purpose of assessing the probative value of evidence lawfully adduced relates to its credibility. [30]

93. In order to do so, in areas giving rise to complex economic assessments, the Court has stated that the EU judicature must establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent. [31]

94. Without questioning those parameters, I consider that the authenticity of a piece of evidence is necessarily a question that must precede any assessment of its credibility: evidence that is not authentic cannot be regarded as credible even if it appears to be so.

28 See, to that effect, judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 75).

29 See, to that effect, judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 76).

30 See, to that effect, judgments of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 128), and of 27 April 2017, *FSL and Others* v *Commission* (C-469/15 P, EU:C:2017:308, paragraph 38).

31 See, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 54).

95. It is therefore necessary to come back to the basic principle that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.[32] Where the Court still has a doubt, the benefit of that doubt must be given to the undertaking accused of the infringement.[33]

96. That means in reality that if the Court finds that there is any doubt as to the actual nature of a contested document and/or whether it was obtained by proper means, the document must be disregarded.[34] It is nothing more, or less, than a question of admissibility of the evidence. Only in the event that the evidence provided by the Commission is admissible can an assessment be made as to its credibility.[35]

(b) Application to the present case

97. In the present case, the appellant contests the authenticity of an internal Samsung email sent by one of its employees on 3 November 2003. First, there are several versions of printouts of that email, and secondly, the two expert reports lodged by the appellant concluded, in essence, that it was not possible to confirm its authenticity.

98. Those arguments were developed in detail by the appellant in paragraphs 68 to 86 of its application for annulment. First, the appellant described a first version of the printout, which did not show any addressee nor anybody in 'carbon copy' which was allegedly sent at 3:27 a.m. (European time), although the telephone call from the Infineon employee mentioned in the offending email allegedly took place that same day. Secondly, the appellant pointed out the differences between the first version of the email produced and the two subsequent versions which, unlike the first version, showed an addressee and six other individuals in carbon copy, as well as different sending times. Thirdly, the appellant relied on an expert report in which the independent expert stated that the email of 3 November 2003 could not be considered authentic beyond reasonable doubt, something which was confirmed by the same expert in a second report.

99. Despite the above matters, the General Court found, in paragraph 181 of the judgment under appeal, that the Commission 'could reasonably conclude that the [appellant] had participated in [unlawful] discussions', basing this finding, inter alia, on the fact 'that no expert report concluded that the email of 3 November 2003 did not constitute authentic contemporaneous evidence — which the [appellant] [had] not indeed established before [it]'. The General Court added, in paragraph 182 of the judgment under appeal, that the appellant had not 'proved that the objective reasons advanced by the Commission stating why there [were] several versions of that email [were] incorrect.'

100. I take the view that, in so doing, the General Court committed an error of law by failing to comply with the standard of proof required with regard to fines imposed for infringement of competition law. Even putting to one side the differences in the essential elements of an email such as the addressees or time of sending, it can be seen from the expert reports lodged by the appellant that it

32 See, to that effect, judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraph 71).

33 See, to that effect, judgment of 22 November 2012, *E.ON Energie* v *Commission* (C-89/11 P, EU:C:2012:738, paragraphs 72 and 73).

34 See, to that effect, judgment of 17 December 1981, *Ludwigshafener Walzmühle Erling and Others* v *Council and Commission* (197/80 to 200/80, 243/80, 245/80 and 247/80, EU:C:1981:311, paragraph 16).

35 See, to that effect, Bellis, J.-Fr., 'La charge de la preuve en matière de concurrence devant les juridictions de l'Union européenne', in Mahieu, St. (dir.), *Contentieux de l'Union européenne. Questions choisies*, Bruxelles, Larcier, coll. Europe(s), 2014, p. 217 to 233, in particular p. 221. I would add that, even though the Court has never expressly recognised the criminal nature of fines for infringement of competition law, the European Court of Human Rights ('ECtHR') has held that a fine imposed for infringement of competition law was a criminal penalty, so the criminal limb of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms was applicable in that case (ECtHR, judgment of 27 September 2011, *A. Menarini Diagnostics v. Italy*, application No 43509/08, CE:ECHR:2011:0927JUD004350908, paragraph 44). Despite the fact that the ECtHR limits its examination to the case before it, the essential grounds of its judgment allow generalisations to be drawn from the conclusions reached.

was not possible to confirm for certain that the email of 3 November 2003 was authentic. Bearing those factors in mind, the General Court should have rejected that piece of evidence: it was for the Commission to positively establish the authenticity of the email of 3 November 2003, if necessary by using the measure requested by the appellant.

101. However, the General Court also held that the fact that the unlawful discussions mentioned in the email of 3 November 2003 took place resulted also from other evidence, the whole constituting a 'body of evidence'. [36]

102. Unlike in the matter of compliance with the rules on the burden of proof and the taking of evidence, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the evidence adduced before the General Court has been distorted, that appraisal therefore does not constitute a point of law which is subject to review by the Court of Justice. [37]

103. As a consequence, even if there is a question over the evidence taken into account by the General Court, findings of fact cannot be reviewed by the Court of Justice in the context of an appeal. Since the General Court held that other documents confirmed the content of the unlawful discussions between the competitors involved in the infringement at issue, the argument relating to the authenticity of the email of 3 November 2003 is, in any event, ineffective.

VI. Referral of the case back to the General Court

104. After my analysis of the first part of the first ground of appeal in conjunction with the third ground of appeal, I reached the conclusion that the General Court had committed an error of law by failing to examine each of the arguments that had been put forward by the appellant in order to establish the lawfulness of the contacts it was found by the Commission to have had.

105. Under Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of proceedings so permits, or refer the case back to the General Court for judgment.

106. In the present case, the state of the proceedings does not, in my view, permit final judgment. Examination of the merits of the appellant's arguments would lead to the Court ruling on questions of fact on the basis of matters that were not assessed by the General Court in the judgment under appeal. Moreover, the allegations of fact relating to the substance of the dispute have not been debated before the Court.

107. The case should therefore be referred back to the General Court and the costs reserved.

36 Paragraph 181 of the judgment under appeal. See also paragraph 183 of the judgment under appeal.

37 See, to that effect, judgments of 25 January 2007, *Sumitomo Metal Industries and Nippon Steel* v *Commission* (C-403/04 P and C-405/04 P, EU:C:2007:52, paragraphs 38 and 56), and of 19 December 2013, *Siemens and Others* v *Commission* (C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraphs 39, 76, 77 and 129).

VII. Conclusions

108. In the light of the foregoing considerations and without prejudice to the examination of the other grounds of appeal, I propose that the Court should:

– set aside the judgment of the General Court of the European Union of 15 December 2016, *Infineon Technologies* v *Commission* (T-758/14, not published, EU:T:2016:737), in that the General Court failed to examine each of the arguments raised by the appellant to establish the lawfulness of the contacts it was found by the Commission to have had, and

– refer the case back to the General Court and order that the costs be reserved.