JUDGMENT OF THE GENERAL COURT (Second Chamber)

9 April 2019 (*)

(Competition — Market for baseband chipsets used in consumer electronic devices — Administrative procedure — Article 18(3) and Article 24(1)(d) of Regulation (EC) No 1/2003 — Decision requesting information — Obligation to state reasons — Necessity of the information requested — Proportionality — Burden of proof — Privilege against self-incrimination — Principle of good administration)

In Case T-371/17,

Qualcomm, Inc., established in San Diego, California (United States),

Qualcomm Europe, Inc., established in Sacramento, California (United States),

represented by M. Pinto de Lemos Fermiano Rato and M. Davilla, lawyers,

applicants,

v

European Commission, represented by H. van Vliet, G. Conte, M. Farley and C. Urraca Caviedes, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU for annulment of Commission Decision C(2017) 2258 final of 31 March 2017 relating to a proceeding pursuant to Article 18(3) and to Article 24(1)(d) of Council Regulation (EC) No 1/2003 (Case AT.39711 — Qualcomm (predation)),

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, E. Buttigieg (Rapporteur) and B. Berke, Judges,

Registrar: N. Schall, Administrator,

having regard to the written part of the procedure and further to the hearing on 11 September 2018,

gives the following

Judgment

Background to the dispute

1 Qualcomm, Inc. and Qualcomm Europe, Inc., which has a subsidiary established in the United Kingdom (together referred to as ‘Qualcomm’ or ‘the applicants’), have brought the present action.

2 Following a complaint lodged by Icera Inc. on 8 April 2010, the European Commission initiated proceedings against Qualcomm concerning an alleged abuse of its dominant position in the form of predatory pricing in the market for Universal Mobile Telecommunications System-compliant (UMTS) baseband chipsets (‘UMTS-compliant baseband chipsets’).

3 In that context, between 7 June 2010 and 14 January 2015, the Commission sent Qualcomm a number of requests for information under Article 18 of Council Regulation (EC) No 1/2003 of 16 December

2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), two of which gave rise to additional questions on the part of the Commission. Qualcomm responded to all of those requests for information.

4 On 16 July 2015, the Commission opened formal proceedings against Qualcomm. On 3 September 2015, Qualcomm and the Commission met for a state-of-play meeting ('the state-of-play meeting of 3 September 2015').

5 On 8 December 2015, the Commission adopted a statement of objections against Qualcomm ('the statement of objections').

6 The Commission's objections related to an infringement of Article 102 TFEU and Article 54 of the Agreement on the European Economic Area (EEA). The Commission's provisional view was that, from 3 February 2009 to 16 December 2011, Qualcomm had supplied certain quantities of three of its UMTS-compliant baseband chipsets (the MDM8200, MDM6200 and MDM8200A baseband chipsets) to two of its key customers (Huawei and ZTE) below cost, in order to eliminate Icera, the only competitor in that market segment during that period. Consequently, the Commission reached the preliminary conclusion that Qualcomm had abused its dominant position on the market for UMTS-compliant baseband chipsets.

7 On 15 August 2016, Qualcomm submitted its observations on the statement of objections ('observations on the statement of objections').

8 On 10 November 2016 an oral hearing took place pursuant to Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

9 On 30 January 2017, the Commission sent Qualcomm a request for information pursuant to Article 18(1) and (2) of Regulation No 1/2003 ('the request for information of 30 January 2017'). The deadline for replying to that request was set for 27 February 2017.

10 Between 13 February and 15 March 2017, Qualcomm sent a number of communications to the Commission, asking the latter, inter alia, to revoke the request for information of 30 January 2017, to state the scope or precise subject matter of the investigation and to adopt a new request for information limited to what was, in its view, strictly necessary for the investigation.

11 By letter of 20 February 2017, the Commission informed Qualcomm of its intention to adopt a decision requesting information under Article 18(3) of Regulation No 1/2003 if Qualcomm did not respond to the questions contained in the request for information of 30 January 2017.

12 On 31 March 2017, the Commission adopted Decision C(2017) 2258 final relating to a proceeding pursuant to Article 18(3) and to Article 24(1)(d) of Council Regulation (EC) No 1/2003 (Case AT.39711 — Qualcomm (predation)) ('the contested decision').

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

'*Article 1*

Qualcomm Europe shall supply the information specified in ... Annex I to this Decision, which forms an integral part of this Decision, by 12 May 2017, with the exception of the information sought by Questions 1, 2, 6, 8, 9 and 10, to which Qualcomm shall reply by 26 May 2017.

Article 2

Should Qualcomm fail to supply the complete and correct information requested within the period prescribed in Article 1, it shall incur a periodic penalty payment of EUR 580 000 per day of delay, calculated from the date after the expiry of one of the periods specified in Article 1 of this Decision.

Article 3

This Decision is addressed to Qualcomm Europe ...'

14 By letter of 10 April 2017, Qualcomm requested that the deadline for response be extended until 28 July 2017. On 26 April 2017, Qualcomm was informed that the Commission would not grant its request but agreed to it submitting its replies by 26 May 2017, with the exception of questions 1, 2, 6 and 8 to 10, to which responses were required by 9 June 2017.

15 On 15 May 2017, the Hearing Officer, at Qualcomm's request, granted a further extension of the deadline for response until 16 June 2017, with the exception of questions 1, 2, 6 and 8 to 10, to which responses were required by 30 June 2017.

16 On 30 May 2017, the Commission and Qualcomm held a meeting concerning the practical difficulties which Qualcomm was having in its attempts to respond to the contested decision.

17 On 16 June 2017, Qualcomm sent the Commission its response to the questions contained in the contested decision, with the exception of questions 1, 2, 6 and 8 to 10, to which a response was sent to the Commission on 30 June 2017.

18 On 18 July, 19 September and 10 November 2017, the Commission put follow-up questions to Qualcomm concerning the responses that Qualcomm had sent it on 16 and 30 June 2017.

Procedure and forms of order sought

19 By application lodged at the Court Registry on 13 June 2017, the applicants brought the present action.

20 By separate document lodged at the Court Registry on the same date, the applicants made an application for interim measures seeking suspension of operation of the contested decision or, in the alternative, of Article 2 of the contested decision, and also requesting that the Commission should be ordered to pay the costs. By order of 12 July 2017, *Qualcomm and Qualcomm Europe* v *Commission* (T-371/17 R, not published, EU:T:2017:485), the President of the General Court dismissed the application for interim measures and reserved the costs.

21 The applicants claim that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

22 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

23 By document lodged at the Court Registry on 24 August 2018, the applicants lodged further evidence consisting, in particular, of additional explanations that they had provided in response to the Commission's requests made in November 2017 and May and June 2018 as well as in the supplementary statement of objections adopted by the Commission on 19 July 2018 and notified to Qualcomm on 23 July 2018.

24 By document lodged at the Court Registry on 31 October 2018, the applicants submitted further evidence, pursuant to Article 85(3) of the Rules of Procedure of the General Court. Since that evidence was lodged after the close of the oral part of the procedure, the Court decided not to reopen that part of the procedure, as none of the conditions laid down in Article 113(2) of the Rules of Procedure were met in the present case. That evidence was therefore not placed on the case file.

Law

The admissibility of the new evidence submitted by the applicants

25 In its observations of 5 September 2018, the Commission contends that the evidence lodged on 24 August 2018 is inadmissible as the applicants have not presented any reasoning explaining why that evidence has been provided at a late stage.

26 It should be recalled in that regard that, according to Article 85(1) to (3) of the Rules of Procedure, evidence is to be submitted in the first exchange of pleadings, the main parties exceptionally having the opportunity to produce further evidence before the oral part of the procedure is closed, provided that the delay in the submission of such evidence is justified.

27 In the present case, although the applicants have not put forward anything explaining the delay in the production of the documents concerned, it must nonetheless be stated that those documents post-date the lodging of the reply and that the applicants therefore could not produce them in the exchanges of pleadings between the parties (see, to that effect, judgment of 16 May 2018, *Troszczynski* v *Parliament*, T-626/16, not published, under appeal, EU:T:2018:270, paragraph 40). In those circumstances, the evidence concerned must be held to be admissible.

The claim for annulment

28 In support of their action, the applicants put forward six pleas in law. The first alleges infringement of the principle of necessity, the second, infringement of the principle of proportionality, the third, infringement of the obligation to state reasons, the fourth, reversal of the burden of proof, the fifth, infringement of the right to avoid self-incrimination, and the sixth, infringement of the principle of good administration.

29 As a preliminary point, it must be noted that the applicants cite on several occasions the excessive duration of the administrative procedure, arguing that, in the present case, the length of the investigation — conducted, moreover, under several successive Commissioners and by a number of teams — is twice the average length of an investigation in this type of Commission procedure.

30 In that regard, it must be borne in mind that compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the Courts of the Union ensure (see judgment of 14 April 2011, *Visa Europe and Visa International Service* v *Commission*, T-461/07, EU:T:2011:181, paragraph 231 and the case-law cited).

31 It should be pointed out that, as regards the application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements, provided that it has been established that the breach of that principle adversely affected the rights of defence of the undertakings concerned. Other than in that specific case, failure observe the duty to deal with the matter within a reasonable time has no effect on the validity of the administrative procedure under Regulation No 1/2003 (see judgment of 18 June 2008, *Hoechst* v *Commission*, T-410/03, EU:T:2008:211, paragraph 227 and the case-law cited).

32 Such a complaint is therefore irrelevant in the present action, which concerns a claim for the annulment of a decision requesting information adopted in an administrative procedure that may possibly result in a decision finding an infringement of Article 102 TFEU. It is therefore in any action against a decision making a finding of infringement of Article 102 TFEU in their regard that the applicants would be entitled, if appropriate, to argue that the length of the administrative procedure was excessive and to show that that excessive length was liable to impede the establishment of evidence to refute the existence of conduct that could render them liable.

33 The complaint concerning the excessive length of the administrative procedure must therefore be rejected as ineffective.

34 It is appropriate to examine, first of all, the third plea, which alleges infringement of the obligation to state reasons.

Third plea, alleging infringement of the obligation to state reasons

35 By their third plea, the applicants maintain that the Commission failed to state adequate reasons for the contested decision, particularly since the decision was issued almost seven years after the start of the investigation and a year and a half after the statement of objections was adopted. They submit that the Commission offers no explanation as to why the information requested is necessary or what purpose it serves, which prevents them from properly exercising their rights of defence.

36 The Commission argues that the contested decision is adequately reasoned and contends that the third plea should be rejected.

37 According to settled case-law, the statement of reasons required under Article 296 TFEU for measures adopted by EU institutions must be appropriate to the measure at issue and must disclose clearly and unequivocally the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to review its legality. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph16 and the case-law cited).

38 As regards, in particular, the reasoning of a decision requesting information, it should be recalled that Article 18(3) of Regulation No 1/2003 specifies the essential elements thereof and provides that the Commission is to ‘state the legal basis and the purpose of the request, specify what information is required and fix the time limit within which it is to be provided’. It further states that the Commission ‘shall also indicate the penalties provided for in Article 23’, that it ‘shall indicate or impose the penalties provided for in Article 24’ and that it ‘shall further indicate the right to have the decision reviewed by the Court of Justice’.

39 That obligation to state specific reasons is a fundamental requirement designed not merely to show that the request for information is justified, but also to enable the undertakings concerned to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence (see judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 19 and the case-law cited).

40 As regards the obligation to state the ‘purpose of the request’, this relates to the Commission’s obligation to indicate the subject matter of its investigation in its request, and therefore to identify the alleged infringement of the competition rules (see judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 20 and the case-law cited).

41 In that regard, the Commission is not obliged to communicate to the addressee of a decision requesting information all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, provided that it clearly indicates the suspicions which it intends to investigate (see judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 21 and the case-law cited).

42 That obligation may be explained, inter alia, by the fact that, as is apparent from Article 18(1) of Regulation No 1/2003 and recital 23 thereof, in order to carry out the duties assigned to it by that regulation, the Commission may, by simple request or by decision, require undertakings and

associations of undertakings to provide ‘all necessary information’ (judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 22).

43 It follows that the Commission is entitled to require the disclosure only of information which may enable it to investigate the presumed infringements which justify the conduct of the investigation and are set out in the request for information (see, to that effect, judgments of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 23, and of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 333 and the case-law cited).

44 Since the necessity of the information must be judged in relation to the purpose stated in the request for information, that purpose must be indicated with sufficient precision, otherwise it will be impossible to determine whether the information is necessary and the EU judicature will be prevented from exercising judicial review (see judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 24 and the case-law cited).

45 Whether the contested decision is adequately reasoned will thus depend on whether the presumed infringements that the Commission intends to investigate are defined in sufficiently clear terms (see, to that effect, judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 25).

46 When the extent of the obligation to state reasons in respect of a decision requesting information under Article 18(3) of Regulation No 1/2003 is assessed, account should also be taken of the stage of the investigation and of the fact that the Commission already has some information concerning the presumed infringements (see, to that effect, judgment of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 39, and Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, point 50).

47 In the present case, the contested decision clearly states that it is adopted on the basis of Article 18(3) of Regulation No 1/2003 and that the practices under investigation might infringe Article 102 TFEU and Article 54 of the EEA Agreement. Recitals 28 and 29 of the contested decision expressly refer to the penalties and to the right of review mentioned in paragraph 38 above.

48 As regards the presumed infringement that the Commission intends to investigate, the contested decision expressly states, in recitals 2, 3 and 10, that the Commission is investigating predatory pricing by Qualcomm, from 3 February 2009 until 16 December 2011, for three of its UMTS-compliant baseband chipsets (MDM8200, MDM6200 and MDM8200A based chipsets) with regard to two of its key customers (Huawei and ZTE) with the aim of eliminating Icera.

49 That statement of reasons discloses, clearly and unequivocally, the products and the customers to which the investigation relates and the suspicions of infringement justifying the adoption of that decision.

50 Moreover, it is apparent from recital 7 of the contested decision that ‘at this stage of the investigation’ the Commission seeks to obtain the information necessary to assess the evidence in its possession in the light of the arguments put forward by the applicants following the issue of the statement of objections.

51 It follows that the statement of reasons of the contested decision enables the applicants to ascertain whether the requested information is necessary for the purposes of the investigation and also enables the EU judicature to exercise its power of review. It must be concluded therefrom that the contested decision is sufficiently reasoned, even though it was adopted at a late stage in the procedure.

52 That conclusion is not undermined by the applicants’ claims that the Commission does not explain how the information requested will enable it to respond to the arguments that they put forward in their observations on the statement of objections or to assess their relevance to its investigation. Nor, so they

argue, does the Commission explain why, in the contested decision, it extended the temporal scope of the investigation to the periods adjacent to the period in respect of which it had raised objections in the statement of objections.

53 Contrary to what is argued by the applicants, the Commission, in recitals 9 to 19 of the contested decision, clearly indicates — outlining their essential content and referring to the specific paragraphs of the reply to the statement of objections or of the presentation made at the hearing on 10 November 2016 — the arguments put forward by the applicants following the issue of the statement of objections, to which it intends to respond and explains how it proposes to evaluate, with the help of the information requested, their possible impact on its preliminary conclusions. Similarly, the Commission states, in recitals 20 to 22 of the contested decision, the reasons which have led it, in the light of the applicants' arguments, to request certain information relating to the periods adjacent to the period in respect of which it raised objections in the statement of objections.

54 That reasoning must be considered to be sufficient to enable the applicants to evaluate whether the information requested was necessary. Given that the purpose of the request is clearly specified in the contested decision, the Commission is not obliged, under Article 18(3) of Regulation No 1/2003 or by virtue of the case-law set out in paragraphs 39 to 46 above, to provide more detailed reasoning on how it intends to use the information requested for the purpose of examining, in the light of the purpose of the investigation, the arguments put forward by the applicants in response to the statement of objections. If the Commission were required to provide more detailed reasoning, even at an advanced stage of the investigation, after the issue of the statement of objections, that would amount, as the Commission submits, to requiring it to describe the way in which it intends to address the arguments brought against its preliminary conclusions, whilst the information requested is sought precisely to enable the Commission to evaluate the impact that those arguments might have on its preliminary conclusions.

55 In so far as the applicants submit that questions 1, 4, 8, 9, 11, 12 and 23 to 25 are irrelevant for the purpose of achieving the stated objective — that is, for examining the arguments they put forward in response to the statement of objections — they are in fact disputing the necessity of that information and the merits of the reasons put forward in that regard in the contested decision. Those arguments, which dispute the necessity of the information requested, go to the substantive legality of the contested decision and cannot be taken into account in the examination of a plea alleging infringement of the obligation to state reasons (see judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 146 and the case-law cited). They will therefore be analysed when the Court examines the first plea. The same is true of the applicants' argument that question 27 of the contested decision amounts to a reversal of the burden of proof, which will be examined when the Court considers the fourth plea.

56 Having regard to all the foregoing, the third plea must be rejected.

The first plea, alleging infringement of the principle of necessity

57 By their first plea, the applicants argue that the contested decision infringes the principle of necessity. This plea essentially falls into three parts. In the first part of the plea, the applicants maintain that the information requested goes beyond the scope of the investigation as previously defined by the Commission. In the second part, they argue that the information requested is unnecessary having regard to the presumed facts that the Commission intends to investigate. Finally, in the third part, the applicants maintain that collection of the information requested entails an inordinate burden for them.

58 The Commission disputes the applicants' arguments and contends that the information requested is necessary to the extent that it can
reasonably be supposed that it will assist the Commission in determining whether Qualcomm has infringed Article 102 TFEU.

59 As a preliminary point, it should be noted that the third part of the first plea amounts to a claim that the information requested is disproportionate in view of the amount of work that responding to the request

entails for the applicants and this part thus overlaps with the first part of the second plea. Those complaints will therefore be examined in the assessment of the second plea.

60 Next, it should be recalled that, according to recital 23 of Regulation No 1/2003, the Commission should be empowered throughout the European Union to require such information to be supplied as is necessary, inter alia, to detect any abuse of a dominant position prohibited by Article 102 TFEU. It also follows from Article 18(1) of Regulation No 1/2003 that, in order to carry out the duties assigned to it by that regulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide 'all necessary information'.

61 According to settled case-law, the Commission is entitled to require the disclosure only of information which may enable it to investigate the presumed infringements which justify the conduct of the investigation and are set out in the request for information (see, by analogy, judgments of 12 December 1991, *SEP* v *Commission*, T-39/90, EU:T:1991:71, paragraph 25, and of 8 March 1995, *Société générale* v *Commission*, T-34/93, EU:T:1995:46, paragraph 40).

62 Given the Commission's broad powers of investigation and assessment, it falls to it to assess whether the information which it requests from the undertakings concerned is necessary. As regards the Court's power of review over that assessment by the Commission, it should be noted that, according to the case-law, the concept of 'necessary information' must be interpreted by reference to the objectives for the achievement of which the powers of investigation in question have been conferred upon the Commission. Thus, the requirement that a correlation must exist between the request for information and the presumed infringement will be satisfied as long as, at that stage in the procedure, the request may legitimately be regarded as having a connection with the presumed infringement, in the sense that the Commission may reasonably suppose that the information will help it to determine whether the alleged infringement has taken place (see judgment of 14 March 2014, *Holcim (Deutschland) and Holcim* v C*ommission*, T-293/11, EU:T:2014:127, paragraph 110 and the case-law cited).

63 The first and second parts of the first plea must be examined in the light of these principles.

– *Alleged expansion of the scope of the investigation*

64 The applicants submit that the contested decision goes beyond the scope of the Commission's investigation, as defined in the statement of objections, at the state-of-play meeting of 3 September 2015, at the hearing of 10 November 2016 and in earlier requests for information, so far as concerns both potential theories of harm and the duration of the alleged infringement. First, in the contested decision, the Commission does not specify either the relevant chipsets or customers concerned. They submit that the Commission also pursued an altogether different theory of harm covering seven instead of three products and that it belatedly realised that data relating to the various components of chipsets were necessary for its investigation. Second, the applicants submit that the Commission doubled the temporal scope of the investigation. Specifically, the Commission failed to explain to the required legal standard why the information from the second fiscal quarter of 2012 onwards — which was outside the initial temporal scope of the investigation — was necessary.

65 The applicants argue that such an expansion of the scope of the investigation is contrary to the Commission's internal manual of procedures concerning the application of Articles 101 and 102 TFEU of 12 March 2012 ('the manual of procedures') and to the Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ 2011 C 308, p. 6; 'Best Practices'), under which the statement of objections should have been adopted after an in-depth investigation. The applicants submit that it was legitimate to expect that, following seven years of investigation, the statement of objections was adopted when the fact-finding was considered complete. Therefore, either the Commission has been requesting the wrong
type of information all these years, or it has only realised at this late stage in the investigation that its initial theory was untenable. The applicants add that the investigation cannot continue indefinitely.

66 The Commission contests the merits of those arguments.

67 In that regard, the Court notes that the arguments which the applicants put forward in this part of the first plea are based on the premiss that, before issuing a statement of objections, the Commission must have terminated its preliminary investigation.

68 It is true that, according to settled case-law, the administrative procedure under Regulation No 1/2003, which takes place before the Commission, is divided into two separate, successive stages, each having its own internal logic, namely a preliminary investigation stage and an *inter partes* stage. The preliminary investigation stage, during which the Commission uses the powers of investigation provided for in Regulation No 1/2003 and which covers the period up until the notification of the statement of objections, is intended to enable the Commission to gather all the relevant information tending to prove or disprove the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how it is to proceed. By contrast, the *inter partes* stage, which covers the period from the notification of the statement of objections to the adoption of the final decision, must enable the Commission to reach a final decision on the alleged infringement (see, by analogy, judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 113 and the case-law cited, and of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 47).

69 However, although the statement of objections is generally issued after a preliminary investigation by the Commission, it does not follow that after issuing that statement the Commission is prevented from continuing with its investigation, inter alia by sending requests for further information (see, to that effect, judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraphs 111 and 112).

70 In that regard, the statement of objections is a procedural and purely preparatory document setting out the Commission's provisional findings, which, in order to ensure that the rights of the defence may be exercised effectively, delimits the scope of the administrative procedure initiated by the Commission, thereby preventing the latter from relying on other objections in its decision terminating the procedure in question. It is therefore inherent in the nature of that statement that it is provisional and liable to be changed during the assessment subsequently undertaken by the Commission on the basis of the observations submitted to it by the parties and other findings of fact. The Commission must take into account the factors emerging from the whole of the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains (judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 63; see also, to that effect, judgment of 10 May 2007, *SGL Carbon* v *Commission*, C-328/05 P, EU:C:2007:277, paragraph 62).

71 Far from being a measure recording the Commission's final assessment of the lawfulness of the practices in question, the statement of objections is, on the contrary, a purely preparatory measure setting out the Commission's provisional findings, which it may revisit in the final decision. The Commission is therefore perfectly entitled, in order in particular to take account of the arguments or other factors put forward by the undertakings concerned, to continue with its fact-finding after the adoption of the statement of objections with a view to withdrawing certain complaints or adding others as appropriate (judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 116).

72 Moreover, under Article 18(2) and (3) of Regulation No 1/2003, the Commission may obtain, by requests for information, all necessary information from the undertakings and associations of undertakings, provided that it states the legal bases and the purpose of the request and also the penalties for supplying incorrect information. A request for information thus enables the Commission to obtain all necessary clarification of the arguments and the evidence put forward by the undertakings concerned in their response to the statement of objections (see, by analogy, judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 117).

73 Subject to the rules on limitation, Article 18(2) and (3) of Regulation No 1/2003 does not impose any restriction on the Commission as to the timing of requests for information. In particular, provided that the information requested is necessary, that provision does not restrict the power of the Commission to send requests for information after the statement of objections has been issued (see, by analogy, judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 118).

74 Thus, even if the Commission already has some indicia, or indeed proof, of the existence of an infringement, it may legitimately take the view that it is necessary to request further information to enable it, inter alia, better to define the scope of the infringement and to determine its duration (see judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 119 and the case-law cited).

75 It follows from the foregoing that, contrary to the applicants' submission, the mere fact that the Commission continues its investigation after the adoption of the statement of objections by issuing requests for additional information cannot render those requests unlawful or, in itself, call in question the necessity of the information requested.

76 On the contrary, given the preparatory nature of the statement of objections, which reflects the adversarial nature of the administrative procedure applying the competition rules of the Treaty, the Commission must logically be able to send requests for additional information after issuing the statement of objections in order to be able, if necessary, to withdraw complaints or add new ones (judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 121).

77 That conclusion is not undermined by the argument which the applicants base on the rules in the Best Practices and the manual of procedures.

78 First, the statement of objections does not have to be adopted once the investigation has been closed but, under the rule contained in point 82 of the Best Practices, 'after an in-depth investigation' or, in the words of the manual of procedures, 'as far as it is possible, ... when the fact-finding is considered complete'. Next, both the Best Practices (see in particular paragraphs 109 and 113) and the manual of procedures (see Section 11, paragraph 8) envisage a situation in which the Commission obtains — after the statement of objections has been adopted — new elements on which it intends to rely in order to alter its legal assessment. There is therefore nothing to support the conclusion that the Best Practices or the manual of procedures restricted the Commission's investigative powers with the result that, once the statement of objections had been adopted, it could no longer send the undertakings concerned requests for additional information.

79 Accordingly, it is irrelevant to claim that the contested decision raises new questions as compared with those dealt with by the statement of objections, in particular concerning components of the chipsets covered by the investigation or periods adjacent to the period of the infringement. That fact might be capable of showing that, at the time when the statement of objections was adopted, the Commission had not terminated its administrative investigation into the practices in question. However, as has been stated in paragraphs 70 and 71 above, as the statement of objections is a preparatory document that may be amended by the Commission, in particular in order to take account of the response thereto, the Commission is not required to have definitively terminated its administrative investigation at the time of adoption of the statement of objections. Consequently, the Commission's powers cannot be limited as to the questions it seeks to raise in the requests for information sent after the statement of objections, provided however that (i) in accordance with the applicable provisions, those questions enable it to obtain information necessary for the investigation and (ii) the Commission gives the undertakings concerned the opportunity to comment on fresh matters of fact or law arising from the responses of the undertakings concerned to those questions (judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 122).

80 In the present action, the Court has merely to rule on the legality of the contested decision, inter alia by examining, in the context of the second part of this plea, whether the information requested was necessary in view of the presumed facts that the Commission wished to investigate.

81 In any event, the Court finds that the scope of the investigation as defined in the statement of objections, at the state-of-play meeting of 3 September 2015 and at the hearing on 10 November 2016 has not been extended in the present case.

82 In the first place, as a preliminary point, it should be noted that, contrary to what is maintained by the applicants and as has been stated in paragraphs 47 and 48 above, the temporal scope, the products in question and the customers concerned are indeed identified in the contested decision, inter alia, by reference to the preliminary conclusions set out in the statement of objections. First of all, the Commission states, in recital 2 of the contested decision, that it is currently investigating alleged predatory pricing practices by the applicants with regard to UMTS-compliant baseband chipsets. It then outlines, in recital 3 of the contested decision, the framework of the investigation as defined in the statement of objections, thus specifying that the investigation covers a period from 3 February 2009 to 16 December 2011 and concerns pricing practices with regard to two of the applicants' customers, Huawei and ZTE, in respect of three of their UMTS-compliant baseband chipsets. The Commission also explains, in recital 7 of the contested decision, that it wishes to clarify the arguments put forward by the applicants following the adoption of the statement of objections. Lastly, it identifies, in recital 10 of the contested decision, the three chipsets under investigation to which recital 2 refers, namely MDM8200, MDM6200 and MDM8200A based chipsets. A combined reading of recitals 2, 3, 7 and 10 of the contested decision therefore shows — without it being possible to claim that there is any ambiguity at all — that the Commission specifically confined its requests to the preliminary conclusions set out in the statement of objections, as described in paragraph 6 above.

83 The applicants do not point to any questions contained in Annex I to the contested decision which allegedly concern chipsets and customers other than those identified in the statement of objections.

84 In the second place, the fact that the Commission is seeking to obtain information relating to the chips of which the chipsets covered by the investigation are composed, or that it is asking for information concerning periods adjacent to the period of the infringement as defined in the statement of objections, does not establish that the scope of the investigation was expanded in the present case.

85 The Commission submits, as has, moreover, been accepted by the applicants at the hearing, that the level at which their accounting system records sales is that of the individual chip (and not that of the chipset) and that the gross prices that it wishes to analyse are thus available only at the level of the chips. In those circumstances, the applicants have no ground for maintaining that the Commission, in requesting in the contested decision information concerning the chips of which the three chipsets identified in the statement of objections are composed, expanded the scope of the investigation.

86 Moreover, as regards the applicants' argument that the Commission doubled the temporal scope of the investigation by requesting that it be provided with data relating to the period 2008 to 2013 rather than to the period 2009 to 2011, which was defined in the statement of objections as the period of the infringement, the Court recalls, first, that the EU judicature has recognised the Commission's need to request information relating to a period predating the period of the infringement for the purpose of setting out the context surrounding the conduct during the latter period (see judgment of 22 March 2012, *Slovak Telekom* v *Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraph 51 and the case-law cited).

87 Thus, the Commission cannot be criticised for having asked the applicants to produce data relating to 2008, as those data were necessary for evaluating how prices and costs of one of the products at issue, the MDM8200 based chipset, had evolved since the beginning of the product's lifecycle, as is stated in recital 21 of the contested decision.

88 Secondly, it must be noted that, in their observations on the statement of objections, the applicants criticised the price-cost test used by the Commission in that statement, arguing that it did not take account of the fact that the revenue recognition principles which they apply entail recognition of full

revenues only in the period after a particular sale took place. The applicants also argued, in their observations on the statement of objections, that the price-cost test had to be applied on the basis of fiscal years and not on the basis of data corresponding to calendar years.

89 It follows from recitals 7 and 20 to 22 of the contested decision and the reasons that emerge therefrom that, in requesting information relating to the periods adjacent to the infringement period defined in the statement of objections, the Commission does not expand the temporal scope of the investigation but seeks to establish a price-cost test that is in keeping with the revenue recognition principles applied by the applicants, as those principles were outlined by the latter in their observations on the statement of objections.

90 Indeed, given that the final months of the period of the alleged infringement as defined in the statement of objections correspond to the first quarter of the applicants' fiscal year 2012, the Commission seeks data relating to 2012 in order to carry out its assessment on the basis of fiscal rather than calendar years. In addition, as full revenue is accounted for by the applicants only once a particular sale has taken place, as was acknowledged by the applicants at the hearing in response to a question put by the Court, the Commission's assessment must be carried out on the basis of data for the applicants' fiscal year 2013 and subsequent accounting quarters which relate to sales made to the customers in question in the fiscal year 2012 so as to be able to allocate the accrual releases to the quarters in which the units in question were sold to the customers concerned.

91 Accordingly, when the Commission requested information relating to the periods adjacent to the period of the infringement as defined in the statement of objections, it did not expand the temporal scope of the investigation, as that information was (i) relevant in that it provided insight into the context surrounding possibly unlawful conduct and (ii) necessary for the application of an appropriate price-cost test.

92 The first part of the first plea must therefore be rejected.

– *Whether the information requested is necessary in view of the presumed infringements that the Commission intends to investigate*

93 The applicants argue that the Commission has not established that the additional information requested in Annex I to the contested decision had a connection with the presumed infringement as it was presented in the statement of objections in the sense that the Commission could reasonably suppose that that information would help it to determine whether the infringement had taken place. Given their far-reaching nature, the questions contained in the contested decision cannot, in the applicants' submission, be regarded as follow-up questions seeking clarifications in relation to the arguments put forward in the observations on the statement of objections and at the hearing on 10 November 2016. Even assuming that to be the case, the information requested particularly by question 1 — apart from the fact that it concerns, in part, a document which had been in the Commission's possession for a long time — is unnecessary and disproportionate inasmuch as the Commission, which has to establish a credible theory of harm, is imposing on the applicants, under the threat of fines, a burden entailing the collection of indicia to substantiate the arguments put forward by the applicants in their observations on the statement of objections.

94 According to the applicants, the Commission is in reality attempting to modify or adjust the theory of harm and the price-cost test that were used in the statement of objections and, with that end in view, is seeking to obtain new information from them.

95 The applicants submit that the Commission is also seeking, by questions 1 and 2, to audit the applicants' financial accounts *de novo* in order to verify that the information which the applicants provided in the response to the request for information of 10 July 2013, and more particularly in Annex 43.3 thereto regarding the calculation of accrual releases, is correct. The Commission has no reason to doubt the accuracy of the financial data provided by the applicants during the course of the investigation and, moreover, has never expressed any such doubts.

96 Accordingly, the Commission, in their view, shows bias and requests superfluous information that has no connection with the presumed infringement.

97 The Commission contests the merits of those arguments.

98 First, as regards the doubts expressed by the applicants concerning the need for questions 1 and 2 on the ground that they are not necessary to enable the Commission to investigate the presumed infringement as described in the statement of objections and, more particularly, to analyse the price-cost test applied therein, it must be noted that, as follows from recitals 9 and 19 of the contested decision and as the Commission in essence maintained before the Court, the Commission seeks by those questions to obtain data enabling it to establish the prices effectively paid by Huawei and ZTE for the chipsets concerned during the infringement period defined in the statement of objections in order to carry out an appropriate price-cost test.

99 As is clear from the case-law referred to in paragraph 62 above, in view of its broad powers of investigation and assessment, it is for the Commission to assess whether the information which it requests from the undertakings concerned is necessary. It can be seen from recitals 8 to 10 and 19 of the contested decision and from the 'Introductory information for replying to Questions 1.1 and 1.2' that is included in Annex I to the contested decision that, in the wake of the applicants' observations on the statement of objections and the criticisms expressed at the hearing on 10 November 2016, the Commission took the view that the data on which it had relied in establishing the price-cost test in the statement of objections did not reflect the prices effectively paid by customers because of the revenue recognition principles applied by the applicants (see paragraph 90 above) and because the chipsets at issue had been sold in different configurations. As the Commission argues, taking the view that using exclusively the data in its possession would not reflect business reality, and so as to avoid any factual errors in calculation, it seeks by the contested decision to obtain information that will allow the price-cost test to be established on the basis of data accurately reflecting the situation during the relevant period, as this element will be decisive in ascertaining whether the infringement was committed.

100 Similarly, as regards, secondly, the applicants' argument that there is no justification for undertaking an expanded price-cost analysis, in temporal and material terms, in view of the scope of the investigation as defined, inter alia, in the statement of objections, it is apparent from the Court's examination in paragraphs 84 to 91 above that it cannot reasonably be denied that there is a correlation between (i) information relating to the periods adjacent to the infringement period defined in the statement of objections or to the chips of which the chipsets covered by the investigation are composed and (ii) the presumed infringement which the Commission is investigating.

101 Given that it was solely in the light of the observations put forward by the applicants on the statement of objections and at the hearing on 10 November 2016 that the Commission could decide whether that information, requested in the contested decision, was necessary, it cannot properly be maintained that the information was not justified by the needs of the investigation merely because the contested decision was adopted at a late stage of the investigation. On the contrary, the Commission has thus complied with its duty to examine, carefully and impartially, all the relevant evidence, including the arguments put forward by the applicants (see, to that effect, judgments of 21 Novembers 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98, T-212/98 to T-214/98, EU:T:2003:245, paragraph 404).

102 It follows that, contrary to what is maintained by the applicants, the request for information at issue cannot be considered to constitute a breach of their rights of defence. Indeed, it was precisely to have a better understanding of the arguments advanced by the applicants in their observations submitted in response to the statement of objections, in the exercise of their rights of defence, that the Commission adopted the contested decision in order to find out more about certain aspects of those replies deemed relevant for its investigation and then adjust, where necessary, its methodology or its conclusions on the basis of those arguments.

103 Therefore, having regard to the case-law referred to in paragraphs 70 and 74 above, even if the Commission was seeking, on the basis of the information requested, to modify or adjust its methodology in view of the applicants' observations and the matters that came to light following the issue of the statement of objections, that information must be regarded as being necessary, within the meaning of the case-law set out in paragraphs 61 and 62 above, for the examination of the presumed

infringements which justify carrying out the investigation, in the sense that it may reasonably be supposed that the information will help the Commission to determine whether the alleged infringement has taken place.

104 That conclusion is not called into question by the applicants' other arguments.

105 Concerning the argument that, by question 1 of the contested decision, the Commission asks for the production of numerous data relating to a document which has already been sent to it, corresponding to Annex 43.3 to the reply to the request for information of 10 July 2013, it is correct that requests for information aimed at obtaining information on a document already in the Commission's possession could not be regarded as justified by the needs of the investigation (see, to that effect, judgments of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98, T-212/98 to T-214/98, EU:T:2003:245, paragraph 425, and of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraph 72).

106 However, that argument is based on an incorrect reading of the contested decision. As the Commission states, the reference to Annex 43.3 to the reply to the request for information of 10 July 2013, which concerns a chipset other than the chipsets at issue in the statement of objections, must be understood as requesting the applicants to produce the same kind of data with regard to the chipsets at issue. It is not at all a question of the Commission requesting that the document be produced afresh or that the applicants make fresh observations on that document.

107 The applicants are thus also incorrect in maintaining that the Commission is seeking to audit their financial accounts afresh in order to satisfy itself as to the accuracy of the information provided in Annex 43.3 to the reply to the request for information of 10 July 2013 regarding the calculation of accrual releases.

108 Lastly, the applicants submit that the additional questions sent to them on 18 July, 19 September and 10 November 2017 and on 16 May 2018, as well as the supplementary statement of objections adopted by the Commission on 19 July 2018, confirm that the contested decision was not limited to what was necessary for the purpose of addressing the arguments made by them in the response to the statement of objections and that, in fact, the Commission broadened the scope of the investigation as defined in the statement of objections with the aim of pursuing a new case against them. The applicants submit that, in so doing, the Commission abused its investigative powers.

109 It must be observed in that regard that the requests and the supplementary statement of objections, mentioned in paragraph 108 above, post-date the adoption of the contested decision. Since the legality of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted, the applicants' argument must be rejected as ineffective (see, to that effect, judgment of 22 March 2012, *Slovak Telekom* v *Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraph 85 and the case-law cited).

110 As regards the argument that the contested decision also amounts to a breach of the applicants' rights of defence in that it deals with points concerning responses provided, in some instances, more than 5 years previously, which relate to facts that occurred at least 10 years earlier and to which, given the passage of time, it is difficult to respond with the level of detail required, this argument overlaps with certain complaints in the first part of the second plea and will be analysed when that part of the second plea is examined. The same is true of the argument that the Commission showed bias in seeking to build a new case against the applicants, which overlaps with the sixth plea and will be considered when that plea is examined.

111 Subject to that reservation, the second part of the first plea and, without prejudice to the examination of the third part when the second plea is considered, the first plea in its entirety must therefore be rejected.

The second plea, alleging infringement of the principle of proportionality

112 By their second plea, the applicants submit that the contested decision infringes the principle of proportionality. This plea is structured in three parts. The applicants emphasise, first, the significant amount of work which the provision of the specific and far-reaching information requested entails for them. They argue, second, that the periodic penalty payment provided for in the contested decision is extremely onerous and, third, that the time limit set for responding is unreasonable.

– *The allegation that the information requested is disproportionate in view of the burden it entails for the applicants*

113 In the context of the third part of the first plea and the first part of the second plea, the applicants draw attention to what they claim is the clearly disproportionate burden involved in responding to the contested decision, which requires them to provide a particularly large amount of information in a specific format. They submit that they have had to devote an enormous amount of time and resources to providing the information requested, in view, in particular, of the fact (i) that they are not under any legal requirement to maintain financial records for longer than three and a half years and (ii) that those documents, which are stored with an outside provider, were not organised in a systematic fashion. The applicants also criticise the fact that the Commission requires the provision of data relating to facts that occurred a long time ago and complain that the questions are overbroad.

114 They further argue that the Commission asks them to undertake a significant amount of work on its behalf, including the processing and analysis of data which has sometimes been in its possession for a long time or the provision of information ‘to the extent not already provided’. That goes beyond their obligations arising from the duty to cooperate.

115 Even though the Commission sought after the adoption of the contested decision to address the applicants’ concerns by making some ‘concessions’ to facilitate their task, the burden remained clearly disproportionate, while not appearing to be necessary to clarify any information previously provided. The investigated practice is not serious enough to warrant the contested decision being so far-reaching.

116 The applicants add that they have provided a significant amount of information since 2009. According to them, the Commission ought either to accept the arguments put forward in their observations on the statement of objections, or reject them, without taking further investigative steps.

117 The Commission contests the merits of those arguments.

118 It should be recalled, as stated in paragraph 60 above, that, in order to carry out the duties assigned to it by Regulation No 1/2003, the Commission may require undertakings to provide ‘all necessary information’. According to the case-law referred to in paragraphs 61 and 62 above, even though it falls to the Commission to decide whether the information which it requests from the undertakings concerned is necessary, it is entitled to require the disclosure only of information which may enable it to investigate the presumed infringements which justify the conduct of the investigation.

119 For its part, an undertaking which is being investigated is subject to an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject matter of the investigation (judgments of 18 October 1989, *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraph 27, and of 22 March 2012, *Slovak Telekom* v *Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraph 44).

120 The point should be made, however, that the Commission’s exercise of this power is subject to the observance of, inter alia, the principle of proportionality. Indeed, the obligation imposed on an undertaking to supply information should not be a burden on that undertaking which is disproportionate to the needs of the investigation. In addition, according to the case-law, the need for protection against arbitrary or disproportionate intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, is recognised as a general principle of law of the European Union (see judgment of 22 March 2012, *Slovak Telekom* v *Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraph 81 and the case-law cited).

121 However, the mere fact that a request for information involves a significant workload for an undertaking is not sufficient per se to establish that it is disproportionate in relation to the needs of the investigation relating to, inter alia, the presumed infringements which the Commission intends to investigate and the circumstances of the procedure in question (see, to that effect, judgment of 14 March 2014, *Cementos Portland Valderrivas* v *Commission*, T-296/11, EU:T:2014:121, paragraphs 88 and 89).

122 In the present case, it is not disputed that a large amount of information of considerable scope is requested under the contested decision. Responding to that request thus entails a significant workload for the applicants.

123 However, it cannot be concluded that that workload is disproportionate having regard to the needs of the investigation relating to the presumed infringement which the Commission intends to investigate, particularly when account is taken of the applicants' replies to the statement of objections.

124 In that regard, it should be recalled that the contested decision is an integral part of a procedure whose purpose is to examine whether there may have been an abuse of a dominant position in the EEA as a result of predatory pricing practices between 3 February 2009 and 16 December 2011 on the market for UMTS-compliant baseband chipsets, more specifically MDM8200, MDM6200 and MDM8200A based chipsets. According to the preliminary conclusion reached in the statement of objections, the applicants are said to have supplied UMTS-compliant chipsets, below cost, to two of their key customers, Huawei and ZTE, with the intention of eliminating Icera from the market, their only competitor offering, at that point in time in the market segment, advanced data rate performance.

125 The alleged predatory pricing under investigation requires, as the Commission argues, complex analyses of large amounts of data, most of which can be accessed only by the applicants, in order to re-construct the price-cost structure. Such an exercise can be particularly complex where the investigation concerns composite products.

126 Indeed, the products under investigation are chipsets composed of individual components. The Commission asserts, without being contradicted on this point by the applicants, that those components are sold separately in different configurations, to different customers and at different prices, attracting different rebates, their sales also being accounted for at different times.

127 In the statement of objections, the Commission based the price-cost criterion on accounting data that did not draw a distinction between the various components of a chipset. Having regard to the accounting principles described by the applicants in their observations on the statement of objections and mentioned in paragraph 85 above — from which it can be seen that the information concerning gross prices and the various rebate schemes offered by the applicants to their customers is primarily available only at the level of the chips of which a chipset is composed, and in view of the fact that, since those chips are sold separately, sales are recorded at the level of the chip and not at the level of the chipset — it was necessary for the Commission to have information concerning the components that make up the chipsets under investigation.

128 Accordingly, the scope of the contested decision is such as to justify the provision of a significant amount of information, irrespective of the allegedly small proportion of products offered below-cost — were it to be proven — which the applicants invoke. As is apparent from the examination of the first plea, the information requested is necessary in the light of the purpose of the investigation, particularly having regard to the applicants' observations on the statement of objections.

129 Moreover, none of the applicants' arguments establishes that the information requested goes beyond what is necessary in view of that purpose.

130 As regards, first, the argument whereby the applicants seek to establish that, since the Commission had already requested significant amounts of information, it could no longer take other investigative measures at an advanced stage of the investigation, but had either to accept or to reject the arguments that they had advanced in their observations on the statement of objections, it should be noted that, as is clear from the examination of the first plea, the Commission is perfectly entitled — in order, inter

alia, to take account of arguments or any other matters put forward by the undertakings concerned — to continue with its fact-finding after the adoption of the statement of objections, precisely for the purpose of complying with the obligation to conduct its investigation carefully and impartially. In the present case, the contested decision seeks to obtain information concerning, or following up on, the arguments put forward by the applicants in their observations on the statement of objections, as is stated in recital 7 of that decision. The applicants cannot therefore claim that the decision is disproportionate in relation to the purpose of the investigation solely on the ground that the Commission is asking for a large amount of information, responding to which entails considerable work on their part.

131 As regards, second, the applicants' argument that the Commission was not entitled to require them to respond in a specific format, the Court observes that, according to the case-law, since the provision of 'information' within the meaning of Article 18 of Regulation No 1/2003 should be understood as covering not only the production of documents, but also the obligation to answer questions relating to those documents, the Commission is not confined merely to requesting the production of existing information irrespective of any involvement of the undertaking concerned. It is therefore open to it to direct questions at an undertaking which entail the latter having to marshal the requested information (judgment of 14 March 2014, *Holcim (Deutschland) and Holcim* v *Commission*, T-293/11, EU:T:2014:127, paragraph 71). Consequently, the fact that the Commission asked the applicants for information in a particular format or one facilitating the processing of that information does not, in itself, render the contested decision unlawful.

132 In any event, it in no way appears from the contested decision that the format suggested by the Commission for replying to certain questions was obligatory or that the applicants did not have the option of adapting the format if that proved to be more suitable. On the contrary, it is clear from the 'Introductory information for replying to Questions 1.1 and 1.2' that a sample of the format for responding to those questions was provided for the applicants' convenience and that they could adapt the answer if the assumptions on which those questions were based did not reflect their internal accounting practices correctly.

133 In addition, the formats suggested by the Commission tend rather to facilitate the applicants' task. First, the format suggested by the Commission for replying to question 1 corresponds, in part, to the format of the response provided by the applicants to the request for information of 10 July 2013 and as Annex 11 to the observations on the statement of objections, which permitted the Commission reasonably to assume that that format was favoured by the applicants. The fact that the applicants do not store the information requested in that particular format does not in itself render the contested decision disproportionate as it is open to the Commission to direct questions at an undertaking which entail the latter having to marshal the requested information (see paragraph 131 above) and as, in any event, the applicants are free to choose the format in which they reply to the question.

134 Secondly, as regards the format suggested by the Commission for replying to questions 17 and 18, that format sets out in a structured fashion, in the form of a table with the appropriate headings, the categories of information that the applicants are required to provide: that is such as to make it easier for them to respond to those questions in the most complete and correct way.

135 Third, the applicants' argument that the disproportionate nature of the burden imposed by question 1 is also evidenced by the fact that the Commission had to provide detailed guidance on how to respond to question 1 cannot succeed. The explanations provided by the Commission in the 'Introductory information for replying to Questions 1.1 and 1.2', which are set out in Annex I to the contested decision, instead show that the Commission is seeking to facilitate the applicants' work and to allow for an efficient use of their resources so as to provide complete and correct information in response to the contested decision. In any event, the fact that the Commission provided detailed guidance on how to respond to some of the questions in the contested decision does not establish that the contested decision is itself disproportionate.

136 As regards, fourth, the applicants' argument that they encountered practical difficulties in obtaining some of the information requested in that, since they were under no legal requirement to maintain financial records beyond a period of three and a half years, they did not organise their records in a

systematic way, it cannot be accepted in the circumstances of the present case. Admittedly, undertakings cannot, as a rule, be obliged to provide the Commission with documents which are no longer in their possession and which they are no longer under any legal requirement to maintain. However, account should also be taken of the general duty of care attaching to any undertaking or association of undertakings, by virtue of which they are required to ensure the proper maintenance, in their books or files, of information enabling details of their activities to be retrieved, in order, inter alia, to have the necessary evidence available in the event of legal or administrative proceedings. Thus, since the applicants had been in receipt of requests for information from the Commission under Article 18(2) and (3) of Regulation No 1/2003 since 7 June 2010, it was incumbent on them, at least from that date, to act with greater diligence and to take all appropriate measures in order to preserve such evidence as might reasonably be available to them (see, to that effect, judgment of 16 June 2011, *Heineken Nederland and Heineken* v *Commission*, T-240/07, EU:T:2011:284, paragraph 301 and the case-law cited).

137 Contrary to what the applicants claim, the fact that their records, which are stored with an external provider, had not been organised in a systematic way, which made it particularly difficult to pinpoint and collect the information requested by the contested decision, is irrelevant. As the Commission rightly observes, the proportionality of the contested decision cannot be linked to, or made dependent upon, the manner in which the applicants store their records. If it were possible to rely on such a state of disorganisation of the files, undertakings with organised records would be penalised. Undertakings would then be encouraged to store their data in a disorganised way.

138 As regards, fifth, the applicants' arguments that they will be compelled to undertake a significant amount of work on the Commission's behalf inasmuch as the contested decision obliges them to review documents already in the Commission's possession, inter alia to determine what had not previously been provided or what might be relevant, it is true that it is not for the undertaking under investigation to perform the tasks of the Commission, that being the case irrespective of the size of the undertaking and the means at its disposal (Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, point 133).

139 However, it does not appear from the contested decision that the Commission has asked for information other than information to which only the applicants have access. It is therefore in no way a question of work which the Commission could have undertaken itself.

140 In addition, in the case of questions 5, 12.3.3, 14.2, 23 and 24, for which the Commission asks for information 'to the extent not already provided', the Commission indicates the relevant information which it considers it already has in its possession.

141 In any event, the statement 'to the extent [the information requested has] not already [been] provided' does not show that the contested decision is disproportionate, inasmuch as the aim of that statement is to limit the burden on the applicants and to avoid them being obliged to provide afresh information produced in response that is already in the Commission's possession. However, in order to comply with their obligation to be complete and correct in their response to the contested decision, the applicants must explain in what respect the document previously provided is to be regarded as being the reply, or as forming part of a reply, to the contested decision. Nothing prevents the applicants from producing complete information in response to the contested decision without referring to documents already produced, even if that would result in certain items being included twice in the Commission's file. Consequently, the mere fact that the applicants might possibly have to review documents previously supplied to the Commission does not support the conclusion that the contested decision requires them to carry out an excessive amount of work in the Commission's stead.

142 Finally, in so far as this argument concerns question 21.4 of the contested decision, it must be observed that that question relates to the same subject matter as the information requested under question 6 of the request for information of 3 November 2011.

143 It must be stated, however, that question 21.4 of the contested decision in fact entails the provision of information additional to that provided in respect of the earlier requests for information, inasmuch as it presents a greater degree of precision. Indeed, whilst question 6 of the request for information of

3 November 2011 related to external and internal discussions, or any other document, encouraging or providing any type of incentive or advantage to the applicants' customers and question 9 related to all external communications referring to Icera, question 21.4 relates only to internal communications concerning a single 'package' offered to a single customer, Huawei, in and around 2010, in the context of a strategy with regard to Icera. The fact that the aim of question 21.4 of the contested decision is to secure more detailed information thus shows that the information requested is necessary (see, to that effect, judgment of 14 March 2014, *Holcim (Deutschland) and Holcim* v *Commission*, T-293/11, EU:T:2014:127, paragraph 129). Since, as can be seen from recital 16 of the contested decision, those details are intended to allow an assessment of the applicants' argument that the Commission misinterpreted the documents on which it relied in the statement of objections, that question does not go beyond what is necessary in the light of the purpose of the investigation.

144 As regards, sixth, the applicants' argument that it is not proportionate to require, in the context of question 1.2.3, the production of hypothetical disaggregated prices for chipset units that did not qualify for a specific financial incentive agreed with a customer, the Court observes that the applicants are seeking to establish that the information requested is not necessary, within the meaning of Article 18(3) of Regulation No 1/2003, in the light of the purpose of the investigation. They argue, in essence, that the hypothetical prices that Huawei and ZTE expected to pay at the time of the negotiations with the applicants cannot, given that those prices never materialised, serve to define a price-cost test based on prices effectively paid by the customers in question. However, the Commission, as it contends, is not seeking to define the price-cost test on the basis of hypothetical prices not paid but rather to determine the price that Huawei and ZTE expected to pay if all units purchased had qualified for the whole financial incentive offered by the applicants, as that price would also have had an impact on the customer's choice of supplier at the time of purchase and is therefore relevant to the Commission's investigation into the potentially predatory nature of the applicants' pricing strategy.

145 In addition, the Court, concurring with the Commission, notes that the applicants are best placed to answer such a question, inter alia because the question relates to entries in their accounts. It is also more appropriate to direct those questions to the applicants rather than to their customers so as to obtain the relevant data from a single source in order to generate a consistent dataset.

146 It must therefore be found that those requests for information are necessary in the light of the purpose of the investigation and that, having regard to that purpose, they do not impose a disproportionate burden on the applicants.

147 As regards, seventh, the applicants' argument that it is difficult to provide information — in particular the information requested under questions 4, 11, 17, 18 and 21.4— relating to facts dating from several years previously, it should be stated that those requests cannot be regarded as disproportionate merely because they concern facts that occurred several years previously. The applicants do not argue that the information requested by those questions does not fall within the framework of the Commission's investigation. In any event, as is shown by the Commission's letter of 20 February 2017 to the applicants, nothing prevented them from explaining, in their response to the contested decision, the reasons why they were unable to provide the information requested owing to lapse of time or to the fact that some employees had left the company, and from providing supporting documents in that regard.

148 As regards, eighth, the fact that the contested decision identifies the documents in the Commission's file by referring to the internal production numbers used by the applicants rather than to the Commission case file numbers, it is sufficient to state that that fact does not establish that the contested decision is disproportionate in the sense that it places an inordinate burden on the applicants. Indeed, in the case of a reference system specific to the applicants, the Commission could assume that such references would make it easier for the applicants to locate the relevant documents.

149 In the light of the foregoing, the Court rejects the arguments put forward by the applicants in the third part of the first plea and the first part of the second plea.

– *The allegation that the periodic penalty payment is disproportionate*

150 The applicants maintain that the extremely high amount of the periodic penalty payment of EUR 580 000 per day of delay, calculated from the day after the expiry of one of the periods for response specified in the contested decision, infringes the principle of proportionality. They argue that, contrary to what is stated in recital 26 of the contested decision, they never failed to reply to the request for information of 30 January 2017 but rather requested the Commission to define the scope of the investigation or to reconsider a number of the questions. They submit that the Commission did not react to their requests until after the adoption of the contested decision. They further submit that they always cooperated with the Commission, responding to all the requests for information that the Commission had previously sent them. Moreover, a possible failure on their part to comply with the contested decision would have no impact on the market, given the narrow scope of the investigation. Finally, as the Commission has failed to establish either a foreclosure effect or consumer harm, the applicants consider that the imposition of such a harsh periodic penalty cannot be justified.

151 The Commission contends that these complaints should be rejected as premature and ineffective.

152 In that regard, it should be held that, by the complaints put forward in this part of the second plea, the applicants seek, implicitly but necessarily, annulment of Article 2 of the contested decision on the ground that the fine imposed on them infringes the principle of proportionality.

153 It must be recalled that, under the second sentence of Article 18(3) of Regulation No 1/2003, when the Commission requires information by decision, it is also to indicate or impose the penalties provided for in Article 24 of that regulation.

154 According to the Court of Justice's case-law concerning Article 16 of Regulation No 17 of the Council of 6 February 1962 (First Regulation implementing Articles [101] and [102 TFEU] (OJ, English Special Edition 1959-62, p. 87), which is applicable to Article 24 of Regulation No 1/2003, the fixing of periodic penalty payments necessarily involves two stages. In its first decision, referred to in Article 24(1) of Regulation No 1/2003, the Commission imposes a periodic penalty payment not exceeding 5% of the average daily turnover in the preceding business year per day of delay and calculated from the date appointed by the decision. Since that decision does not determine the total amount of the periodic penalty payment, it cannot be enforced. That amount can be definitively fixed only in another decision (see, by analogy, judgment of 21 September 1989, *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 55). Moreover, it should be observed that, under Article 24(2) of Regulation No 1/2003, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision.

155 Since it represents a preliminary step in the procedure for imposing a periodic penalty payment under Article 24 of Regulation No 1/2003 and since it thus does not produce binding legal effects, the decision referred to in Article 24(1) of that regulation, imposing a periodic penalty payment not exceeding 5% of the average daily turnover in the preceding business year per day of delay and calculated from a date fixed by it, does not constitute a challengeable measure (see, to that effect, order of 24 June 1998, *Dalmine* v *Commission*, T-596/97, EU:T:1998:138, paragraph 31).

156 Indeed, as the Commission submits, that decision constitutes only a stage in the procedure at the end of which it may possibly adopt a decision which definitively fixes the total amount of the periodic penalty payment and can thus be enforced. Before it adopts this second decision, the Commission must fulfil certain procedural obligations. In particular, it must serve a statement of objections on the undertaking concerned explaining that the latter has not provided the requested information within the period prescribed, or that the information provided was incomplete or incorrect, it must organise a hearing of the undertaking concerned and consult the Advisory Committee on restrictive practices and dominant positions, so that both the undertaking and the Advisory Committee are then in a position properly to express their views on all the matters on the basis of which the Commission has imposed the periodic penalty payment and fixed the definitive amount thereof (see, to that effect, order of 24 June 1998, *Dalmine* v *Commission*, T-596/97, EU:T:1998:138, paragraph 32 and the case-law cited).

157 In the present case, the Commission has imposed, by Article 2 of the contested decision, a periodic penalty payment of EUR 580 000 per day of delay, calculated from the date after expiry of one of the

periods for the applicants to reply. The decision contained in Article 2 is thus a decision imposing a periodic penalty payment, under Article 24(1) of Regulation No 1/2003, not a decision definitively fixing the total amount of the periodic penalty payment.

158 Article 2 of the contested decision does not therefore produce binding legal effects in so far as it imposes a periodic penalty payment (see, to that effect, order of 24 June 1998, *Dalmine* v *Commission*, T-596/97, EU:T:1998:138, paragraph 34).

159 The applicants' head of claim relating to Article 2 of the contested decision does not therefore concern a challengeable decision. Consequently, it must be dismissed as inadmissible (see, to that effect, order of 24 June 1998, *Dalmine* v *Commission*, T-596/97, EU:T:1998:138, paragraph 36).

– *The allegation that the time limits for responding are insufficient*

160 The applicants submit that the time limits for responding to the questions contained in the contested decision, despite having been extended by the Commission and by the Hearing Officer, are unreasonable in view of the work to be done. In their submission, the pressure placed on them is not justified in view of the length of the investigation. They deduce from that that the setting of such short time limits amounts to an infringement of the principle of proportionality.

161 The Commission contends that this part of the second plea should be rejected.

162 For the purpose of assessing the possible disproportionality of the burden entailed by the requirement to respond to the contested decision within six weeks and, as regards questions 1, 2, 6 and 8 to 10, eight weeks, account must be taken of the fact that the applicants, as addressees of a decision requesting information under Article 18(3) of Regulation No 1/2003, ran the risk not only of receiving a fine or periodic penalty payment if they supplied incomplete or belated information, or if they failed to provide information, pursuant to Article 23(1)(b) and Article 24(1)(d) of Regulation No 1/2003, respectively, but also of receiving a fine if they supplied information which the Commission considered to be incorrect or misleading, pursuant to Article 23(1)(b) of that regulation.

163 Thus, the examination of the appropriateness of a time limit fixed in a decision requesting information is particularly important. That time limit must enable the addressee of the decision not only to provide its reply in practical terms, but also to ensure that the information supplied is complete, correct and not misleading (judgment of 14 March 2014, *Holcim (Deutschland) and Holcim* v *Commission*, T-293/11, EU:T:2014:127, paragraph 64).

164 It is the case, as has already been stated in paragraph 122 above, that the quantity of information requested represented a significant workload for the applicants.

165 However, in view of the resources at their disposal associated with their economic weight, the applicants could reasonably be considered to be in a position to provide a reply within the periods stipulated, all the more so because (i) the questions in Annex I to the contested decision follow up on the arguments that they submitted in response to the statement of objections, (ii) those questions are for the most part similar to those in the request for information of 30 January 2017 and (iii) in any event, those periods were ultimately set at 10 and 12 weeks.

166 This part of the second plea and, consequently, the second plea in its entirety must therefore be rejected.

The fourth plea, alleging a reversal of the burden of proof

167 By their fourth plea, the applicants maintain that the Commission unduly reverses the burden of proof by requiring them, for the purpose of answering questions 1 and 27, to complete tasks which belong to the building of a case and are, consequently, typically carried out by the Commission.

168 First, as regards question 1, the applicants submit that the Commission asks them to verify, on its behalf, each and every one of their accounting data entries in order to prove the reliability of the data

previously provided. In their submission, that amounts to a *de novo* audit of the accounts. If the Commission considers that the data provided by the applicants are not reliable, it needs to identify precisely why it has reached this conclusion, and then allow the applicants to respond to the point. Moreover, taking account of the significant quantity of data to be provided, the Commission cannot maintain that it is simply seeking to adjust the price-cost test.

169 Second, as regards question 27, the applicants argue that, although it is for the Commission to prove that they have not conducted their business in accordance with the law, they are being asked implicitly to prove that they have acted in accordance with the law.

170 The Commission takes the view that the applicants' arguments are unfounded and premature.

171 It follows from Article 2 of Regulation No 1/2003 and from settled case-law that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is incumbent on the Commission to prove the infringement found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (judgment of 17 December 1998, *Baustahlgewebe* v *Commission*, C-185/95 P, EU:C:1998:608, paragraph 58; see also judgment of 12 April 2013, *CISAC* v *Commission*, T-442/08, EU:T:2013:188, paragraph 91 and the case-law cited). Consequently, undertakings cannot be required to carry out tasks which, properly speaking, belong to the instruction and investigation of the case (see, to that effect, Opinion of Advocate General Wahl in *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2015:694, point 102).

172 As regards the allegation that questions 1 and 27 of the contested decision entail an undue reversal of the burden of proof, the Court observes that it is based on a misreading of the contested decision.

173 First, as has already been noted in the examination of the second part of the first plea, more particularly, in paragraphs 106 and 107 above, by question 1 — contrary to what is claimed by the applicants — the Commission is not seeking to audit their financial accounts but rather to secure the necessary information to adjust the price-cost test methodology so as to take account of the criticisms raised by the applicants in their observations on the statement of objections.

174 Similarly, it has been held in the context of the first part of the second plea, more specifically in paragraphs 138 to 140 above, that the Commission was not asking the applicants to perform tasks on its behalf.

175 Secondly, there is no ground for maintaining that, by question 27, the Commission is asking the applicants to prove that they have conducted their business in accordance with the law. Indeed, it is apparent from recital 18 of the contested decision that the Commission is not asking the applicants to prove that they have acted in accordance with the law but to produce internal documents pertaining to the relevant period which corroborate their own assertion that, when taking pricing decisions, they relied on the relevant case-law and on the Communication relating to the Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7).

176 It follows that the Commission did not reverse the burden of proof to the detriment of the applicants. The fourth plea must therefore be rejected.

The fifth plea, alleging infringement of the right to avoid self-incrimination

177 In the context of their fifth plea, the applicants submit that the contested decision infringes their right to avoid self-incrimination. First, the Commission requires the applicants to respond to questions which go beyond the scope of providing information that is factual in nature or of producing documents already in existence. Second, question 27 requires the applicants to demonstrate that they complied with EU competition rules.

178 The Commission considers the applicants' arguments to be unfounded and contends that the fifth plea should be rejected.

179 It is apparent from recital 23 of Regulation No 1/2003 that when complying with a decision of the Commission, undertakings cannot be forced to admit that they have committed an infringement, but they are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement.

180 Moreover, according to settled case-law, although the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it, the Commission may not compel the undertaking to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (judgment of 18 October 1989, *Orkem* v *Commission*, 374/87, EU:C:1989:387, paragraphs 34 and 35; see also judgment of 28 April 2010, *Amann & Söhneand Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 325 and the case-law cited).

181 Thus, an undertaking in receipt of a decision requesting information pursuant to Article 18(3) of Regulation No 1/2003 cannot be recognised as having an absolute right of silence. To acknowledge the existence of such a right would be to go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty to ensure that the rules on competition within the internal market are observed. A right of silence can be acknowledged only to the extent that the undertaking concerned would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (see, by analogy, judgment of 28 April 2010, *Amann & Söhneand Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 326 and the case-law cited).

182 In order to ensure the effectiveness of Article 18 of Regulation No 1/2003, the Commission is therefore entitled to compel the undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anticompetitive conduct (see, by analogy, judgment of 28 April 2010, *Amann & Söhneand Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 327 and the case-law cited).

183 Thus, an undertaking may not evade a request for information on the ground that by complying with that request it would be required to give evidence against itself (see, to that effect, judgment of 29 June 2006, *Commission* v *SGL Carbon*, C-301/04 P, EU:C:2006:432, paragraph 48).

184 That means that, in the event of a dispute as to the scope of a question, it must be determined whether an answer from the undertaking to which the question is addressed is in fact equivalent to the admission of an infringement, such as to undermine the rights of the defence (judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 273).

185 Answers that are purely factual cannot, as a rule, be regarded as capable of requiring the addressee of questions to admit the existence of an infringement of the rules on competition (see, to that effect, judgment of 8 March 1995, *Société générale* v *Commission*, T-34/93, EU:T:1995:46, paragraph 75).

186 It should be stated at the outset that the applicants merely plead an infringement of the right to avoid self-incrimination in an abstract manner without demonstrating specifically that the contested decision leads them to admit the existence of an infringement which it is incumbent upon the Commission to prove.

187 In any event, the Court notes that, in the present case, the information requested by questions 1, 16 and 27, which is challenged by the applicants under this plea, is of a purely factual nature that will allow the Commission to undertake its own analysis and evaluation in order to determine whether there has been an infringement of Article 102 TFEU, and therefore cannot, for the applicants, be equivalent to an admission of the infringement.

188 Question 1 in fact concerns the production of internal figures that will allow the Commission to reconstruct the relevant facts and calculate the prices effectively paid by the customers in question, in order to take account of the criticisms made by the applicants in their observations on the statement of objections and at the hearing of 10 November 2016 with regard to the price-cost test applied by the Commission in the statement of objections. Even if that information could be used by the Commission as material relevant for the purpose of establishing that the applicants had engaged in predatory pricing in breach of Article 102 TFEU, the mere fact that responding to that question might involve the applicants giving evidence against themselves is not equivalent to an admission of the infringement, as is apparent from the case-law recalled in paragraph 183 above.

189 As regards question 16, it requires the applicants to explain the difference between the price of the MDM8200 based chipsets, to which reference is made in their internal communications, and the price of the same chipsets as mentioned in the documents produced by the applicants in response to an earlier request for information. Thus, by that question the Commission seeks to obtain explanations of certain factual discrepancies revealed by the material at its disposal. Consequently, question 16 must be considered to be asking the applicants for factual information; it therefore does not imply an answer that would involve an admission by the applicants of the existence of the infringement which it is incumbent upon the Commission to prove.

190 As to question 27, as is clear from paragraph 175 above, the Commission has asked the applicants to produce the internal documents which corroborate the claim raised in their observations on the statement of objections and at the state-of-play meeting of 3 September 2015 that, when taking pricing decisions, they relied on the relevant case-law and on the Communication relating to the Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings. The Commission thus in no way requires the applicants to undertake any assessment of such a kind as to lead them to admit that they acted in breach of Article 102 TFEU.

191 In that context, it should also be borne in mind that it was held in the context of the second plea that, by the contested decision, the Commission was not requesting the applicants to carry out work that it could have done itself. On the contrary, the figures requested under question 1, the explanations of the factual discrepancies asked for in the context of question 16 or the internal documents covered by question 27 are data to which only the applicants have access. As follows from the case-law recalled in paragraphs 182 and 183 above, undertakings must provide the Commission with all necessary information concerning such facts as may be known to them or as are in their possession, even if the latter may be used to establish the existence of anticompetitive conduct; undertakings may not evade that obligation on the ground that by complying with it they would be required to give evidence against themselves.

192 As regards the applicants' argument that the contested decision amounts to an infringement of the right to avoid self-incrimination because it compels them to provide documents that cannot be regarded as already in existence, it is true that, according to the case-law, the fact of being obliged to answer purely factual questions put by the Commission and to comply with its request for the production of documents already in existence cannot constitute a breach of the fundamental principle of respect for the rights of the defence or impair the right to fair legal process (judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 328). However, that case-law cannot be interpreted to the effect that a request for production of a document that cannot be regarded as already in existence necessarily infringes the right of the addressee to avoid self-incrimination. In the present case, the applicants have not put forward any concrete argument establishing that the fact that — in order to respond to the Commission's questions — they would have to marshal the requested factual data in a document facilitating the Commission's understanding thereof, is capable, in itself, of constituting an infringement of that right in their regard. It is apparent from the case-law referred to in paragraph 131 above that the Commission is not confined merely to requesting the production of existing information irrespective of any involvement of the undertaking concerned; it is therefore open to the Commission to direct questions at an undertaking which entail the latter having to marshal the requested information.

193 In that regard, attention must again be drawn to the context in which the questions put by the contested decision fall to be answered. Those questions follow on from arguments and criticisms put forward by the applicants with regard, in particular, to the methodology that the Commission used in the statement of objections to establish the price-cost test and their purpose is thus to clarify those arguments so as to enable the Commission to take a decision as to the existence or otherwise of the presumed infringement on the basis of all the relevant elements, including those put forward by the applicants. Consequently, in so far as the questions put by the contested decision continue on from, and clarify, the arguments raised by the applicants themselves, it cannot be held, absent any specific factors put forward by the applicants, that, in answering those questions, the latter would be led to admit the existence of the presumed infringement.

194 Finally, as is clear from the case-law, there is nothing to prevent the applicants from showing, either later in the administrative procedure or in proceedings before the Courts of the European Union, that the facts set out in their replies or the documents produced by them have a different meaning from that ascribed to them by the Commission (see, to that effect and by analogy, *Mannesmannröhren-Werke* v *Commission*, T-112/98, EU:T:2001:61, paragraph 78, and of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T-446/05, EU:T:2010:165, paragraph 328 and the case-law cited).

195 It follows that the fifth plea must be rejected.

The sixth plea, alleging infringement of the principle of good administration

196 The applicants maintain that the Commission has failed to comply with its obligations deriving from the principle of good administration. In that regard, they rely, first, on the scale of the information requested at such a late stage of the investigation, the length of which was, in their submission, already excessive. Second, they argue that the contested decision, which was sent to them without warning, is the result of prosecutorial bias against them on the part of the Commission since in their view the Commission has continued with its investigation solely to justify the time and resources employed over many years of fruitless investigation and in order to conceal its failure to establish the alleged infringement. The applicants submit that the Commission has abused its investigatory powers by prolonging a flawed investigation. Third, a number of questions in the contested decision clearly go beyond the scope of the investigation as previously defined by the Commission. Fourth, aside from the fact that the applicants are undertaking a significant amount of work on the Commission's behalf, the contested decision seeks to follow up on points concerning responses given, in some instances, more than 5 years ago and pertaining to facts which occurred 10 or more years ago.

197 The Commission denies having infringed the principle of good administration.

198 It should be noted that recital 37 of Regulation No 1/2003 states that the regulation 'respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union' and that it 'should be interpreted and applied with respect to those rights and principles'.

199 Article 41 of the Charter of Fundamental Rights — which, under the first subparagraph of Article 6(1) TEU, has the same legal value as the Treaties — is entitled 'Right to good administration' and states, in paragraph 1, that 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions bodies, offices and agencies of the Union'.

200 According to the case-law on the principle of good administration, where, as in the present case, the institutions of the European Union have a power of appraisal, observance of the guarantees afforded by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, as has been recalled in paragraph 101 above, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98, T-212/98 to T-214/98, EU:T:2003:245, paragraph 404).

201 It should be noted that the complaints that the applicants put forward in this plea overlap with those advanced in support of the first five pleas; the applicants appear to accept that that is so by making reference, in their arguments in support of this plea, to arguments presented in the context of the other pleas. Those complaints, which the Court has rejected when examining those pleas, thus cannot establish that, in adopting the contested decision, the Commission infringed the principle of good administration. On the contrary, it is apparent from the analysis of those pleas that it was precisely to comply with its duty to examine carefully and impartially the arguments put forward by the applicants in their observations on the statement of objections and at the hearing on 10 November 2016 that the Commission sent the contested decision to the applicants in order to assess, with the help of the information requested thereunder, whether that information had any impact on its preliminary conclusions. Consequently, the Commission was entitled to adopt the contested decision in order to prepare its final decision on the possible existence of an infringement of Article 102 TFEU with all due care and attention and to take its decision on the basis of all the data that might influence that decision.

202 That being so, it must be found that the applicants have not established that the Commission showed bias in the sense that it adopted the contested decision with the aim of concealing its failure to conclude its long-running investigation by finding an infringement and of building a new case against them. In that connection, it should be recalled that the complaint alleging an infringement of the right to have the administrative procedure disposed of within a reasonable time has been rejected as being of no relevance in the present action (see paragraph 32 above).

203 The sixth plea must therefore be rejected and, in consequence, the action must be dismissed in its entirety.

Costs

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

On those grounds,

THE GENERAL COURT (Second Chamber),

hereby:

1. **Dismisses the action;**

2. **Orders Qualcomm, Inc. and Qualcomm Europe, Inc. to pay the costs, including those of the interim proceedings.**

Prek Buttigieg Berke

Delivered in open court in Luxembourg on 9 April 2019.

E. Coulon M. Prek

Registrar President

* Language of the case: English.