



EUROPEAN COMMISSION  
Competition DG

***CASE AT.39633 –  
SHRIMPS***

(ONLY THE DUTCH AND GERMAN TEXTS ARE AUTHENTIC)

**CARTEL PROCEDURE**  
**Council Regulation (EC) 1/2003**

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**Article 7 Regulation (EC) 1/2003**  
**Date: 27.11.2013**

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EUROPEAN COMMISSION

Brussels, 27 November 2013  
C(2013) 8286 final

**COMMISSION DECISION**

**of 27.11.2013**

**addressed to:**

**GOLDFISH BV**

**HEIPLOEG BV**

**HEIPLOEG BEHEER BV**

**HEIPLOEG HOLDING BV**

**HOLDING L.J.M. KOK BV**

**KLAAS PUUL BV**

**KLAAS PUUL BEHEER BV**

**KLAAS PUUL HOLDING BV**

**L. KOK INTERNATIONAL SEAFOOD BV**

**STÜHRK DELIKATESSEN IMPORT GmbH & Co. KG**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the  
European Union**

**(AT.39633 - Shrimps)**

(Only the Dutch and German texts are authentic)

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**HOLDING L.J.M. KOK BV**

**KLAAS PUUL BV**

**KLAAS PUUL BEHEER BV**

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**L. KOK INTERNATIONAL SEAFOOD BV**

**STÜHRK DELIKATESSEN IMPORT GmbH & Co. KG**

relating to a proceeding under Article 101 of the Treaty on the Functioning of the

**European Union**

**(AT.39633 - Shrimps)**

(Only the Dutch and German texts are authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>2</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 12 July 2012 to initiate proceedings in this case.

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and 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 81 and 82 of the Treaty<sup>3</sup>,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

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<sup>1</sup> OJ C115, 9.5.2008, p.47.

<sup>2</sup> OJ L1, 4.1.2003, p.1.

With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market".

<sup>3</sup> OJ L123, 27.4.2004, p. 18.

Having regard to the final report of the hearing officer in this case<sup>4</sup>,

Whereas:

## **1. INTRODUCTION**

- (1) This decision relates to a single, continuous and complex infringement of Article 101 of the Treaty on the Functioning of the European Union (hereinafter "TFEU"). The infringement consisted of price fixing, market sharing and exchanges of sensitive commercial information between suppliers of North Sea shrimps that affected trade in the European Union ("EU") and lasted from June 2000 until January 2009.<sup>5</sup>
- (2) This Decision is addressed to the following undertakings:
- Heiploeg BV, Goldfish BV, Heiploeg Beheer BV and Heiploeg Holding BV ("Heiploeg")
  - Klaas Puul BV, Klaas Puul Beheer BV and Klaas Puul Holding BV ("Klaas Puul")
  - Stührk Delikatessen Import GmbH & Co. KG ("Stührk")
  - L. Kok International Seafood BV and Holding L.J.M. Kok BV ("Kok Seafood")
- (3) The undertakings concerned, and in particular Heiploeg and Klaas Puul, had long standing and frequent contacts to discuss their business – including prices to be paid to their suppliers, prices to be charged to their customers, and the allocation of those customers. Discussion and co-operation reduced competition.

## **2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS**

### **2.1. The product**

- (4) North Sea shrimps (*crangon crangon*) are a shrimps species captured in the North Sea.<sup>6</sup> The main part of the catch is landed in Denmark, Germany and the Netherlands where it is purchased by specialised shrimps traders directly (contract fishing) or in the Netherlands also at fish auctions (free fishing).
- (5) The traders further process and handle the North Sea Shrimps, including transport, peeling<sup>7</sup>, freezing and packaging. They supply North Sea shrimps for human consumption, peeled or unpeeled, fresh or frozen, to retailers such as supermarkets, seafood wholesalers, food processing companies or restaurants.

### **2.2. The market**

- (6) In the period from 2000 to 2009, the value of all sales of North Sea shrimps in the EU fluctuated between EUR 100 000 000 and EUR 200 000 000 per year.<sup>8</sup> The

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<sup>4</sup> Final Report of the Hearing Officer of 26.11.2013.

<sup>5</sup> See Chapter VI of this Decision for an assessment of the individual duration of infringement for each addressee.

<sup>6</sup> North Sea shrimps are captured near the coasts of Belgium, France, Denmark, Germany and the United Kingdom. They are also known as "grey shrimps" or "brown shrimps", as opposed to "pink shrimps" or "Northern prawns" (*pandalus borealis*).

<sup>7</sup> Peeling is still a largely manual operation carried out in peeling stations in low cost countries.

<sup>8</sup> Sources: [...]. See also [...], estimating a yearly value of sales of EUR 126 000 000 for 9 000 tons.

volume fluctuated between 5 000 and 10 000 tons per year. Roughly 85% of these shrimps are sold peeled and 15% unpeeled.<sup>9</sup>

- (7) North Sea shrimps are supplied to customers in at least five Member States: Belgium, Denmark, France, Germany and the Netherlands. Belgium accounts for approximately 50% of total EU North Sea shrimps consumption. Germany accounts for 25% and the Netherlands for most of the remainder.<sup>10</sup> France, Denmark and other Member States account for a significantly lower volume of North Sea Shrimps consumption. In Belgium, the Netherlands and Germany the product is sold mostly in *peeled* form. In France, *unpeeled* shrimps are more popular and are sold both by wholesalers and horeca.
- (8) The two largest traders of North Sea shrimps in the EU are Heiploeg and Klaas Puul. Their estimated combined market share ranges between 75 and 85%.<sup>11</sup> Other traders have considerably smaller market positions and they do not serve all geographical areas or product segments.

### 2.3. Undertakings subject to the proceedings

#### 2.3.1. Heiploeg

- (9) Heiploeg trades North Sea shrimps and other seafood products throughout Europe.<sup>12</sup> Relevant legal entities within the undertaking for this business are:

Name	Registered office
Heiploeg Shellfish International BV ("HSI")	Zoutkamp, the Netherlands
Heiploeg Shellfish International Holding NV ("HSI Holding")	Amsterdam, the Netherlands
Heiploeg Holding BV	Zoutkamp, the Netherlands
Heiploeg Beheer BV	Zoutkamp, the Netherlands
Heiploeg BV	Zoutkamp, the Netherlands
Goldfish BV	Volendam <sup>13</sup> , the Netherlands
Büsumer Fischerei-Gesellschaft mbH & Co KG ("BFG")	Wöhrden, Germany
Heiploeg Fischerei GmbH	Hüsum, Germany
Dansk Heiploeg A/S	Rømø, Denmark

- (10) In the period to 6 September 2000, HSI BV was the top-holding of the Heiploeg group.<sup>14</sup> HSI BV fully owned Heiploeg Beheer BV and all of its subsidiaries.<sup>15</sup> As of 6 September 2000, all shares in HSI BV were acquired by HSI Holding NV, a newly created entity majority-owned by a private equity investor.<sup>16</sup> HSI Holding NV thus became the new top-holding of the Heiploeg group and fully owned Heiploeg Beheer BV and all of its subsidiaries from 6 September 2000 until 3 February 2006.<sup>17</sup> On 3

<sup>9</sup> [...]

<sup>10</sup> [...]

<sup>11</sup> [...]

See also [...], where the market shares of Klaas Puul and Heiploeg on the North Sea shrimps market are estimated at around 35% to 45% each; [...], where the market shares of Klaas Puul and Heiploeg on the North Sea shrimps market are estimated at around 10% to 45% each, with the remainder of the market accounting for around 20%; [...], estimating the combined market share of Heiploeg and Klaas Puul at around 90%.

<sup>12</sup> [...]. Heiploeg's main customers are located in Belgium, the Netherlands, Germany and France.

<sup>13</sup> Visitor's address in Zoutkamp. [...]

<sup>14</sup> [...]

<sup>15</sup> [...]

[...]

<sup>16</sup> [...]

<sup>17</sup> [...]



February 2006, the ownership of Heiploeg Beheer BV was transferred from HSI Holding NV to Heiploeg Holding BV<sup>18</sup>, a newly created entity majority-owned by another private equity investor.<sup>19</sup> Heiploeg Holding BV is currently the top-holding of the Heiploeg group that owns Heiploeg Beheer BV and all of its subsidiaries.<sup>20</sup>

(11) In the period from 21 June 2000 to 24 March 2009, Heiploeg Beheer BV fully owned a number of operational entities through direct and/or indirect shareholdings: notably Heiploeg BV and Goldfish BV, but also BFG GmbH, Heiploeg Fischerei GmbH and Dansk Heiploeg A/S.<sup>21</sup> Several of the leading managers or sales representatives of these operational entities played a role in the cartel that is described in this Decision. Many of them were also directors of Heiploeg Beheer BV and/or other Heiploeg subsidiaries.<sup>22</sup>

(12) The main relevant individuals at Heiploeg for the purpose of this decision are:<sup>23</sup>

Name	Entity	Function	Period
[...] <sup>24</sup>	HSI Holding NV HSI BV Heiploeg Beheer BV Heiploeg BV		[...]
	HSI BV Heiploeg Holding BV Heiploeg Beheer BV Heiploeg BV		
	BFG GmbH Heiploeg Holding BV Heiploeg Beheer BV		
	Heiploeg Beheer BV Heiploeg BV BFG GmbH Heitrans BV		
	Heiploeg BV Heiploeg Beheer BV Goldfish BV		
	HSI BV Heiploeg Beheer BV Heiploeg BV BFG GmbH		
	BFG GmbH Heiploeg Fischerei GmbH		

18 [...]
   
19 [...]
   
20 [...]
   
21 [...]

Heiploeg BV is the main operational entity of Heiploeg in the North Sea shrimps business. Goldfish BV is another operational subsidiary that was acquired by Heiploeg Beheer BV in 1999. Medio 2010 all operational activities of Goldfish have been taken over by other entities of the Heiploeg group. Since then, Goldfish BV is officially still registered in Volendam, but has a visitor's address in Zoutkamp.

Büsumer Fischerei-Gesellschaft mbH & Co KG ('BFG') in Wöhrden, Germany, Heiploeg Fischerei GmbH in Hüsum, Germany, and Dansk Heiploeg A/S in Rømø, Denmark operate on the purchasing side of the business, notably as regards landing facilities in Germany and Denmark.

22 [...]
   
23 [...]
   
24 [...]

	BFG GmbH (via BKF)	
	Dansk Heiploeg A/S	

- (13) In the business year 2012/2013 2009/2010 Heiploeg had a consolidated worldwide turnover of EUR between [...] million and the value of its sales of North Sea shrimps was EUR between [...] million.<sup>25</sup>

### 2.3.2. *Klaas Puul*

- (14) Klaas Puul is a producer and trader of different kinds of seafood products, with special focus on the sale of peeled and unpeeled North Sea shrimps.

- (15) Relevant legal entities are:

Name	Registered office
Klaas Puul Beheer BV	Volendam, the Netherlands
Klaas Puul Holding BV	Volendam, the Netherlands
Klaas Puul BV	Volendam, the Netherlands
Klaas Puul België NV (+ Jemalo BVBA)	Puurs, Belgium
Klaas Puul France S.A.R.L.	Orsay, France
Klaas Puul Deutschland GmbH	Büsum, Germany
Klaas Puul Danmark A/S	Havneby, Denmark

- (16) The main operational subsidiary is Klaas Puul BV. Other operational entities of the group are: Klaas Puul België NV, Klaas Puul France S.A.R.L., Klaas Puul Deutschland GmbH, Klaas Puul Danmark A/S. They are directly or indirectly wholly owned (or almost wholly owned) by Klaas Puul Beheer BV.<sup>26</sup>

- (17) Klaas Puul Holding BV wholly owned Klaas Puul Beheer BV until 24 November 2006 and is still the only director of Klaas Puul Beheer BV according to the latter's articles of association.<sup>27</sup>

- (18) The main relevant individuals at Klaas Puul for the purpose of this decision are:<sup>28</sup>

Name	Entity	Function	Period
[...] <sup>29</sup>	Klaas Puul Holding BV Klaas Puul Beheer BV Klaas Puul BV Klaas Puul België NV Klaas Puul Danmark A/S Klaas Puul France sarl Klaas Puul Deutschland GmbH		[...]
	Klaas Puul BV Klaas Puul Deutschland GmbH		
	Jemalo BVBA		
	Klaas Puul Beheer BV Klaas Puul BV Klaas Puul België NV Klaas Puul Danmark A/S Klaas Puul France sarl Klaas Puul Deutschland		

<sup>25</sup> [...] Financial year from 1 April until 31 March.

<sup>26</sup> [...]

<sup>27</sup> [...]

<sup>28</sup> [...]

<sup>29</sup> [...]

	GmbH	
	Klaas Puul Danmark A/S	

- (19) The consolidated worldwide turnover of Klaas Puul in the business year 2012/2013 amounted to EUR between [...] million and the value of its sales in North Sea shrimps amounted to EUR between [...] million.<sup>30</sup>

### 2.3.3. Stührk

- (20) Stührk Delikatessen Import GmbH & Co.KG is a fish and shrimps trader, located in Marne, Germany and mainly active in Germany.

- (21) The relevant individuals at Stührk are:<sup>31</sup>

Name	Entity	Function	Period
[...]	Stührk Delikatessen Import GmbH & Co KG		[...]
	Stührk Delikatessen Import GmbH & Co KG		
	Stührk Delikatessen Import GmbH & Co KG		

- (22) The consolidated worldwide turnover of Stührk in 2012 amounted to EUR between [...] million and the value of its sales in North Sea shrimps amounted to EUR between [...] million.<sup>32</sup>

### 2.3.4. Kok Seafood

- (23) Kok Seafood is a trader of North Sea shrimps and provider of shrimps transport, freezing, peeling and packaging services. Kok Seafood purchased shrimps at auctions and via contract fishermen in the Netherlands, Germany and Denmark and sold most of them to Heiploeg on the basis of a long-term contract.<sup>33</sup>

- (24) Relevant legal entities are:

Name	Registered office
L. Kok International Seafood BV	Enkhuizen, the Netherlands
Holding L.J.M. Kok	Enkhuizen, the Netherlands <sup>34</sup>

- (25) L. Kok International Seafood BV was the operational entity, selling shrimps to Heiploeg.<sup>35</sup> The company was and is wholly-owned by Holding L.J.M. Kok BV<sup>36</sup>.

Name	Entity	Function	Period
[...]	L. Kok International Seafood BV Holding L.J.M. Kok BV		[...]

- (26) On 13 December 2007, Holding L.J.M Kok BV set up a 50/50 joint venture with the shrimps and fish wholesaler W.G. den Heijer & Zn. BV. The seafood business of both undertakings was incorporated in the newly created entity ••k• Holding BV and its operational subsidiary Heyko BV, located in Enkhuizen, the Netherlands.<sup>37</sup>

<sup>30</sup> [...]

<sup>31</sup> [...]

<sup>32</sup> [...]

<sup>33</sup> [...]

<sup>34</sup> L. Kok International Seafood BV and Holding L.J.M Kok BV are statutory seated in Volendam, but with a visitors address in Enkhuizen only.

<sup>35</sup> [...]

<sup>36</sup> [...]

<sup>37</sup> [...]

L.Kok International Seafood BV remained in existence for the purpose of the long-term contract with Heiploeg.<sup>38</sup>

- (27) The consolidated worldwide turnover of Kok Seafood (L. Kok International Seafood BV and Holding L.J.M. Kok BV) in 2012 amounted to EUR [...] million; also the value of sales of North Sea shrimps in 2012 amounted to EUR [...] million.<sup>39</sup>
- (28) The consolidated worldwide turnover of Heyko (Heyko Holding BV and Heyko BV) in 2012 was [...] million. The value of sales of North Sea shrimps equally amounted to EUR [...] million.<sup>40</sup>

#### **2.4. Other traders**

- (29) Various other traders are active in the North Sea shrimps industry.<sup>41</sup> Traders mentioned in this Decision are [...] <sup>42</sup>, [...] <sup>43</sup>, [...] <sup>44</sup> and [...] <sup>45</sup>.

#### **2.5. Trade between Member States**

- (30) The undertakings subject to these proceedings purchased and/or supplied North Sea shrimps across borders within the EU. The major traders, Heiploeg and Klaas Puul in particular, purchased North Sea shrimps in various countries, notably in Denmark, Germany and the Netherlands, and supplied the product to customers in various countries, in particular in the Netherlands, Belgium, Germany, Denmark and France.

### **3. PROCEDURE**

- (31) On 14 January 2003 the National Competition Authority in the Netherlands (Nederlandse Mededingingsautoriteit, “NMa”) adopted a decision based on national competition law and on Article 81 EC, now Article 101 TFEU, against several undertakings and associations of undertakings active in the North Sea shrimps industry. The decision covered minimum price agreements and output restrictions in the period January 1998 until January 2000 and the obstruction of the entrance of a new trader on the Dutch shrimp auctions in October-November 1999. Fines were imposed, inter alia, on Heiploeg BV, Goldfish BV, Klaas Puul & Zoon BV and L. Kok International Seafood BV.<sup>46</sup> On 28 December 2004, in administrative appeal, the fines of several smaller traders, including L. Kok International Seafood BV, were repealed and the fines for Heiploeg BV, Goldfish BV and Klaas Puul & Zoon BV were reduced.<sup>47</sup> In Court, the NMa decision was essentially upheld.<sup>48</sup>

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<sup>38</sup> Heyko BV sells North Sea shrimps to various customers, while sales from Kok Seafood to Heiploeg are invoiced from Heyko BV to L. Kok International Seafood BV to Heiploeg BV.

<sup>39</sup> [...]

<sup>40</sup> [...]

<sup>41</sup> [...]

<sup>42</sup> [...]

<sup>43</sup> [...]

<sup>44</sup> [...]

<sup>45</sup> [...]

<sup>46</sup> Decision NMa of 14 January 2003 in case 2269 “Noordzeegarnalen” [ID 1252].

<sup>47</sup> Decision NMa [DirGen] of 28 December 2004 in case 2269 [ID 1254].

<sup>48</sup> Judgment of the *Rechtbank Rotterdam* of 19 July 2006 [ID/1771] and Judgment of the *College van Beroep voor het bedrijfsleven* of 17 March 2011 [ID 1401/46]. The *College van Beroep voor het bedrijfsleven* only reduced the fines of *Heiploeg BV*, *Goldfish BV* and *Klaas Puul & Zoon BV* because the proceedings had not been conducted within a reasonable time.

- (32) On 13 January 2009, Klaas Puul approached the Commission stating its intention to submit an application for immunity from fines in connection with a cartel in the North Sea shrimps industry. The Commission granted Klaas Puul a marker until 26 January 2009 in order to allow it to gather the necessary information and evidence.<sup>49</sup>
- (33) [...] Klaas Puul submitted its leniency application. [...] <sup>50</sup> <sup>51</sup> [...] the Commission granted Klaas Puul conditional immunity from fines.<sup>52</sup>
- (34) On 24, 25 and 26 March 2009, the Commission carried out unannounced inspections of business premises and private homes in Belgium, Denmark, Germany and the Netherlands.<sup>53</sup>
- (35) In the period between 3 August 2009 and 9 March 2012 the Commission issued several requests for information.<sup>54</sup> Meanwhile, Klaas Puul continued to cooperate with the Commission providing further information, documentation and explanations.<sup>55</sup>
- (36) On 12 July 2012 the Commission decided to initiate proceedings against Goldfish BV, Heiploeg BV, Heiploeg Beheer BV, Heiploeg Holding BV, Holding L.J.M. Kok BV, L. Kok International Sefood BV, Klaas Puul BV, Klaas Puul Beheer BV, Klaas Puul Holding BV and Stührk Delikatessen Import GmbH & Co KG.<sup>56</sup> On the same day, the Commission adopted a Statement of Objections against these parties.<sup>57</sup> It was sent to them on 13 July 2012.<sup>58</sup>
- (37) All addressees subsequently requested and received a DVD containing the accessible documents in the Commission file.<sup>59</sup> Documents and statements that were accessible at Commission premises were consulted by Heiploeg only.<sup>60</sup> The other addressees did not request access.
- (38) All addressees of the Statement of Objections submitted written comments<sup>61</sup> and were heard in an oral hearing on 7 February 2013.
- (39) In the period between the Statement of Objections and this Decision, the Commission issued additional requests for information, mainly for the purpose of the fines calculation.<sup>62</sup>

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<sup>49</sup> See Point 15 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases ('Leniency Notice'), OJ C 298, 8.12.2006, p. 17–22.

<sup>50</sup> [...]

<sup>51</sup> [...]

<sup>52</sup> [...]

<sup>53</sup> Pursuant to Articles 20 (4) and 21 of Regulation 1/2003. Inspection decisions [ID 434, 458, 490, 505, 522, 527, 534, 560, 574, 580, 615, 628, 649, 652 and 667].

<sup>54</sup> Pursuant to Article 18(2) of Regulation No 1/2003 or pursuant to Point 12 of the Commission Notice on Immunity from fines and reduction of fines in cartel cases. [...]

<sup>55</sup> [...]

<sup>56</sup> [...]

<sup>57</sup> [...]

<sup>58</sup> [...]

<sup>59</sup> [...]

<sup>60</sup> [...]

<sup>61</sup> [...]

<sup>62</sup> [...]

#### 4. DESCRIPTION OF THE EVENTS

##### 4.1. Basic principles of organisation of the cartel

(40) The North Sea shrimps industry is characterised by long term business and personal relationships with frequent bilateral contacts, mostly in person or via telephone.<sup>63</sup> [...] stated:

[...]<sup>64</sup>

(41) The cartel described in this Decision operated by way of bilateral contacts. Various representatives of Heiploeg and Klaas Puul frequently talked to each other by phone or directly in meetings, sometimes weekly.<sup>65</sup>

(42) In these informal contacts, every aspect of the business could come up for discussion. But a key aspect was the price level for customer [...] in Belgium. Not so much because an important part of North Sea shrimps consumption takes place in Belgium and [...] is an important customer there, but also because in terms of general price strategy [...] in Belgium has a special importance.

(43) [...] in Belgium was originally supplied by Heiploeg.<sup>66</sup> Klaas Puul managed to become a second supplier in 2001<sup>67</sup> and [...] became the third supplier in 2008.

(44) For buying North Sea shrimps, [...] operates on the basis of tender proceedings with fixed prices for several months.<sup>68</sup> [...] tendering procedures were designed in a way which allowed [...] to propose the candidates – based on the finally retained lowest price offer – an offer at or below this price. This technique creates price transparency and gives wider importance to the finally retained lowest price.

(45) The different purchasing branches of [...] were also in contact with each other over the price levels offered. This means that the important Belgian price level was known and had an influence on the prices paid by [...] elsewhere, in particular in Germany and the Netherlands.

(46) In Germany, Heiploeg<sup>69</sup>, Klaas Puul (since 2001) and Stührk (since 2004) were the three main suppliers of [...]<sup>70</sup>. The Belgian price level was indicative, to the extent that [...] decided in 2007 to set purchasing prices for Germany directly by reference to prices paid in Belgium, increased by a stable margin.<sup>71</sup>

(47) In the Netherlands, Heiploeg was the only main supplier of [...].<sup>72</sup> The Belgian price level was therefore indicative, to the extent that [...] decided in 2008 to purchase North Sea shrimps for the Netherlands via Germany, where the price was already set by reference to the Belgian purchase price.<sup>73</sup> As Heiploeg was involved in price

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<sup>63</sup> [...]

<sup>64</sup> [...]

<sup>65</sup> [...]

<sup>66</sup> [...]

<sup>67</sup> [...]

<sup>68</sup> [...]

<sup>69</sup> Heiploeg and its German subsidiary BFG.

<sup>70</sup> [...]

<sup>71</sup> [...]

<sup>72</sup> Heiploeg and/or its subsidiary Goldfish. [...]

<sup>73</sup> [...]

coordination for [...] in Belgium, there was obviously no further need to separately coordinate the Dutch price over and beyond the Belgian price.<sup>74</sup>

- (48) The [...] -price also served more widely as benchmark for price negotiations with other customers. [...] was generally viewed as taking small margins over its sales and no rebates. The price charged by [...] therefore could be considered indicative for the overall price level of North Sea shrimps. In practice, any change in the [...] -price, in particular in Belgium, therefore directly or indirectly affected the overall price level of North Sea shrimps. [...] <sup>75</sup> this is corroborated by other evidence. It was for instance clearly mentioned in the context of conversations between Heiploeg and Kok Seafood in 2006 and 2008:

[...] <sup>76</sup>
[...] <sup>77</sup>

- (49) The above conversation comes from a continuous text without interpunction. The Commission made a text interpretation for attributing the statements to Heiploeg.<sup>78</sup> But it matters little who said exactly what in this conversation; what counts is that it confirms the role of the [...] price.
- (50) The importance of the [...] price is also addressed later in this decision, when dealing with the arguments of the parties in that respect, Heiploeg in particular.<sup>79</sup>
- (51) When [...] asked for price offers in the course of tender procedures, Heiploeg contacted Klaas Puul and for Germany also Stührk and exchanged and/or agreed the prices to be offered.<sup>80</sup> Price coordination in France between Heiploeg and Klaas Puul was often made with reference to [...].<sup>81</sup>
- (52) The stability achieved by coordinating the sales price level was further enhanced by a tacit market sharing arrangement. Heiploeg and Klaas Puul had stable customer relations and in principle did not go to each other's customers. Where necessary specific arrangements were made.<sup>82</sup> They also did in principle not take over each other's fishermen.<sup>83</sup>
- (53) The big traders also coordinated their behaviour with respect to purchases of North Sea shrimps, because the purchase price of North Sea shrimps is the main cost element, and fluctuating.<sup>84</sup> They tried to influence the price level at the auctions or

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74 [...]

75 [...]

76 [...]

77 [...]

78 The first quote is attributed to Heiploeg on the basis of the text interpretation that it concerns an answer to a complaint of Kok Seafood for being disadvantaged by Heiploeg. The second quote is also attributed to Heiploeg on the basis of the text interpretation that Heiploeg is explaining its price setting to Kok Seafood. It is supported by the reference [...] or by the fact that it talks about intentions for getting the price of [...] up, and this is something Heiploeg can do, but not Kok Seafood.

79 See Recitals (340) - (347).

80 [...]

81 [...]

82 See Recitals (124) to (135).

83 See Recital (137).

84 See Recitals (143) to (180).

exercised pressure on other traders to keep them away from the auctions.<sup>85</sup> They directly or indirectly exchanged prices and rebates paid to their contract fishermen.<sup>86</sup>

- (54) The desired stability also made the big traders take action towards possible competitive threats, to some extent implicating other traders in the anticompetitive arrangements. Heiploeg arranged that the alternative [...] supplier [...], that purchased all its shrimps from Heiploeg, applied a price level instructed by Heiploeg.<sup>87</sup> When [...] also started supplying [...], Heiploeg and Klaas Puul attempted to exchange prices with this newcomer in order to bring it within the scope of their cartel.<sup>88</sup> The competitive threat of alternative trader Kok Seafood was neutralised by means of a long-term contract between Heiploeg and Kok Seafood that allowed the latter to sell its shrimps to Heiploeg for a price set in function of the Heiploeg sales price.<sup>89</sup> Kok Seafood knew that this price was subject to coordination with Klaas Puul and actively supported price increase initiatives.<sup>90</sup>

## 4.2. The cartel history

### 4.2.1. General overview

- (55) Already in 2000, Heiploeg and Klaas Puul were the two most prominent traders of North Sea shrimps, active in all relevant parts of the market.<sup>91</sup>
- (56) On 21 June 2000, Heiploeg and Klaas Puul met each other at a hotel in Wieringerwerf, the Netherlands. They agreed on the price for North Sea shrimps offered to benchmark customer [...], as well as on other trading conditions.<sup>92</sup> At least since that date, they undertook various actions, where necessary with other traders, to influence the price level of North Sea shrimps, limit competition and stabilise the market. Since 2000 Heiploeg and Klaas Puul also consulted each other on prices offered to contract fishermen in Germany and Denmark.<sup>93</sup>
- (57) On 12 October 2000, Kok Seafood and Heiploeg concluded a long-term “strategic alliance”, renewed on 11 February 2005 and 16 April 2009.<sup>94</sup> Under the terms of the contract, Heiploeg purchased North Sea shrimps from Kok Seafood for a remuneration set in function of Heiploeg's average downstream sales prices. As a result and/or in return, Kok Seafood refrained from becoming a viable competitor to Heiploeg and Klaas Puul. Kok Seafood was in contact with many parties in the North Sea shrimps industry, including Heiploeg and Klaas Puul and sometimes was instrumental in passing on sensitive commercial information between competitors.

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<sup>85</sup> See Recitals (155) to (168).

<sup>86</sup> See Recitals (146) to (153) and (170) to (179).

<sup>87</sup> See Recitals (187) to (188).

<sup>88</sup> See Recitals (189) to (198).

<sup>89</sup> See Recitals (199) to (205).

<sup>90</sup> See Recitals (206) to (224) and (403) to (406).

<sup>91</sup> See Recital (8).

Heiploeg (including subsidiaries Goldfish and BFG) was originally the only trader substantially purchasing North Sea shrimps in various Member States, but this situation had changed in 1999 when Klaas Puul gained direct access to contract fishermen in Germany and Denmark, by means of acquiring the German North Sea shrimps fishing co-operative Holsatia.

<sup>92</sup> See Recitals (69) to (73).

<sup>93</sup> [...]

<sup>94</sup> [...]



- (58) In 2001 Klaas Puul started supplying part of [...] in Belgium and also became active in Germany.<sup>95</sup> Tension shortly rose between Heiploeg and Klaas Puul, but the collusive contacts continued.<sup>96</sup> Meetings between Heiploeg and Klaas Puul often took place at premises of Heiploeg in Harlingen, which is halfway between the headquarters of Heiploeg and Klaas Puul.<sup>97</sup> In 2004 Heiploeg sold these premises. Subsequent meetings took place at various hotels and restaurants in the north of the Netherlands<sup>98</sup>, at premises of Goldfish or in the private homes of individuals involved.<sup>99</sup> At these meetings, Heiploeg and Klaas Puul discussed all aspects of the market, including volumes and prices of North Sea shrimps, customers and suppliers.<sup>100</sup> Both [...] Heiploeg and Klaas Puul participated in these meetings and other contacts. [...] Heiploeg and Klaas Puul were also involved in the preparation and implementation of the arrangements.<sup>101</sup> Heiploeg's subsidiary Goldfish, which supplied benchmark customer [...], was also involved.<sup>102</sup>
- (59) The frequency of meetings between Heiploeg and Klaas Puul decreased following reorganisations of Heiploeg and the departure of [...] in 2004.<sup>103</sup> But anticompetitive contacts never stopped.<sup>104</sup> This is also confirmed by conversations between Kok Seafood and Klaas Puul in 2007 and with another trader in 2008 :

[...] <sup>105</sup>
[...] <sup>106</sup>

- (60) The above conversation comes from a continuous text without interpunction. The Commission made a text interpretation for attributing the statements to Klaas Puul and Kok Seafood respectively.<sup>107</sup> But it matters little who exactly said what in this conversation; what counts is that it confirms that contacts between Heiploeg and Klaas Puul continued.
- (61) New Heiploeg [...] were directly involved or, at least, informed about the coordination between Heiploeg and Klaas Puul.<sup>108</sup> They did not distance Heiploeg from the arrangements nor did they effectively put coordination to an end.<sup>109</sup> Heiploeg and Klaas Puul continued to regularly agree on price increases.<sup>110</sup>

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95 See Recitals (79) and (80).

96 [...]

97 [...]

98 [...] mentions Restaurant Zeezicht in Harlingen, Hotel Wieringermeer in Wieringerwerf and Hotel Mercure in Nulde.

99 [...] See the meetings in Recitals (93), (102), (103), (105), (110), (115), (116) and (118).

100 [...]

101 [...]

102 [...]

103 [...]

104 [...]

105 [...]

106 [...]

107 The first note is attributed to Klaas Puul on the basis of the text interpretation that it can only be Klaas Puul who has knowledge about these facts and informs Kok Seafood and not vice versa. The second note is attributed to Kok Seafood because it informs about Heiploeg and Klaas Puul and Kok Seafood is in general more knowledgeable on this issue than its contact partner in the conversation.

108 See Recital (121).

109 [...]

110 See for instance Recitals (93), (103) and (215).

- (62) In the telephone contacts and meetings [...] Heiploeg and Klaas Puul also discussed arrangements concerning France.<sup>111</sup> But contacts concerning France were less frequent. Heiploeg, [...] and Klaas Puul accounted for the main part of supplies and the price level was relatively stable.<sup>112</sup> The top management of Heiploeg and Klaas Puul was normally not involved in the day-to-day business concerning France.<sup>113</sup> Coordination was in practice delegated to staff from Heiploeg's sales department dealing with this geographic area [...].<sup>114</sup> They were in contact by telephone and [...] they usually met in order to discuss the market.<sup>115</sup>
- (63) In Germany, Stührk also became a supplier of [...] <sup>116</sup> and at least since March 2003 this undertaking actively contributed to benchmark price fixing in Germany.<sup>117</sup> Stührk exchanged information with Heiploeg and indirectly also with Klaas Puul on sales and purchase prices in Germany.<sup>118</sup> By doing this, Stührk was kept informed about the price setting of Heiploeg/Klaas Puul and determined its own price in accordance.<sup>119</sup> Stührk's active contribution ended in 2007 when [...] decided to link the price paid in Germany directly to the price paid in Belgium.<sup>120</sup> Contacts between Stührk and Heiploeg, mainly by telephone, took place at the level of the directors.<sup>121</sup> Klaas Puul was involved to a lesser degree as the business relation with Stührk was less friendly, in particular after 2005.<sup>122</sup>
- (64) When Klaas Puul started to engage in contract fishing in the Netherlands around 2005, it was relatively easy to extend the already existing cooperation for contract fishing in Germany and Denmark to the Netherlands, despite Heiploeg's reluctance to let Klaas Puul have access to contract fishing there.<sup>123</sup>
- (65) [...] entered the market in 2007 and managed to obtain a contract to supply [...] in Belgium in 2008. Heiploeg and Klaas Puul responded to this new competitive threat, by trying to establish contacts with [...] – directly or indirectly via Kok Seafood - and exchange price information in order to avoid [...] counteracting their own price strategy.<sup>124</sup>
- (66) Bilateral contacts between the parties continued until the Commission inspection of 24 March 2009.<sup>125</sup> Even the day before, [...], expressed his worries and frustrations about Heiploeg and the shrimps market to a private equity investor with large

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111

[...]

112

[...]

Klaas Puul supplied peeled shrimps in France since 1999 to only one supermarket chain, and otherwise refrained from competing actively in this region. [...]

113

See Recitals (90), (91), (108) and (115).

114

[...]

115

[...]

116

See Recital (46).

117

[...] See Recitals (85), (87), (88), (99), (101), (109), (112), (114) and (120) for Stührk's involvement in sales price coordination. [...]

118

See Recitals (169) - (179).

119

See Recital (250).

120

See Recital (120).

121

See for instance Recitals (85), (87), (88), (99) and (112).

122

See Recital (100).

123

[...]

124

See Recitals (189) - (197).

125

For 2009, see Recitals (122), (200), (223) and (224).

interests in Heiploeg.<sup>126</sup> He pleaded for opening the North Sea shrimps market to competition by ending the contract with Kok Seafood, stopping to purchase together with Klaas Puul from an important supplier, allowing contract fishermen to sell their product on the free market, and stop purchasing from competitors.

#### 4.2.2. *Chronology of events*

- (67) Below, the cartel is further described by means of a chronology of facts and events on file. As mentioned above, the cartel functioned by means of numerous informal bilateral contacts.
- (68) All aspects of the business could come up for discussion in these bilateral contacts, but for redactional purposes events are presented separately in this Decision for the (1) coordination of sales prices, (2) market sharing and customer allocation, (3) purchase price coordination, and (4) conduct towards other traders, including the specific role played by Kok Seafood.

##### 4.2.2.1. Sales price coordination

- (69) A meeting between [...] Heiploeg and Klaas Puul took place on 21 June 2000 in a hotel in Wieringerwerf.<sup>127</sup> Evidence for this meeting comes from [...] <sup>128</sup>, [...] <sup>129</sup> and [...] <sup>130</sup>.
- (70) Heiploeg contests the credibility of all statements and supporting evidence [...], but this wider argument is answered further below in this Decision.<sup>131</sup>
- (71) Apart from disputing the credibility, Heiploeg falls short of bringing an alternative explanation. Heiploeg cannot remember if this meeting took place, and raises doubts by pointing at the inability of the author of the note of the meeting to clarify some of his words and by pointing to a contradiction in a later statement where he stated that he had been to two meetings in Wieringerwerf in 2005.<sup>132</sup>
- (72) The author admitted that his initial reference to 2005 must be a mistake and confirmed that he had been to two or three meetings in Wieringerwerf in or around 2000.<sup>133</sup> The author's inability to clarify in 2009 the meaning of some words written down in 2000 rather seems to support the contemporaneous character of his note.
- (73) The aim of the meeting was to [...].<sup>134</sup> Heiploeg and Klaas Puul agreed a price increase for benchmark customer [...], which also applied to other sales of peeled North Sea shrimps. The contemporaneous note reads: [...] <sup>135</sup> In addition, Heiploeg and Klaas Puul agreed on the price for [...], discussed contracts with North Sea shrimps fishermen and discussed [...].<sup>136</sup>

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126 [...] *see* Recital (10).  
127 [...]  
128 [...]  
129 [...]  
130 [...]  
131 *See* Recitals (284) - (311).  
132 [...]  
133 [...]  
134 [...]  
135 [...]  
136 [...]

- (74) After 21 June 2000, Heiploeg and Klaas Puul continued to coordinate prices for North Sea shrimps sold to [...] in this way.<sup>137</sup> [...] estimated 40 agreements.<sup>138</sup> Heiploeg and Klaas Puul met or were otherwise frequently in contact to discuss a wide range of market-related issues, from purchases of upstream inputs to downstream sales prices. In these encounters, [...] participated regularly for Heiploeg.<sup>139</sup> For Klaas Puul regular participants were [...].<sup>140</sup>
- (75) Prices for other Dutch North Sea shrimps customers, such as for [...], continued to be coordinated as well, in any event from 2002 to 2008.<sup>141</sup> Contacts between Heiploeg and Klaas Puul in respect of prices offered to this customer usually started with the customer asking for offers from the suppliers. Following such requests, Heiploeg and Klaas Puul considered prices over the phone together in order to keep prices from falling. In this context, they equally discussed the quantities to be offered.<sup>142</sup>
- (76) Heiploeg denies the anticompetitive character of the conduct for [...] because this customer knew that Heiploeg was in contact with Klaas Puul.<sup>143</sup> But any such knowledge does not exempt Heiploeg and Klaas Puul from applying the competition rules. It remains unclear what [...] exactly knew<sup>144</sup> and there is evidence on file that Heiploeg and Klaas Puul tried to hide (part of) their behaviour for [...].<sup>145</sup> [...] indeed did not complain about possible coordination between Heiploeg and Klaas Puul, as long as it would get an extra rebate from Klaas Puul, unknown to Heiploeg, i.e. a competitive advantage over competitors that paid a coordinated price without rebate.<sup>146</sup>
- (77) In October 2000 Heiploeg concluded a first long-term (five year) contract with Kok Seafood for deliveries of peeled North Sea shrimps to Heiploeg.<sup>147</sup> The purpose of this contract for Heiploeg was to avoid Kok Seafood entering the North Sea shrimps trade market as a direct competitor, while allowing him to resale its shrimps at a price in function of the Heiploeg price. An objective which both the contracting parties<sup>148</sup> and Klaas Puul<sup>149</sup> knew.
- (78) As [...] shows [...] management followed up on the implementation of prices agreed in meetings between Heiploeg and Klaas Puul. This document, for which Heiploeg has no explanation<sup>150</sup>, mentions that Heiploeg and Klaas Puul had agreed a minimum price for North Sea shrimps earlier in a meeting in Harlingen:

[...] <sup>151</sup>

137 See for instance Recitals (78), (82), (93), (103), (110), (116) and (121).

138 [...]

139 [...]

140 [...]

141 [...]

142 [...]

143 [...]

144 [...]

145 See Recital (127)

146 [...]

147 See Recitals (57) or (255).

148 See Recital (203).

149 See Recital (204).

150 See Recital (335).

151 [...]

- (79) The above statement also shows that the situation between Heiploeg and Klaas Puul became temporary tense in 2001, when Klaas Puul entered the market in Germany and had also acquired [...] as client.<sup>152</sup> [...] stated in this respect:

[...] <sup>153</sup>

- (80) This is also confirmed by [...]:

[...] <sup>154</sup>

- (81) [...] also confirmed that:

[...] <sup>155</sup>

- (82) Two days before submitting a tender proposal, Klaas Puul discussed with Heiploeg the price to be offered by the three suppliers to [...].<sup>156</sup> For this purpose, Heiploeg [...] contacted Klaas Puul [...] by telephone.<sup>157</sup>

- (83) The prices agreed upon were never identical. This would raise suspicion. In general there was a difference of 40-50 cents between the offers of the different traders. When [...] came with a counter proposal, there was contact again, in the same way.<sup>158</sup>

- (84) From 2000 to 2003 the meetings took place at the premises of a Heiploeg subsidiary in Harlingen.<sup>159</sup> [...] refer to meetings with Heiploeg in Harlingen, in which Klaas Puul had been reassured that the cooperation with Heiploeg would continue, irrespective of Heiploeg's owners at that time.<sup>160</sup>

- (85) On 14 March 2003 [...] Heiploeg [...] informed Stührk [...] about prices Heiploeg was going to offer to [...] on 17 March 2003:

[...] <sup>161</sup>

- (86) Klaas Puul confirmed the existence of coordination between Heiploeg/BFG, Stührk and Klaas Puul concerning [...].<sup>162</sup> The task of coordinating with Stührk in Germany mainly fell to Heiploeg, because the business relation between Klaas Puul and Stührk was not always good.<sup>163</sup>

- (87) On 30 July 2003 Heiploeg and Stührk discussed a request for price reduction received from customer [...] in Germany by telephone.<sup>164</sup> Both agreed not to reduce their price offers. Heiploeg and Stührk also considered this incident as a 'test' for

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<sup>152</sup> See Recital (58).

<sup>153</sup> [...]

<sup>154</sup> [...]

<sup>155</sup> [...]

<sup>156</sup> [...]

<sup>157</sup> [...]

<sup>158</sup> [...]

<sup>159</sup> [...]

<sup>160</sup> [...]

<sup>161</sup> [...]

<sup>162</sup> [...]

<sup>163</sup> See Recitals (99) - (100).

<sup>164</sup> [...]

further talks concerning [...].<sup>165</sup> This event is uncontested by Heiploeg.<sup>166</sup> An internal note on this contact exists, because the person involved was not able to report via telephone. This shows that these discussions normally took place via telephone and explains why written evidence may be scarce.

- (88) On 12 January 2004 Stührk [...] reported in an internal e-mail communication on a recent phone contact with Heiploeg [...] concerning purchasing prices and quotes in the context of an envisaged price offer to [...]. This communication refers to North Sea shrimps prices offered by both Heiploeg and Klaas Puul as being essentially in the same range as Stührk's pricing intentions:

[...].<sup>167</sup>

- (89) Heiploeg claims that only the second part of this email [...] relates to the [...] price offer, and that there is no evidence that [...] was also involved in this part of the conversation. Heiploeg tries to demonstrate his non-involvement by referring to his function [...], not responsible for the sales to supermarkets.<sup>168</sup> However there is evidence on the file that [...] was heavily involved in anticompetitive contacts both for sales and purchases.<sup>169</sup> Heiploeg also manifestly fails to give an alternative explanation for the explicit reference in this email to the agreement of Stührk's competitors, explicitly referring to Heiploeg and Klaas Puul prices. All this clearly suggests that the [...] price offers were indeed coordinated.
- (90) In France, Klaas Puul sold shrimps via a distributor; only [...] were supplied directly.<sup>170</sup> [...] new prices for France following contact and price exchanges with Heiploeg.<sup>171</sup> [...] <sup>172 173</sup>
- (91) [...] <sup>174</sup> [...], Heiploeg communicated its prices to Klaas Puul, before Klaas Puul passed them on to its customers, [...] in particular.<sup>175</sup> [...] prices exchanged with Heiploeg included a rebate for [...] and a supplement for transport costs.<sup>176</sup> [...] prices communicated to its French distributor for customers other than [...] also followed contacts and exchanges of information with Heiploeg.<sup>177</sup> And also for the sales of unpeeled shrimps in France, Klaas Puul followed Heiploeg's pricing policy with a small delay and sometimes after having contacted each other.<sup>178</sup>
- (92) Heiploeg explains in its reply to the Statement of Objections that it reads in these accounts [...] nothing but a personal calculation model, without any exact date of anticompetitive contacts. But Heiploeg fails to give an explanation for the indications

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165 [...]  
166 [...]  
167 [...]  
168 [...]  
169 See for instance Recitals (94), (102), (103), (137), (147), (150), (157), (162), (177), (201),(204), (206), (211), (213), (216) and (514).  
170 [...]  
171 [...]  
172 [...]  
173 [...]  
174 [...]  
175 [...]  
176 [...]  
177 [...]  
178 [...]

[...]. For the supporting statements [...] Heiploeg again does not go any further than denying the value of such evidence in general, without going into the content.<sup>179</sup>

- (93) Internal Klaas Puul notes of a meeting between Heiploeg and Klaas Puul [...] show that they agreed a price adjustment for (Dutch) North Sea shrimps applicable from 15 March 2004:

[...] <sup>180</sup>

- (94) On 28 December 2004, i.e. the day on which the Dutch Competition authority reduced the fines imposed on Heiploeg and Klaas Puul for infringing the competition rules and repealed the fines imposed on smaller traders, Heiploeg informed Kok Seafood that Klaas Puul had paid an unofficial visit to Heiploeg, in the course of which Heiploeg and Klaas Puul had discussed the North Sea shrimps market. This appears from various versions of this conversation:

[...] <sup>181</sup>  
[...] <sup>182</sup>

- (95) There are very small textual differences between the two versions of this conversation and the original transcripts are continuous text, without interpunction, requiring the Commission to make a text interpretation for attributing the content to either Heiploeg or Kok Seafood. The references in the text to '*admits [...]*', '*he said*', '*says [...]*' on the one hand and '*I say*' '*I guess*' and '*me*' on the other hand offer clear guidance for this purpose. But, in any way, it matters little who exactly said what when the general message that Klaas Puul paid an unofficial visit to Heiploeg to discuss the shrimps business comes out unambiguously.

- (96) These two documents do not explicitly refer to December 2004. One contains no date and the other refers to a date in 2008. But it is clear that this date in 2008 cannot be a reference to the date of the conversation. Both documents contain a compilation of various transcripts or notes of conversations from different periods. The context of the conversation, and in particular the reference to [...] <sup>183</sup> in the first version, or to [...] <sup>184</sup> in the second version, leaves no doubt that this conversation took place at the time of the decision of the Dutch Competition Authority of 28 December 2004 that confirmed the imposition of fines on Heiploeg, Klaas Puul, and others, but repealed the fine imposed on Kok Seafood.<sup>185</sup>

- (97) In February 2005 Heiploeg renewed the long-term contract with Kok Seafood concerning deliveries of peeled North Sea shrimps for the same duration (five year) and on essentially the same terms.<sup>186</sup> But since Kok Seafood had invested in its production facilities, the volume that Heiploeg purchased from Kok Seafood was considerably increased.<sup>187</sup>

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<sup>179</sup> See Recitals (300) to (311).

<sup>180</sup> [...]

For other content of this meeting, *see also* Recital (135) and (141).

<sup>181</sup> [...]

<sup>182</sup> [...]

<sup>183</sup> *See* Recital (94). [...]

<sup>184</sup> [...]

<sup>185</sup> *See* Recital (31).

<sup>186</sup> *See* Recital (57).

<sup>187</sup> [...]

- (98) On 18 April 2005 a representative of [...], expressed his concern and asked in an internal communication to the management of Heiploeg about allegations of [...] relating to the existence of illegal price agreements with Klaas Puul and recommended to close any channels of [...] to 'inside' information.<sup>188</sup>
- (99) On 12 December 2005 Heiploeg [...] informed Stührk [...] about the price which Klaas Puul [...] wished to achieve in Germany.<sup>189</sup> This communication from Heiploeg to Stührk does not necessarily demonstrate that Heiploeg and Klaas Puul had coordinated this price, but it shows that Heiploeg knew about Klaas Puul's price intention, that Heiploeg informed Stührk accordingly and that Stührk subsequently determined its own price offer in function of what Heiploeg would do.
- (100) On 13 February 2006, a meeting took place between Heiploeg, Klaas Puul, Stührk and customer [...].<sup>190</sup> This meeting, also confirmed by Stührk, was not anticompetitive, but illustrates that the relation between Stührk and Klaas Puul had become tense because of a conflict over this customer.<sup>191</sup> [...] as a consequence Stührk and Klaas Puul stopped coordinating directly with each other. However, both continued to coordinate prices with Heiploeg, [...], and therefore also indirectly with each other.<sup>192</sup>
- (101) On 6 April 2006 Heiploeg contacted Stührk because another competitor had offered North Sea shrimps to customer [...] for a price, which Heiploeg considered to be too low. Stührk assured Heiploeg that nothing had changed from Stührk's perspective and that Stührk would not deviate from the agreed price level for the time being.<sup>193</sup> The event is not contested by Heiploeg<sup>194</sup> and confirmed by Stührk.<sup>195</sup>
- (102) Heiploeg informed Kok Seafood on 27 April 2006 about a meeting between Heiploeg [...] and Klaas Puul [...], which would be continued on Monday (1 May 2006) by [...] of Klaas Puul and [...] for Heiploeg.<sup>196</sup>
- (103) [...] contact with Klaas Puul on 8 September 2006, referring to a price increase with Heiploeg for 14 September 2006:
- |                      |
|----------------------|
| [...] <sup>197</sup> |
| [...] <sup>198</sup> |
- (104) The above conversation comes from a continuous text without interpunction. The commission made a text interpretation for attributing the statements to Klaas Puul or Kok Seafood respectively. The references in the text to *'I ask'* and *'I say'* offer guidance for this purpose. But it matters little who exactly said what when it comes out unambiguously that Kok Seafood was informed about a price increase that was agreed between Heiploeg and Klaas Puul.

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188 [...]
   
189 [...]
   
190 [...]
   
191 [...]
   
192 [...]
   
193 [...]
   
194 [...]
   
195 [...]
   
196 [...]
   
197 [...]
   
198 [...]



- (105) On 29 September 2006 Heiploeg [...] France [...] met with Klaas Puul [...] Belgium and France [...] in a restaurant in Bruges.<sup>199</sup> In these discussions on France, [...] prices served as reference for coordination purposes.<sup>200</sup>
- (106) Heiploeg, again, contest the evidence value of these statements or supporting documents and finds the description of the discussion in the Statement of Objections too vague for qualifying as an infringement of Article 101 TFEU. But the description given [...] to the discussions for France was very detailed<sup>201</sup> and Heiploeg largely fails to comment on the content of these discussions or on the whereabouts of its employee on that day.
- (107) The difficult relation between Klaas Puul and Stührk<sup>202</sup> also appears on 17 January 2007 when Stührk discussed internally a price offer, which Klaas Puul had submitted to a customer of Stührk. Stührk interpreted this 'unusual' offer to a 'traditional' Stührk customer as a signal that Klaas Puul intended to step up competition in future.<sup>203</sup>
- (108) On 7 September 2007 Klaas Puul communicated its shrimps prices for France with effect of 5 November to Heiploeg.<sup>204</sup>
- (109) On 11 September 2007 Stührk reflected internally on the price level applied to [...]. In the course of this reflection, it was suggested to inform Heiploeg in respect of these pricing intentions.<sup>205</sup>
- (110) On 25 September 2007 a meeting took place between Heiploeg and Klaas Puul, in which they agreed to increase prices for North Sea shrimps, both concerning [...] and for wholesalers.<sup>206</sup> In a conversation between Kok Seafood and a German trader, the latter made reference to such a meeting in Den Oever between Heiploeg and Klaas Puul on prices, and to an agreed price increase for 8 October 2007:
- [...] <sup>207</sup>
- (111) The above statement comes from a continuous text without interpunction and is attributed to the trader on the basis of a text interpretation. This interpretation was confirmed by Kok Seafood.<sup>208</sup> But it matters little who exactly said what in this conversation, where the main point is the reference to this meeting between Heiploeg and Klaas Puul in Den Oever about prices.
- (112) When [...] asked Stührk for new prices on 30 October 2007, Stührk [...] contacted Heiploeg [...] before making an offer on 5 November 2007. The intention underlying this offer was to maintain at least the same price level as before. Stührk reported internally that Heiploeg and another competitor in Germany with whom Stührk worked closely together would submit their offers to [...] on the same day.

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199 [...]
   
200 [...]
   
201 [...]
   
202 See Recital (100).
   
203 [...]
   
204 [...]
   
205 [...]
   
206 [...]
   
207 [...]
   
208 [...]

[...] <sup>209</sup>

- (113) Heiploeg claims that these communications do not show sales price coordination but are legitimate contact between [...] Stührk and its supplier Heiploeg: Stührk needs to know at what price it can purchase shrimps from Heiploeg before making its offer to [...].
- (114) The person involved for Stührk [...] was indeed purchase manager, but he was also general manager.<sup>210</sup> The wording of the email of 5 November 2007 furthermore clearly suggests that the subject of this conversation was the price setting of Stührk to [...], and not only the price between Heiploeg to Stührk.<sup>211</sup> The price mentioned also was a sales price and not a purchase price.<sup>212</sup>
- (115) Klaas Puul [...] Belgium/France [...] remembered that he met Heiploeg [...] France [...] on 15 November 2007 at the Crown Plaza Hotel in Antwerp to review price arrangements concerning [...].<sup>213</sup>
- (116) On 15 January 2008 a meeting took place between Heiploeg [...] and Klaas Puul [...] in Hardegarijp, the Netherlands, where they discussed [...] Belgium and came to the conclusion that the price level should be maintained, [...].<sup>214</sup> This discussion also affected prices offered to [...] in Germany on 31 January 2008. [...] stated:

[...] <sup>215</sup>

- (117) Heiploeg claims that the restaurant bills [...] are insufficient to prove the existence of these meetings, but Heiploeg's participants do not explicitly deny the existence of these meetings and Heiploeg fails to explain why the statements [...] are factually incorrect.
- (118) Heiploeg, Klaas Puul and Kok Seafood also met each other in the framework of discussions on the Marine Stewardship Council (MSC) label with fishermen. Both [...] for instance mentioned an incident between Heiploeg and Kok Seafood in the margins of the MSC meeting of 15 February 2008.<sup>216</sup> In the conversation between Kok Seafood and another trader, it is said inter alia that:

[...] <sup>217</sup>

- (119) Even though it is not absolutely clear who says what in this conversation, the reference to a meeting of Klaas Puul and Heiploeg where fishing prices and the price of peeled shrimps is discussed is clear.
- (120) In 2008, the need for Heiploeg, Klaas Puul and Stührk to coordinate prices for [...] in Germany separately vanished, because the customer decided to apply the price level

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209 [...] On 14 December 2007 Stührk and Heiploeg still met each other at the Altera Hotel Schmitz in Oldenburg, Germany, to discuss their business relation and the shrimps industry in general. [...]

210 [...]

211 [...]

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213 [...]

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217 [...]

negotiated in Belgium also in Germany, albeit with a fixed surplus.<sup>218</sup> The customer confirms having effectively handled purchasing operations regarding North Sea shrimps for outlets in Germany, the Netherlands and Belgium in a uniform manner from July 2008.<sup>219</sup> Since then, coordination between Heiploeg and Klaas Puul for the price of [...] in Belgium directly affected prices applied to this customer in Germany.

- (121) On 31 October 2008 Heiploeg and Klaas Puul met [...]. Klaas Puul informed [...] of Heiploeg [...] of the history of longstanding cooperative contacts between Heiploeg and Klaas Puul. The relationship between Heiploeg and Kok Seafood was also discussed.<sup>220</sup>
- (122) Stührk was aware that the main North Sea shrimp traders in the Netherlands were using similar prices and kept a close eye on price developments in the Netherlands.<sup>221</sup> When [...] informed Stührk on 3 March 2009 that the conflict between Heiploeg and Kok Seafood had ended<sup>222</sup>, Stührk reacted internally with a message [...].<sup>223</sup>

#### 4.2.2.2. Market sharing and customer allocation

- (123) The price coordination was supported by market sharing or customer allocation arrangements between Heiploeg and Klaas Puul. They operated on the basis of an unwritten rule to refrain from actively approaching each other's customers.<sup>224</sup>
- (124) In the Netherlands, Heiploeg used to supply customer [...] and Klaas Puul refrained from making offers to this customer. When explicitly asked by [...] to submit an offer, Klaas Puul coordinated such offers with Heiploeg in advance in order to ensure that the customer would retain Heiploeg as supplier.<sup>225</sup>
- (125) Klaas Puul, on the other hand, used to supply customer [...] until 2006. [...] offers to this customer were coordinated with Heiploeg in order to make sure that Klaas Puul would submit the offer with the lowest price.<sup>226</sup>
- (126) Stührk explained in its reply to the Statement of Objections that it was threatened by Klaas Puul when they took over this Dutch customer.<sup>227</sup> This event made business relations between Stührk and Klaas Puul tense for a long time, forcing them to exchange price information with each other only indirectly via Heiploeg.<sup>228</sup>
- (127) Both Heiploeg and Klaas Puul supplied industrial customer [...] and coordinated supplies to this customer.<sup>229</sup> In the meeting on 21 June 2000<sup>230</sup> Heiploeg and Klaas Puul agreed on a price [...] and agreed that Heiploeg-subsiidiary Goldfish should not make a separate offer to this customer. They also discussed an incident [...] with

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<sup>218</sup> See Recital (46).

<sup>219</sup> [...]

<sup>220</sup> [...]

<sup>221</sup> [...]

<sup>222</sup> See also Recitals (220) - (224).

<sup>223</sup> [...]

<sup>224</sup> [...]

<sup>225</sup> [...]

<sup>226</sup> [...]

<sup>227</sup> [...]

<sup>228</sup> See Recital (100).

<sup>229</sup> [...]

<sup>230</sup> See Recital (73).

indications of prices and quantities for both Heiploeg and Klaas Puul. They agreed that sending a communication to the customer in this form was a mistake and should be avoided in future. [...] Heiploeg [...] and [...] Klaas Puul [...] regularly coordinated volumes and prices of North Sea shrimps for this customer by telephone after that.<sup>231</sup>

- (128) In Belgium, [...] was supplied by Klaas Puul.<sup>232</sup> Heiploeg supplied customer [...] <sup>233</sup> Klaas Puul emphasised in the meeting with Heiploeg on 21 June 2000<sup>234</sup> that Klaas Puul had thus far not actively approached potential customers [...] and [...] and had stopped supplying [...] <sup>235</sup> When [...] had asked for an offer explicitly, Klaas Puul had not responded and referred to alleged capacity problems. In exchange, Heiploeg agreed not to approach Klaas Puul customer [...] (in France).<sup>236</sup>
- (129) In the meeting between Heiploeg and Klaas Puul of 27 September 2006 Heiploeg warned Klaas Puul that Heiploeg could approach customer [...] in Belgium should Klaas Puul not help Heiploeg to solve a temporary supply shortage.<sup>237</sup>
- (130) Heiploeg claims that the lack of credibility of this note made by Klaas Puul is proven by the fact that it is not logic for Heiploeg to approach a big customer like [...] in times of shortage.<sup>238</sup> But Heiploeg's warning referred to possible future behaviour, i.e. how Heiploeg could react in future in case Klaas Puul would not give support now to overcome a temporary shortage. The content of the note therefore rather supports its credibility.
- (131) In France, benchmark customer [...] was traditionally supplied by Heiploeg, while [...] was supplied by Klaas Puul.<sup>239</sup> As mentioned before, the situation in France was also discussed in meetings between [...] Heiploeg and Klaas Puul<sup>240</sup>, for example, at the meeting in Harlingen of 25 February 2004 where Heiploeg reminded Klaas Puul of the agreement made concerning France.<sup>241</sup> Heiploeg would also contact [...] Klaas Puul [...] personally in order to complain when Klaas Puul had made offers to customers of Heiploeg in France.<sup>242</sup>
- (132) Customer allocation at times also concerned smaller customers.
- (133) A Goldfish note of an internal meeting with Heiploeg of 26 March 2003 reads:

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231 [...]

232 [...]

233 [...]

234 See Recital (73).

235 [...]

236 [...]

237 [...]

238 [...]

239 [...]

In France, around 80% of unpeeled shrimps are sold to supermarket customers (as opposed to Belgium, where that percentage is around 40%, and even more so to other regions). Notably in France, end-customer demand for unpeeled shrimps is much more pronounced. In France, Klaas Puul made around [...] % of its unpeeled North Sea shrimps sales to supermarkets (partly via an intermediary) in the period 2000 to 2009. Heiploeg supplied both supermarkets and wholesalers, whereas [...] mainly supplied wholesalers.

240 See for instance Recital (62).

241 [...] also mentioned in Recital (93) and (141).

242 [...]

[...] <sup>243</sup>

(134) Heiploeg argues that this note only reflects an internal business assessment and that there was no agreement with Klaas Puul behind.<sup>244</sup> But the fact remains that this note demonstrates that Heiploeg sometimes voluntarily refrained from supplying Klaas Puul customers.

(135) A contemporary note [...] reporting on a meeting with Heiploeg [...] <sup>245</sup> reads:

[...] <sup>246</sup>

(136) Also on the purchase side, Heiploeg and Klaas Puul applied market sharing arrangements.

(137) There was a mutual understanding between Heiploeg and Klaas Puul in principle not to take over fishermen from each other.<sup>247</sup> This statement of Klaas Puul is corroborated by conversations of 2005 and 2007 between Heiploeg and Kok Seafood:

[...] <sup>248</sup>

[...] <sup>249</sup>

(138) The above statement of 2005 is part of a continuous text without interpunction. It is attributed to Heiploeg and Kok Seafood on the basis of a text interpretation and comparison with the original audio file.<sup>250</sup> This interpretation was confirmed by Kok Seafood.<sup>251</sup>

(139) Kok Seafood claims that it is not clear from the conversation whether Heiploeg talks about an agreement with Klaas Puul. Heiploeg also claims that the 2005 statement refers to internal Heiploeg agreements, and not to agreements with Klaas Puul. But references to [...], in combination with the wording used ('together' and 'each other's') clearly points into the direction of agreements between Heiploeg and Klaas Puul. When listening to the audio file, this comes out even better. Moreover, the statement from 2007, and the corroborating statements of Klaas Puul in this respect make it even more clear that this part was not limited to Heiploeg.

(140) Furthermore, the note of the meeting between Heiploeg and Klaas Puul [...] already refers to a discussion concerning a contract-fisherman that considered switching from Klaas Puul to Heiploeg.<sup>252</sup>

(141) Contemporaneous notes of another meeting between Heiploeg and Klaas Puul in Harlingen [...] also show discussion for sharing the output of North Sea shrimps from fishing company [...], and agreement to further discuss this in March.<sup>253</sup>

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243 [...]   
244 [...]   
245 Concerning other content of this note, see Recitals (93) and (141).   
246 [...]   
247 [...]   
248 [...]   
249 [...]   
250 [...]   
251 [...]   
252 [...]   
253 [...]

(142) Heiploeg also attempted to keep Klaas Puul and other traders away from the auctions in the Netherlands, but this is further explained below.<sup>254</sup>

#### 4.2.2.3. Purchase price coordination

(143) Many fishermen work on the basis of a contract with the big shrimp traders ('contract fishing'). Only in the Netherlands, part of the shrimps landings are traded at fish auctions ('free' market). These auction prices are publicly known and directly or indirectly determine the prices paid to the contract fishermen.<sup>255</sup> Contract-fishing prices are usually fixed on a weekly basis.<sup>256</sup> Fishermen exchange and compare the prices obtained from different traders with the prices at the auctions, including across borders. Prices paid to contract fishermen in Denmark, Germany and the Netherlands are therefore largely the same.<sup>257</sup>

(144) Heiploeg and Klaas Puul also coordinated their purchase prices. Contacts took place by telephone, but also during meetings between the management of Heiploeg and Klaas Puul.<sup>258</sup> It went hand in hand with attempts to manipulate prices at the fish auctions.

(145) Contemporaneous notes of the meeting in Wieringerwerf [...] <sup>259</sup> between Heiploeg and Klaas Puul already reveal the existence of purchase price coordination between Heiploeg and Klaas Puul at that time. The note mentions an agreement on [...] loyalty year-end payments for the contract fishermen for the year 2000 and the intention to undertake similar joint action concerning such payments for the year 2001.

(146) The prices and volumes for the contract fishermen were fixed and distributed on a weekly basis. Klaas Puul received copies of Heiploeg's letters to contract fishermen, informing them about prices and volumes for upcoming fishing periods.<sup>260</sup> [...] <sup>261</sup>

(147) Heiploeg claims that it cannot avoid that fishermen pass (future) price information to Klaas Puul, but [...] also received such information directly. This appears for instance from the email of 2 August 2007, where Heiploeg [...] informed Klaas Puul about the envisaged North Sea shrimps purchasing prices for week 31 in Germany, the Netherlands and Denmark.<sup>262</sup>

(148) Heiploeg brings up that it is not clear from the email itself that the prices communicated indeed relate to an upcoming week. It claims that this must have been invented [...] or otherwise that these prices were already communicated by Heiploeg to its fishermen. But the wording of Heiploeg's email refers to 'proposal' (in Dutch 'voorstel') and 'we aim for' (in Dutch: 'wij gaan voor'), clearly suggesting that it is about future conduct. Heiploeg also does not provide any proof that these prices were already communicated to its fishermen.

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<sup>254</sup> See Recitals (155) - (167).

<sup>255</sup> The contract fishing prices are in principle set somewhat below prices achieved at the fish auctions, as contract fishermen benefit from supply certainty and price stability. [...]

<sup>256</sup> [...]

<sup>257</sup> [...]

<sup>258</sup> See Recitals (56) - (74)..

<sup>259</sup> See Recital (73).

<sup>260</sup> [...]

<sup>261</sup> [...]

<sup>262</sup> [...]

- (149) [...] Heiploeg and Klaas Puul in Denmark<sup>263</sup> also exchanged purchasing price proposals for fishermen and subsequently informed [...].<sup>264</sup> This is corroborated by internal Heiploeg emails of 2 January 2006, 13 January 2006, 30 July 2007 and 7-8 October 2007 that reveal that Heiploeg reported internally purchase prices received from Klaas Puul in Denmark.<sup>265</sup> This was even admitted by Heiploeg for some occasions<sup>266</sup>. [...] demonstrates that also Klaas Puul internally reported purchase price information from Heiploeg in Denmark.<sup>267</sup>
- (150) The emails clearly demonstrate that future price information was exchanged between Heiploeg and Klaas Puul. For instance:
- |                      |
|----------------------|
| [...] <sup>268</sup> |
| [...] <sup>269</sup> |
| [...] <sup>270</sup> |
- (151) [...] also shows that Klaas Puul reported already [...] prices that Heiploeg intended to offer to his fishermen on 23 November in Zoutkamp. Any allegation that prices were already communicated to the fishermen well before they were actually offered, are not substantiated.<sup>271</sup>
- (152) It appears from a conversation between Kok Seafood and another trader in February 2008 that the traders, including Heiploeg and Klaas Puul, tried to bring the purchase price level up.
- |                      |
|----------------------|
| [...] <sup>272</sup> |
|----------------------|
- (153) The above conversation comes from a continuous text without interpunction. It may be difficult to deduct with certainty who actually said what in this conversation, but the references to an upcoming coordinated price increase with Klaas Puul and Heiploeg come out unambiguously.<sup>273</sup> The text interpretation was also confirmed by Kok Seafood.<sup>274</sup>
- (154) Heiploeg and Klaas Puul, together with other shrimps traders, also indirectly exercised pressure on the purchase price level by setting the size of sieves to be

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263 [...]
   
264 [...]
   
265 [...]
   
266 [...]
   
267 [...] As this mail is dated 8 days before the planned meeting to inform the fishermen about the price, the source within Klaas Puul [...], a person for which it is established in Recital (174) that he regularly discussed prices with Heiploeg, must have received this information directly from Heiploeg.
   
268 [...]
   
269 [...]
   
270 [...]
   
271 Heiploeg claims in its reply to the Statement of Objections that the information exchanged, if at all, was already known in the market. See also Recitals (352) - (358).
   
272 [...]
   
See also Recital (189).
   
273 Heiploeg claimed in its Reply to the Statement of Objections that this conversation should be ignored for being totally incomprehensible.
   
274 [...]

used.<sup>275</sup> Depending on the size of the sieves to be used, the volumes landed and indirectly the prices paid can be influenced. [...].<sup>276</sup>

- (155) The main traders tried to reduce competition at the auctions in order to control possible negative/upward price effects on the purchase prices paid.
- (156) Klaas Puul [...] operated under a purchase market sharing deal with Heiploeg since 1997.<sup>277</sup> On the basis of this arrangement, Klaas Puul was not supposed to purchase more than 30% of the North Sea shrimps landed at the auctions. Remaining requirements of Klaas Puul were meant to be sourced from Heiploeg and compensation arrangements were in place in order to avoid increased competition. This arrangement was allegedly kept in place until 2004.<sup>278</sup>
- (157) On 18 February 2007 [...] complained to Heiploeg about Heiploeg's request to [...] to discourage a smaller North Sea shrimps trader from purchasing shrimps otherwise than from Heiploeg.<sup>279</sup>
- (158) Kok Seafood complained to Klaas Puul in July 2007 of being prevented by Heiploeg from buying shrimps at the auction in Lauwersoog.

[...] <sup>280</sup>

- (159) Kok Seafood confirmed in its reply to the Statement of Objections that it was indeed hindered at the auctions by Heiploeg, often under the threat of ending the long-term contract.<sup>281</sup>
- (160) When Stührk tried in 2007 to buy shrimps at the auction in Lauwersoog<sup>282</sup> Heiploeg was informed and told Stührk that such action was not useful. According to internal Stührk emails of 17 July 2007 and 16 August 2007:

[...] <sup>283</sup>

[...] <sup>284</sup>

- (161) Stührk confirmed in its reply to the Statement of Objections that after this incident, it refrained from buying at the Dutch auctions, in order not to increase the purchase prices and indirectly also the contract fishing prices in Germany.<sup>285</sup>
- (162) As a result, Stührk decided to wait and purchase shrimps from Heiploeg, if need be. Heiploeg suggested Kok Seafood on 29 September 2007 (via its purchasing agent at the Lauwersoog auction) to sell shrimps to Stührk or other competitors, because

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275 [...]

276 [...]

277 [...]

278 [...] This coincides with [...] and/or the introduction of contract fishing in the Netherlands.

These limitations concerning purchases at the fish auctions in the Netherlands allegedly led Klaas Puul to expand purchasing activities in Germany through the acquisition of Holsatia in 1999. See also footnote 91 in Recital (55).

279 [...]

280 [...]

281 [...]

282 [...]

283 [...]. Despite this negative reaction from Heiploeg, Stührk decided to maintain its price level for [...].

See also Recital (178), for the rest of this conversation.

284 [...]

285 [...]



these competitors were no longer allowed to purchase at the fish auction in Lauwersoog.<sup>286</sup>

- (163) On 26 October 2007 Heiploeg attempted to purchase all North Sea shrimps offered at the fish auction in Lauwersoog. On the market, this behaviour was perceived as a strategic move to keep sales prices high and keep other traders from purchasing.<sup>287</sup>
- (164) On 23 November 2007 Heiploeg and [...] discussed purchases at the fish auction so as to make sure that Heiploeg would receive sufficient volume and that the price would not put pressure on purchasing prices paid to contract fishermen. When the purchasing agent at the auction displayed a lack of discrete handling in regard of this deal, Heiploeg complained to Kok Seafood, warning that competition authorities might become aware, and asked Kok Seafood to pass this message to the purchasing agents.<sup>288</sup>
- (165) On 11 March 2008 Stührk noted internally with surprise that it had been possible to purchase peeled shrimps from Heiploeg at comparatively low cost compared to prices paid at the fish auction on that day.<sup>289</sup>
- (166) In 2008 [...] mentioned to Kok Seafood that a small competitor [...] had been asked by Heiploeg to refrain from purchasing shrimps at the fish auction in Lauwersoog and had received supplies from Heiploeg instead in order to put pressure on purchasing prices.<sup>290</sup>
- (167) But there were similar complaints about Klaas Puul in Volendam. A fishing agent stated to Kok Seafood in 2008:
- [...] <sup>291</sup>
- (168) The above statement is attributed to the fishing agent and Kok Seafood on the basis of an analysis of the audio file.<sup>292</sup> The text interpretation was also confirmed by Kok Seafood.<sup>293</sup> But it matters little who said what in this conversation; what counts is that it is explained that Klaas Puul arranges purchases at the auction in Volendam, and Heiploeg in Lauwersoog.
- (169) As mentioned above, Heiploeg coordinated sales prices in Germany with the German trader Stührk.<sup>294</sup> They also exchanged purchase pricing information.
- (170) An internal Stührk email of 28 April 2003 contains fishing prices of competitors and a reference to a *'fax from Heiploeg'*.<sup>295</sup>
- (171) On 8 July 2004 Heiploeg and Stührk met fishermen in Germany who had gone on strike to underpin their request for higher volumes of output and/or prices for North

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286 [...]

287 [...]

288 [...]

289 [...]

290 [...]

291 [...]

292 [...]

293 [...]

294 See Recitals (85) - (89), (99) - (101), (109) and (112) - (114).

295 [...] The email also refers to a visit of Heiploeg to a competitor and to an assessment of Stührk to reduce the purchase price level if it were to attain the [...] price level from May 2003. It is explained in Recital (84) that this [...] price level for May was discussed with Heiploeg.

Sea shrimps.<sup>296</sup> Klaas Puul did not participate, allegedly because it considered such discussion possibly incompatible with competition rules.

- (172) On 20 May 2005 and 26 July 2005 Stührk reported internally on the North Sea shrimps purchasing prices of its competitors for the upcoming week including a volume limitation requested by Heiploeg and Klaas Puul.<sup>297</sup> It is however not clear if Stührk received this pricing information from its competitors or from the fishermen.
- (173) On 19 September 2005 Heiploeg indicated via telephone to Stührk that they wanted to talk to them. An internal Stührk report of this telephone conversation contains the new Heiploeg contract fishing prices for the following week.<sup>298</sup> This clearly suggests that these prices were exchanged in this telephone conversation.<sup>299</sup>
- (174) On 7 November 2005 Stührk checked and corrected contract fishing price information received from fishermen directly with Heiploeg.<sup>300</sup>
- (175) On 16 February 2007 Stührk decided on purchasing price offers based on pricing information that was directly confirmed by Heiploeg.<sup>301</sup>
- (176) On 30 March 2007 Heiploeg informed Stührk about purchase prices to be offered by Heiploeg and Klaas Puul in the following week, albeit with a remark that the price information for Klaas Puul was not entirely certain.<sup>302</sup>
- (177) On 4 May 2007, when Stührk had received information in the market that Heiploeg intended to lower purchasing prices,<sup>303</sup> Heiploeg informed Stührk about the price it would pay to its fishermen next week, i.e. giving confirmation that the purchasing prices for the next week would remain the same.<sup>304</sup>
- (178) On 16 July 2007 Heiploeg and Stührk compared the prices paid by Heiploeg, Stührk and Klaas Puul. Heiploeg was concerned about the price differences and urged for a better price coordination in future.

[...] <sup>305</sup>

- (179) Stührk confirmed in its reply to the Statement of Objections that Heiploeg did not want Stührk to offer prices to fishermen that were higher than the Heiploeg price, and added that [...] still today remembers the above incident of 16 July 2007, as Heiploeg was furious and threatened Stührk with consequences in case of repetition.<sup>306</sup>
- (180) Stührk also reported that Heiploeg informed Stührk on 12 October 2011, this is the day after Stührk obtained a new contract to supply [...], that it wanted to end the

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296 [...]

297 [...]

298 [...]

299 Heiploeg again argued in its reply to the Statement of Objections that it is also possible that Stührk had received this pricing information from fishermen.

300 [...]

301 [...]

302 [...]

303 [...]

304 [...]

305 [...]

See also Recital (160) for the rest of this conversation.

306 [...]

peeling contract with Stührk that existed since 2007. Moreover, Heiploeg threatened to stop purchasing unpeeled shrimps from Stührk. As a consequence, Stührk had to ask [...] to annul the envisaged new contract.<sup>307</sup>

#### 4.2.2.4. Conduct towards other traders

- (181) The existence of coordination between North Sea shrimp traders was also reflected in the perception of other traders in the industry. It can for instance be deduced from a conversation between [...] and Kok Seafood, at the end of 2004:

[...] <sup>308</sup>

- (182) The above statements are attributed to [...] and Kok Seafood on the basis of an analysis of the audio file.<sup>309</sup> Kok Seafood confirmed this interpretation.<sup>310</sup>

- (183) Such general knowledge also appears from the conversation of 2008 between [...] and [...] mentioned below in Recital (341), or from the statement of the trader [...] of 24 March 2000 in the context of the earlier NMa investigation:

[...] <sup>311</sup>

- (184) [...] and Kok Seafood repeatedly expressed their support for coordination in the North Sea shrimps trade. This appears for instance from their conversations of January 2005, March 2005 and July 2006:

[...] <sup>312</sup>  
[...] <sup>313 314</sup>  
[...] <sup>315</sup>

- (185) The above statements of January 2005 are attributed to [...] and Kok Seafood on the basis of an analysis of the audio file.<sup>316</sup> Kok Seafood confirmed this interpretation.<sup>317</sup> The statement of March 2005 comes from a continuous text without interpunction. It is attributed to [...] on the basis of a text interpretation. This text interpretation was confirmed by Kok Seafood.<sup>318</sup> The statement of July 2006 is also attributed to [...] on the basis of a text interpretation. The references "[...] *called me*" or "*says [...]*" offer clear guidance for this purpose. But it matters little who exactly said what in these conversations, what matters is that support for coordination between traders in the North Sea shrimps industry comes out unambiguously.

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307 [...]   
308 [...]   
309 [...]   
310 [...]   
311 [...]   
312 [...]   
313 [...]   
314 [...]   
315 [...]   
316 [...]   
317 [...]   
318 [...]

(186) Heiploeg and Klaas Puul took action to make sure that these other traders did not pose a real threat to the stability they tried to maintain. This will be explained below for [...], [...] and Kok Seafood.<sup>319</sup>

- [...]

(187) Since 1999, [...] was a supplier of [...] in Belgium.<sup>320</sup> It was therefore a relevant factor in the system of price coordination. [...] sourced all its North Sea shrimps from Heiploeg and offered to [...] prices dictated by Heiploeg.<sup>321</sup> When receiving invitations to participate in [...] tenders, [...] immediately contacted Heiploeg and Heiploeg then gave price suggestions for the offer to be made.<sup>322</sup> Klaas Puul was aware of this business relation between Heiploeg and [...].<sup>323</sup>

(188) Heiploeg claims that [...] acted as a pure sales agent of Heiploeg and that there was nothing anti-competitive in this business relation.<sup>324</sup> But irrespective if this argument is factually correct or not<sup>325</sup>, the result was in any way that [...] did not come to the market as a genuine competitor.

- [...]

(189) [...] entered the North Sea shrimps market in 2007. [...] this was perceived as an obstacle for price increases.<sup>326</sup> This also appears from the conversations between Kok Seafood and Heiploeg in 2006 and 2007 and between Kok Seafood and another trader in February 2008:

[...] <sup>327</sup>
[...] <sup>328</sup>
[...] <sup>329</sup>

(190) The above conversations come from a continuous text without interpunction. The Commission made a text interpretation to attribute the statements to Kok Seafood or its conversation partner.<sup>330</sup> This interpretation was confirmed by Kok Seafood.<sup>331</sup> But it matters little who said exactly what in these conversations, when what counts is how [...] was perceived in the market.

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<sup>319</sup> Contacts were not limited to these three undertakings. End 2007, for instance, Heiploeg set up a meeting with [...], to find out about the intentions of this new entrant. [...]

<sup>320</sup> In April 2008, [...] partially lost out as supplier of [...] to [...]. [...]

<sup>321</sup> Heiploeg and [...] also had business relations with each other for other seafood products and salmon. *See for instance* [...].

<sup>322</sup> [...]

<sup>323</sup> [...]

<sup>324</sup> [...]

<sup>325</sup> Heiploeg has for instance not provided an agency agreement and it remains unclear if [...], or other customers, were aware of the fact that Heiploeg determined the prices offered by [...].

<sup>326</sup> [...]

<sup>327</sup> [...]

<sup>328</sup> [...]

<sup>329</sup> [...]

<sup>330</sup> For instance; the first conversation one party talks about its offer to [...]. This points into the direction of Heiploeg. In the second conversation one party asks for information. This points into the direction of Kok Seafood. The other party gives general pricing information. This points into the direction of Heiploeg. In the third conversation the references [...] offers clear guidance as to whom started the conversation.

<sup>331</sup> [...]

(191) For upstream services (freezing, packaging and transport) [...] called upon the services of Kok Seafood<sup>332</sup> and [...].<sup>333</sup> In July 2007 [...] and Kok Seafood discussed [...] position on the market.

[...] <sup>334</sup>

(192) The above conversation comes from a continuous text without interpunction. The Commission made a text interpretation to attribute the statements to Kok Seafood and [...].<sup>335</sup> This interpretation was confirmed by Kok Seafood.<sup>336</sup> But it matters little who said exactly what in these conversations, when what counts is how the position of [...] was perceived by them.

(193) Kok Seafood helped Heiploeg and Klaas establishing communication with [...].<sup>337</sup> Already in 2007 Kok Seafood tried to foster an agreement between [...] and Heiploeg/Klaas Puul in the framework of an industry tradefair in Brussels. Kok Seafood stated in this respect in 2008 in a conversation with another trader:

[...] <sup>338</sup>

(194) Kok Seafood had arranged this meeting between Klaas Puul and [...] in motel Katwoude.<sup>339</sup> This meeting [...] took place on 17 August 2007 but ended without result. [...] confirmed its intention to stay on the North Sea shrimps market, aiming for a greater market share than Klaas Puul was willing to accept.<sup>340</sup>

[...] <sup>341</sup>

[...] <sup>342</sup>

(195) The above conversations come from a continuous text without interpunction. The Commission made a text interpretation to attribute these statements to Kok Seafood.<sup>343</sup> This interpretation was confirmed by Kok Seafood.<sup>344</sup>

(196) Heiploeg constantly encouraged Kok Seafood to discuss prices with [...]. This appears for instance from the conversations of Kok Seafood with [...], from a meeting and a conversation with Heiploeg in October 2007 and a conversation with Klaas Puul in 2008:

[...] <sup>345</sup>

[...] <sup>346</sup>

[...] <sup>347</sup>

---

332 [...]

333 [...]

334 [...]

335 The references [...] offer clear guidance for this purpose.

336 [...]

337 [...]

338 [...]

339 [...]

340 [...]

341 [...]

342 [...]

343 Kok Seafood attended this meeting and can report about it; not its conversation partner.

344 [...]

345 [...]

346 [...]

347 [...]

[...] <sup>348</sup>

- (197) The above conversations come from a continuous text without interpunction. The Commission made a text interpretation to attribute these statements to Kok Seafood.<sup>349</sup> Some of it was confirmed by Kok Seafood.<sup>350</sup> But it matters little who said exactly what in these conversations when it comes out unambiguously that Kok Seafood was instrumental for transferring price information to [...].
- (198) In April 2008 [...] obtained a contract to supply part of [...], at the expense of [...].<sup>351</sup>
- Kok Seafood
- (199) Kok Seafood purchased North Sea shrimps at fish auctions in the Netherlands or from contract fishermen and provided upstream services to the North Sea shrimps trade.<sup>352</sup> Kok Seafood sold shrimps to Heiploeg on the basis of a 5 year contract concluded in October 2000 and renewed in 2005 and 2009.<sup>353</sup>
- (200) When describing the strategic alliance with Kok Seafood, a Heiploeg document of 2009 explicitly refers to 'exclusivity' and 'a contract for good behaviour'.<sup>354</sup> Kok Seafood was paid in function of the average Heiploeg sales prices. In practice, the [...] -price was an important factor in this calculation.<sup>355</sup>
- (201) The underlying purpose of the contract for Heiploeg was to keep Kok Seafood off the market as a viable competitor. This appears for instance clearly from a conversation between Heiploeg and Kok Seafood of April 2005 or another conversations of 2008 between Kok Seafood and the former managing director of Heiploeg, who was at the origin of the first contract:

[...] <sup>356</sup>

[...] <sup>357</sup>

[...] <sup>358</sup>

- (202) The above conversations come from an audio file or from a continuous text without interpunction. The Commission analysed and interpreted the audio file and the text for attributing the statements to Kok Seafood or to its conversation partner.<sup>359</sup> Some of it was confirmed by Kok Seafood.<sup>360</sup> But it matters little who said exactly what in these conversations when it comes out unambiguously that the underlying purpose of the contract between Heiploeg and Kok Seafood was that Kok Seafood would not come to the market as a viable competitor.

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<sup>348</sup> [...]

<sup>349</sup> The references [...] offer guidance in this respect. It can also be deduced from analysing who is best placed to provide this information (Heiploeg), who is best placed to request this information (Kok Seafood), and who is best placed to transfer this information to [...] (Kok Seafood).

<sup>350</sup> [...]

<sup>351</sup> [...]

<sup>352</sup> See Recital (23).

<sup>353</sup> [...]

<sup>354</sup> [...]

<sup>355</sup> See Recital (217). Heiploeg and Kok Seafood developed a long conflict over the exact importance of the [...] price in the calculation.

<sup>356</sup> [...]

<sup>357</sup> [...]

<sup>358</sup> [...]

<sup>359</sup> References like [...] offer guidance in this respect. Any other interpretation is also not plausible.

<sup>360</sup> [...]

(203) Kok Seafood could not be unaware of this underlying objective. Kok Seafood even noted it down in 2008 in a comment on a conversation with Heiploeg.

[...] <sup>361</sup>

(204) Klaas Puul was aware that the contract served to prevent Kok Seafood from being a viable competitor in its own right. This appears from [...] <sup>362</sup> and also from the conversations between Heiploeg and Kok Seafood, for instance in April 2005, when Heiploeg tells Kok Seafood that it has reassured Klaas Puul on the renewal of the contract with Kok Seafood.

[...] <sup>363</sup>

(205) Kok Seafood also confirmed in its reply to the Statement of Objections that Heiploeg threatened Kok Seafood in 2005 to end their business relation in case Kok Seafood would set up competing business. <sup>364</sup>

(206) Kok Seafood could not have been in doubt about the fact that Heiploeg and Klaas Puul entertained contacts and coordinated their behaviour on the market. This appears from the conversations of Kok Seafood with other traders <sup>365</sup> and also from the conversations with Heiploeg, or the (summary) notes thereof, where it is clear that already in December 2004 and March 2005 Heiploeg openly discussed with Kok Seafood upcoming price increases agreed with Klaas Puul.

[...] <sup>366</sup>

[...] <sup>367</sup>

[...] <sup>368</sup>

(207) The above conversations come from transcripts or notes in the form of continuous text without interpunction. The Commission made a text interpretation for attributing the statements to Kok Seafood or to Heiploeg. <sup>369</sup> Some of it was confirmed by Kok Seafood. <sup>370</sup> But it matters little who said exactly what in these conversations when it comes out unambiguously from these conversations that Kok Seafood could be aware of the existence of collusive contacts between Heiploeg and Klaas Puul.

(208) Heiploeg claims that the reference 'with Klaas Puul' in the transcript of the first conversation is possibly not authentic, but was added later on, because it does not appear in the (summary) notes of the same conversation. <sup>371</sup> But this hypothesis is not supported by facts. On the contrary, it seems more logic that this reference did appear in the original conversation and transcript, but was no longer reproduced in

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361 [...]

362 [...]

363 [...]

364 [...]

365 See for instance the conversation between Kok Seafood and [...] in Recital (181), the conversation between Kok Seafood and [...] in Recital (184) or the between Kok Seafood and Heiploeg in Recital (211).

366 [...]

367 [...]

368 [...]

369 References like [...] offer guidance in this respect. Any alternative interpretation does not seem plausible.

370 [...]

371 [...]

the (summary) notes made because it was considered inherent to the conversation. In any way, even if this reference was added (quod non), it cannot hide that there was an intention to increase the price with Klaas Puul and that there were contacts between Heiploeg and Klaas Puul in this respect.<sup>372</sup>

- (209) Since Kok Seafood's remuneration depended on Heiploeg's prices in the market, Kok Seafood directly benefited from higher Heiploeg downstream sales prices<sup>373</sup> and Heiploeg repeatedly reminded Kok Seafood that it benefitted from a higher price level price. For instance, in 2006 and 2008:

[...] <sup>374</sup>
[...] <sup>375</sup>

- (210) Kok Seafood used its knowledge to put pressure on Heiploeg when they developed a conflict over the exact calculation of the remuneration under the contract.<sup>376</sup> At least from 2004, Kok Seafood started recording telephone conversations with Heiploeg and other partners in the business. Kok Seafood was not very secretive about this practice and repeatedly threatened his partners, Heiploeg in particular, to reveal this information to the Dutch Competition Authority. The existence and purpose of these recordings was therefore a public secret in the shrimps business.<sup>377</sup>

- (211) Kok Seafood in principle refrained from competing as long as Heiploeg bought sufficient volume for a good price.<sup>378</sup> Occasionally, Kok Seafood also inquired with Heiploeg why prices could not be increased. This was the case during contacts in December 2005 and April 2007. On these two occasions, Heiploeg replied that the support of Klaas Puul would be required to implement such price increases.

[...] <sup>379</sup>
[...] <sup>380</sup>

- (212) The above conversations come from transcripts or notes in the form of continuous text without interpunction. The Commission made a text interpretation for attributing the statements to Kok Seafood or to Heiploeg.<sup>381</sup> Some of it was confirmed by Kok Seafood.<sup>382</sup> But it matters little who said exactly what in these conversations when Kok Seafood's interest for price increases comes out unambiguously.

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<sup>372</sup> See also Recital (323) for other claims against these transcripts.

<sup>373</sup> [...]. This document mentions the 'formula' applied by Heiploeg and Kok Seafood to calculate the remuneration of Kok Seafood under the contract. Even if the details of application became contentious between the contracting parties, the fact remains that prices of sales to supermarket [...] featured prominently in this formula.

<sup>374</sup> [...]

<sup>375</sup> [...]

<sup>376</sup> [...]

<sup>377</sup> [...]. In this document, [...] explained that [...] during a visit on 13.10.2008, extensively read from the notes prepared from these recordings. He also explained that he subsequently discussed the issue with [...] on 31.10.2008.

<sup>378</sup> [...]

<sup>379</sup> [...]

<sup>380</sup> [...]

<sup>381</sup> The conversations reveal one party asking for explanation on the price setting (= Kok Seafood) and another party giving explanations on the price setting (= Heiploeg). Any alternative interpretation does not seem plausible.

<sup>382</sup> [...]



(213) On 21 April 2006 Heiploeg informed Kok Seafood on a price increase for 8 May 2006 arranged with Klaas Puul.

[...] <sup>383</sup>

(214) In September 2006 Klaas Puul informed Kok Seafood on an upcoming price increase agreed with Heiploeg.

[...] <sup>384</sup>  
[...] <sup>385</sup>

(215) In the middle of a conversation of 14 September 2006 between Kok Seafood and Klaas Puul, Heiploeg called in and Heiploeg and Klaas Puul openly started discussing prices in this improvised telephone conference.

[...] <sup>386</sup>

(216) On 4 October 2007 Heiploeg inquired whether Kok Seafood was still in contact with Klaas Puul in order to check if Klaas Puul was committed to an agreed price increase.<sup>387</sup> Heiploeg confirmed that a price increase had been agreed. Kok Seafood also mentioned on this occasion that Heiploeg (via another manager) had asked a couple of days earlier to pass on price information to [...].

[...] <sup>388</sup>

(217) In a meeting on 11 October 2007 Heiploeg again reminded Kok Seafood about the importance of the [...] price and the nature of their contract:

[...] <sup>389</sup>  
[...] <sup>390</sup>  
[...] <sup>391</sup>  
[...] <sup>392</sup>

(218) The above extracts come from a transcript in the form of a continuous text without interpunction. The Commission made a text interpretation for attributing these extracts to Kok Seafood or to Heiploeg.<sup>393</sup> Some of it was confirmed by Kok Seafood.<sup>394</sup> But what matters is what is said about the importance of the [...] price and about the underlying purpose of the contract, and not so much who said this in the conversation.

---

383 [...]

384 [...]

385 [...]

386 [...]

387 This was in a time when the frequency of contacts between Heiploeg and Klaas Puul decreased due to management changes. *See* Recital (59).

388 [...]

389 [...]

390 [...]

391 [...]

392 [...]

393 Any alternative interpretation does not seem plausible.

394 [...]

- (219) As mentioned before, Kok Seafood also served as information channel between Heiploeg and [...].<sup>395</sup>
- (220) When Heiploeg and Kok Seafood developed a conflict over the exact calculation of the remuneration under the contract, competitors and investors worried that the stability on the market was in danger and actively intervened in order to avoid disruptive effects for the entire sector or their investment.<sup>396</sup>
- (221) [...] offered to intervene and arranged a meeting between Heiploeg and Kok Seafood for 5 February 2008.<sup>397</sup>
- (222) [...] also tried to intervene, sent a letter to Heiploeg on 1 November 2008 and forwarded it to Kok Seafood.<sup>398</sup> On 12 December 2008 he told a representative of fishermen, allegedly also on behalf of Klaas Puul and [...], that they were afraid that Kok Seafood was about to approach competition authorities and asked the representative to intervene and contact the various parties involved.<sup>399</sup> The representative of fishermen intervened as requested.<sup>400</sup>
- (223) Kok Seafood also complained to [...] about Heiploeg.<sup>401</sup> [...] suggested Heiploeg in 2009 to solve the dispute.<sup>402</sup> Prior to a meeting between Kok Seafood and [...] on 2 March 2009, the Heiploeg management meeting discussed on 26 February 2009 a possible new agreement with Kok Seafood. It was considered that no deal might cost Heiploeg more and that it was desirable to keep communication with other market participants open and transparent.<sup>403</sup>
- (224) On 3 March 2009, [...] informed Heiploeg that a deal had been reached with Kok Seafood.<sup>404</sup> The news quickly spread. [...] received the news on the same day and informed [...] that the conflict between Kok Seafood and Heiploeg had been settled: [...].<sup>405</sup> He equally informed Stührk that the conflict between Heiploeg and Kok Seafood had ended, and this message was welcomed by Stührk.<sup>406</sup> On 30 March 2009, Heiploeg and Kok Seafood settled their dispute and signed a new agreement on 16 April 2009.<sup>407</sup>

### 4.3. Implementation

- (225) The participants in the arrangements continued their coordination efforts and their exchanges of commercially sensitive and market relevant information over an

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<sup>395</sup> See Recitals (193) - (196).

<sup>396</sup> [...]. *See also* Recital (122).

<sup>397</sup> [...]

<sup>398</sup> [...]

<sup>399</sup> [...]. This was after a trade association meeting where the conflict between Heiploeg and Kok Seafood was discussed.

<sup>400</sup> [...]

The representative of fishermen contacted [...] on 24 December 2008 by mail complaining about the consequences which the conflict between Heiploeg and Kok Seafood had for the industry and mentioning that Kok had informed competition authorities.

<sup>401</sup> [...]

<sup>402</sup> [...]

<sup>403</sup> [...]

<sup>404</sup> [...]

<sup>405</sup> [...]

<sup>406</sup> *See* Recital (122).

<sup>407</sup> [...]

extended period of time, that is several years, although the downstream sales price objective may not always have been reached on all occasions as intended.<sup>408</sup>

- (226) It can therefore be concluded that the arrangements put in place and into practice can be considered to have been implemented more or less successfully.

## **5. APPLICATION OF ARTICLE 101 TFEU**

### **5.1. The relevant competition rule**

- (227) Article 101(1) TFEU prohibits as incompatible with the internal market all agreements or concerted practices between undertakings, which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market.

### **5.2. Agreements and concerted practices**

#### *5.2.1. Principles*

- (228) Article 101(1) TFEU prohibits *agreements* and *concerted practices* between undertakings.

- (229) An 'agreement' can be said to exist where parties adhere to a common plan, which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action (or abstention from action) on the market. An agreement does not have to be made in writing; no formalities are necessary; and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties.

- (230) The 'concept of agreement' in Article 101 TFEU also applies to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to a definitive agreement. It is therefore not necessary that the participants have agreed in advance on a comprehensive common plan. According to settled case law, it is sufficient that the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way in order for there to be an agreement within the meaning of Article 101 TFEU. This applies also to 'gentlemen's agreements' which represent a faithful expression of such a joint intention concerning a restriction of competition.<sup>409</sup>

- (231) In the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed upon, but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out in *Commission v Anic Partecipazioni SpA*<sup>410</sup>, it follows from the express terms of Article 101(1) TFEU that an agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct.

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<sup>408</sup> See for instance Recital (116) in respect of successful implementation of a coordinated price maintenance.

<sup>409</sup> See in this regard Case T-9/99, *HFB Holding and Others v Commission*, [2002] ECR II-1487, Paragraph 200 (confirmed by Joined Cases C-189/02 P etc., *Dansk Rørindustri and Others v Commission*, [2005] ECR I-5425), as well as C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, [2006] ECR I-8725, Paragraphs 80, 94 to 100, 110 to 113, 135 to 142 and 162.

<sup>410</sup> Case C-49/92P *Commission v Anic Partecipazioni SpA* [1999] ECR I - 4125, Paragraph 81.

- (232) Although Article 101 TFEU draws a distinction between the concepts of 'concerted practices' and 'agreements between undertakings', the object is to bring within the prohibition laid down in that provision a form of coordination between undertakings by which they knowingly substitute practical cooperation between them for the risks of competition even without having reached the stage where an agreement properly so-called has been concluded.<sup>411</sup>
- (233) According to case law, the elaboration of an actual plan is not a prerequisite for considering coordination and/or cooperation to be prohibited. The criteria for assessing such behaviour must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition. Pursuant to these provisions, each economic operator must determine independently the commercial policy, which he intends to adopt in the internal market. This requirement of independence does not deprive undertakings of their right to adapt themselves intelligently to existing or anticipated conduct of their competitors. However, it does strictly preclude all direct or indirect contacts between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct they themselves have decided to adopt or contemplate adopting on the market.<sup>412</sup>
- (234) Conduct may thus fall within the scope of Article 101(1) TFEU as *concerted practice* where the parties concerned have not explicitly subscribed to a common plan defining their action on the market, but where they knowingly adopt or adhere to collusive devices which facilitate coordination of their commercial behaviour. In order to prove that there has been a concerted practice, it is not necessary to show that an undertaking has formally undertaken - in respect of one or several other competitors - to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. It is sufficient that through a declaration of intention an undertaking has eliminated, or at least substantially reduced, the uncertainty as to the conduct to be expected from it on the market.<sup>413</sup>
- (235) Although the concept of a concerted practice requires not only concertation, but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed – subject to proof to the contrary – that undertakings taking part in such a concertation and remaining active on the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period of time.<sup>414</sup> Such a concerted practice is caught

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<sup>411</sup> Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, Paragraph 64.

<sup>412</sup> Joined Cases 40-48/73 etc. *Suiker Unie and Others v Commission* [1975] ECR 1663, Paragraph 173-174.

<sup>413</sup> Case T-279/02 *Degussa vs Commission* [2006] ECR II-897, Paragraph 133; Joined Cases T-25/95 etc. *Cimenteries CBR and Others v Commission* [2000] ECR II-491, Paragraph 1849 and 1852.

<sup>414</sup> Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, Paragraphs 158-167; and *Commission v Anic Partecipazioni SpA*, cited above, Paragraphs 119-121; Case T-303/02, *Westfalen Gassen Nederland BV v. Commission*, [2006] ECR II-4567, Paragraph 133; Case C-8/08 *T-Mobile Netherlands & Others*, [2009] ECR I-4529, Paragraphs 51-62.

Moreover, that presumption cannot be discharged merely by pointing to evidence suggesting that participants did not ultimately follow the same pricing policies: *for that see for example Cimenteries CBR and Others v Commission*, cited above, Paragraph 1912.

by Article 101(1) TFEU even in the absence of anti-competitive effects on the market.<sup>415</sup>

- (236) As concerns 'complex infringements' of long duration, the Commission is not required to characterise conduct exclusively as 'agreements' or 'concerted practice'.<sup>416</sup> The concepts 'agreements' and 'concerted practice' are fluid and may overlap. Anti-competitive behaviour may be varied from time to time or its mechanisms adapted or strengthened to take account of new developments. It may indeed not even be possible to make such a distinction, given that an infringement may present simultaneously characteristics of both forms of prohibited conduct. It would be artificial then to sub-divide analytically into several different forms of infringement what is clearly a continuing common enterprise having one and the same overall objective. A cartel may therefore be an agreement and a concerted practice at the same time.<sup>417</sup>

#### 5.2.2. *Application in the present case*

- (237) The description of events in Chapter IV shows that the traders of North Sea shrimps addressed by this Decision had frequent bilateral contacts during which they revealed and coordinated their conduct on the market and exchanged sensitive commercial information, with the objective of jointly influencing the price level for North Sea shrimps, limiting competition and stabilising the market.
- (238) It appears from the body of evidence taken as a whole that several agreements were reached and concerted practices occurred. The price level in Belgium, Germany, France and the Netherlands was influenced by exchanging and fixing benchmark prices.<sup>418</sup> This sales price coordination was further enhanced by ancillary collusive behaviour with respect to upstream prices<sup>419</sup>, market sharing and customer allocations<sup>420</sup> and specific actions towards potential competitors.<sup>421</sup>
- (239) On several occasions, these contacts concerned elements which could be immediately implemented in their commercial decisions, which indicates that the parties involved had reached the meeting of minds characteristic for an agreement. On other occasions, the contacts may not have amounted to 'agreements', but at least substantially reduced uncertainty as to the conduct they could expect from each other on the market, thereby constituting 'concerted practices'. When parties conveyed their future course of action, this information was reciprocally taken into account by the recipients for determining their own commercial decisions. As a result, all parties concerned undertook the necessary measures that contributed to the functioning of a complex of arrangements.
- (240) Heiploeg and Klaas Puul agreed on various occasions to coordinate their sales price levels. That was already the case with the decisions taken by Klaas Puul and Heiploeg in the meeting on 21 June 2000.<sup>422</sup> [...] reveal agreement between Heiploeg

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<sup>415</sup> See also *Hüls v Commission*, cited above, Paragraphs 158-166.

<sup>416</sup> Joined Cases T-305/94 etc., *Limburgse Vinyl Maatschappij and Others v Commission* (PVC II), [1999] ECR II-931, Paragraph 696.

<sup>417</sup> Case T-7/89, *Hercules v Commission* [1991] ECR II-1711, Paragraph 264.

<sup>418</sup> See Recitals (42) to (51) and (69) to (122).

<sup>419</sup> See Recitals (143) to (180).

<sup>420</sup> See Recitals (123) to (142).

<sup>421</sup> See Recitals (181) to (224).

<sup>422</sup> See Recital (73).

and Klaas Puul on several items discussed, including an increase of the benchmark [...] price and the [...] price in the Netherlands.<sup>423</sup> Similar meetings and agreed conduct concerning the same and other customers followed throughout the whole period of infringement retained in this Decision.<sup>424</sup> Contemporaneous documents in the Commission file refer explicitly to 'agreements' between undertakings in this respect.<sup>425</sup>

- (241) Another example can be derived from [...] indicating that prices communicated to a French (sales) intermediary by Klaas Puul followed information received from Heiploeg ("*informed by HPL*") or provided to Heiploeg ("*announced to Heiploeg*"). These facts witness consistent market conduct concerning France, according to which Heiploeg and Klaas Puul set their prices for customers like [...] and others in function of each other.<sup>426</sup> This concerted practice eliminated or at least substantially reduced the uncertainty as to the conduct they could expect from each other on the market
- (242) Heiploeg and Klaas Puul not only coordinated their sales price level, but equally exchanged and/or coordinated their upstream prices paid to contract fishermen. Already in the minutes of the meeting [...] between Heiploeg and Klaas Puul reference is made to a [...] payment for 2000 and the abolishment of such payment for 2001.<sup>427</sup>
- (243) Exchanges of information and agreed conduct concerning purchases of North Sea shrimps followed throughout the whole period of infringement.<sup>428</sup> Contemporaneous documents refer explicitly to 'agreements' between these undertakings<sup>429</sup> or contain evidence of prior consultations between them in this respect<sup>430</sup>.
- (244) The desired stability was further enhanced by market sharing agreements or concerted practices between Heiploeg and Klaas Puul not to take over each other's customers<sup>431</sup> or contract fishermen.<sup>432</sup> An individual supplier was subject to an output sharing agreement<sup>433</sup> and where necessary tenders could be discussed, giving rise to various individual agreements.<sup>434</sup> A contemporary note reported in Recital (127) for instance explicitly refers to '*agreements*' in this respect.
- (245) [...] the market sharing arrangements also spread to the fish auctions.<sup>435</sup> Heiploeg and Klaas Puul in any way indirectly influenced volumes and purchase prices by agreeing on parallel changes of sieving sizes<sup>436</sup> and by making arrangements with

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<sup>423</sup> See contemporaneous notes of the meeting [...].

<sup>424</sup> See Recitals (74), (75), (78), (81), (82), (83), (84), (90), (91), (93), (94), (100), (102), (103), (105), (108), (110), (115), (116), (118) and (121).

<sup>425</sup> See for example Recitals (59), (80), (93), (135), (183) and (184) [...], Recitals (94) and (116) [...], Recitals (152) and (158) [...].

<sup>426</sup> See Recitals (90), (91), (105) and (115).

<sup>427</sup> See Recital (145).

<sup>428</sup> See Recitals (146), (170), (173), (174) and (178).

<sup>429</sup> See for example Recital (137) [...].

<sup>430</sup> See for instance Recital (146) and (173).

<sup>431</sup> See Recitals (123), (127), (128).

<sup>432</sup> See Recital (154), and the evidence cited there, [...].

<sup>433</sup> See Recital (145) - (146).

<sup>434</sup> See Recital (124), (124), (125), (127) and (128).

<sup>435</sup> See Recital (156).

<sup>436</sup> See Recital (154).

- competitors buying at the fish auctions.<sup>437</sup> These arrangements with competitors may have been individual actions, but fitted in the shared objective of reducing competition at the auctions in order to better control the purchase price level.
- (246) Everything obviously did not go smoothly. The parties reminded each other of the status quo in individual contacts<sup>438</sup>, complaining about non respect<sup>439</sup> and/or voicing threats to approach individual customers.<sup>440</sup> But in general, the agreements, exchanges of information and ancillary actions substantially reduced uncertainty as to the conduct they could expect from each other.
- (247) In Germany, agreements on prices were also reached with Stührk, for example when Heiploeg and Stührk agreed on 30 July 2003 on a refusal to reduce prices to customer [...].<sup>441</sup> Stührk repeatedly reported internally on what had been 'agreed'.<sup>442</sup>
- (248) On other occasions, the evidence does not directly point at the final agreement, but bears witness to the fact that one or the other undertaking would wait for input or discussion with one or several of the other cartel participants before deciding its own conduct.<sup>443</sup> Heiploeg and Stührk openly conveyed amongst themselves their intentions regarding the same matters, so that they reciprocally influenced their market behaviour, which facts constitute, at the very least, concerted practices.
- (249) Stührk was informed about the prices that Heiploeg and Klaas Puul were offering or wished to achieve for customers like [...] in Germany<sup>444</sup> and informed Heiploeg of its own prices<sup>445</sup> and/or set its own prices in function of the prices communicated<sup>446</sup>. One particularly pertinent example out of several can be found in the evidence contained in internal notes showing that on 14 March 2003 Heiploeg informed Stührk of its pricing intentions towards [...] in Germany and that Stührk intended to speak again to Heiploeg before making its own offer.<sup>447</sup>
- (250) Heiploeg claims in its reply to the statement of Objections that this communication was innocent, because related to (purchase) prices charged by Heiploeg to Stührk.<sup>448</sup> But this view is contradicted by the text, referring to [...], and by Stührk, the author of the document. Stührk confirmed in its reply to the Statement of Objections that this event was a typical example of how Heiploeg informed Stührk on its price setting for [...] and confirmed that it took such information into account for its own price setting.<sup>449</sup> The document clearly shows Stührk and Heiploeg were in contact with each other before making a price offer for [...] in Germany.
- (251) These contacts in the form of agreements or concerted practices significantly reduced uncertainty as to the conduct they could expect from each other on the market.

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437 See Recitals (157) - (166).

438 See Recital (131).

439 Idem.

440 See Recital (128).

441 See Recital (86).

442 See for instance footnote 295 in/and Recital (170) [...] and footnote 159 in Recital (87), [...].

443 See for example Recital (87) (concerning Heiploeg and Stührk).

444 See Recitals (84), (87) and (98). See also Footnote 632 in Recital (416) for other customers.

445 See Recitals (86), (87), (99), (108) and (107).

446 See Recitals (84) and (98).

447 See Recital (85).

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- (252) Stührk also refrained from directly competing with Heiploeg and Klaas Puul at the fish auctions in the Netherlands in order not to push prices up.<sup>450</sup> Instead, Stührk purchased shrimps from Heiploeg. For this purpose, Heiploeg obviously communicated prices to Stührk. But the evidence on file also suggests that also the prices paid to contract fishermen in Germany were exchanged. Stührk not only received this information from fishermen or other traders in the market, but sometimes also directly received such price information from Heiploeg, or double checked it with Heiploeg and determined its own prices in function of the information received.<sup>451</sup>
- (253) The document of 16 July 2007 cited in Recital (178) for instance clearly shows that prices were compared in view of further or better alignment. Heiploeg's argument in its reply to the Statement of Objections that the expression of a wish for better coordination in the future is not forbidden but rather proves that there was no such coordination before does not convince in the light of the principles of agreements and concerted practices explained in recitals (228) until (236). The same goes for Heiploeg's explanation that prices can be coordinated without explicit agreement.
- (254) At times, this could lead to individual agreements on purchase pricing.<sup>452</sup> Contemporaneous documents in the Commission file refer explicitly to the existence of '*coordination*' between these undertakings.<sup>453</sup>
- (255) The anticompetitive agreements and concerted practices also spread to Kok Seafood. Kok Seafood had concluded a long-term agreement with Heiploeg, first in October 2000 and later renewed in February 2005 and April 2009, allowing it to sell its shrimps to Heiploeg for a price de facto set in function of the Heiploeg resale price.<sup>454</sup> The underlying objective of this contract was that Kok Seafood would not come to the market as a viable competitor, and Kok Seafood could not have been unaware of this purpose of the long-term partnership.<sup>455</sup> Klaas Puul in any way was fully aware of the role of this contract for the cartel arrangements.
- (256) Kok Seafood was not only aware of the anticompetitive purpose of its contract, but it was equally aware and/or informed of the existence of price coordination between Heiploeg and Klaas Puul.<sup>456</sup> An example can be found in Kok Seafood's notes dated 8 September 2006 showing that it was kept informed of the price increase agreed by Heiploeg and Klaas Puul and applicable as of 14 September 2006.<sup>457</sup> Kok Seafood even actively supported these arrangements and contacts<sup>458</sup>. Kok Seafood was for instance instrumental in establishing indirect contacts between Heiploeg and Klaas Puul and the newcomer [...], with the purpose of improving the general price level, and therefore also the price Kok Seafood was getting from Heiploeg on the basis of the long-term contract.<sup>459</sup>

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<sup>450</sup> See Recitals (160) - (162).

<sup>451</sup> See Recitals (169) - (180).

<sup>452</sup> See Recital (170), [...].

<sup>453</sup> See Recital (178), [...].

<sup>454</sup> See Recitals (57) or (77) and (209).

<sup>455</sup> See Recital (201) - (205).

<sup>456</sup> See Recital (206). See also Recitals (181) - (185).

<sup>457</sup> See Recital (103).

<sup>458</sup> See Recitals (212), (214) and (215).

<sup>459</sup> See Recitals (193) - (196).



- (257) Kok Seafood knew or could reasonably foresee that it was paid a cartelised price for a contract that aimed to eliminate its competitive threat on the market. In practice, this contract enlarged the scope of the price agreements between Heiploeg and Klaas Puul to Kok Seafood.<sup>460</sup>
- (258) Kok Seafood had concluded a long-term contract with Heiploeg and could not be unaware that the underlying purpose of this contract was that it would not come to the market as a viable competitor. Moreover, Kok Seafood was paid in function of the average Heiploeg prices and Kok Seafood was well aware that Heiploeg's price was the result of coordination with other traders, Klaas Puul in particular.
- (259) The Commission is not required to characterise each instance of conduct or to characterise conduct exclusively as 'agreements' or 'concerted practice' in complex<sup>461</sup> infringements like this one. The addressees of this Decision exchanged commercially sensitive information between them and took account of the information exchanged with their competitors in determining their own conduct on the market.<sup>462</sup> Whether these exchanges of commercially sensitive information effectively led to further coordination in the form of an agreement or to a concerted practice is not material to the extent that the exchanges occurred regularly and/or over an extended period and disclosed and influenced the course of conduct on the market of individual competitors. The addressees of this decision took account of the information exchanged with their competitors in determining their own conduct on the market
- (260) This complex of arrangements constitutes a pattern of coordinated market behaviours comprising a number of anti-competitive agreements and/or concerted practices in the sense of Article 101 TFEU. The Commission concludes that the complex of arrangements described in Section 4 presents all the characteristics of an agreement and/or concerted practice prohibited by Article 101(1) TFEU.

### 5.2.3. *Arguments of the parties*

- (261) Heiploeg and Kok Seafood consider that most of the evidence used in this Decision is inadmissible or insufficiently conclusive for proving an infringement of Article 101 TFEU.

#### 5.2.3.1. Admissibility of evidence

- (262) Heiploeg claims that evidence from Kok Seafood in the form of recordings of telephone conversations, and the transcripts or notes made thereof, is inadmissible, because it was made without the consent of the person recorded.
- (263) Kok Seafood claims that this evidence is inadmissible, because it relates to correspondence with an outside lawyer that is legally and professionally privileged. Moreover, it was taken without a legal basis.
- a) Use of telephone recordings in competition investigations
- (264) Heiploeg brings up that it is prohibited in some Member States to secretly record telephone conversations or to make such recordings available to third parties.<sup>463</sup>

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<sup>460</sup> See Recitals (204) and (206).

<sup>461</sup> See also Recitals (288) - (299).

<sup>462</sup> See for instance Recitals (84), (87), (89), (90), (98), (99), (108), (108), (110), (114), (206), (206), (213), (215), (196).

<sup>463</sup> See [...], referring to Austria, France, Germany and the UK.

Heiploeg also refers to other competition investigations where the Commission explicitly refrained from using such evidence. On that basis, Heiploeg claims that the evidence is inadmissible and/or should not be used.

- (265) The Commission notes that the telephone conversations were recorded in the Netherlands and under Dutch law the recording is not a criminal offence.<sup>464</sup> Moreover, even if private parties have obtained evidence in an unlawful manner, this would not imply that the Commission is barred from using this material as evidence of an infringement. There is no provision that expressly prohibits the use of evidence obtained unlawfully by private parties<sup>465</sup> and the case-law of the European Court of Human Rights repeatedly confirmed that the use of unlawfully obtained recordings is not in itself a breach of a fundamental right.<sup>466</sup>
- (266) Neither the Commission nor national authorities were involved in the recording of the telephone conversations. The telephone recordings were gathered during inspections based on Articles 20 (4) and 21 of Regulation 1/2003 and the undertaking where it was found had no incentive to provide incriminating evidence to the Commission. This is an important distinction with other investigations where recordings are made and provided by complainants or leniency applicants that may have a personal interest in providing the Commission with evidence.
- (267) The Commission in any way did not obtain the recordings in a manner that was unlawful vis-à-vis Heiploeg and they therefore can be used as evidence against Heiploeg.
- (268) To the extent that Heiploeg's claim also envisages the inadmissibility of transcripts and notes made of these recordings, the same arguments apply *mutatis mutandis*. It goes without saying that where the Commission is not barred from using telephone recordings it can certainly not be barred from using the transcripts and/or notes made from these recordings.
- b) Legal and professional privilege
- (269) Kok Seafood claimed that the audio files or transcripts/notes of telephone conversations it had recorded cannot be used as evidence because it was made for its external legal counsel and is therefore protected by legal and professional privilege.
- (270) The Commission first of all notes that Kok Seafood has already waived this claim during the administrative proceeding<sup>467</sup>. Kok Seafood acknowledged during the oral hearing that it has given permission to add the material to the Commission file, but no permission to use the material as evidence. The Commission notes that it does not

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<sup>464</sup> According to Article 139c (1) of the Dutch Criminal Code, the recording of a telephone conversation is a criminal offence only if it is done by someone who is not a party to the conversation.

<sup>465</sup> Case T-48/05 *Franchet and Byk v. Commission* [2008] II-1585, paragraph 75.

<sup>466</sup> See, for example, ECHR 26 April 2007, application no. 71525/01, *Popescu v. Romania* (No. 2), paragraph 106.

When asked by the Commission during the oral hearing, Heiploeg was unable to provide other jurisprudence to support its claim. Heiploeg stated that it needed more time to answer such question, but did not provide the requested clarification after the hearing either. Since the telephone recordings were made by a private party on its own initiative, the present case can in no event be compared with instances referred to by Heiploeg where telephone recordings were obtained by or with involvement of public authorities.

<sup>467</sup> [...]

need such additional permission to use the material when the waiver given clearly stated that "[Kok Seafood] *has decided to withdraw his claim for legal privilege.*"<sup>468</sup>

(271) In any way, the claim is unfounded, because it is not compatible with the criterion for attributing legal and professional privilege, which is that the documents should be made exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence<sup>469</sup>, which have a relationship to the subject of the relevant procedure.<sup>470</sup> Kok Seafood itself also admitted in its reply to the Statement of Objections that Kok Seafood wanted to use this information mainly to prove its point in the conflict on the contract with Heiploeg<sup>471</sup> [Underlining added] The Statement of Objections and other evidence on file clearly demonstrated that the material was used for purposes beyond the current procedure on the basis of Article 101 TFEU and that it was even provided to some extent to other parties.<sup>472</sup> Both Klaas Puul and Heiploeg declared that Kok Seafood used the recordings and/or transcripts and notes to put pressure on them.<sup>473</sup> Kok Seafood does not deny or comment on these facts and therefore fails to make unambiguously clear that the documents were effectively drawn up for the sole aim of seeking legal advice from its lawyer.

c) Transfer of material between inspection locations

(272) The Commission inspected the undertaking Kok Seafood at its business premises and at the private home of [...]. For this purpose, the Commission had notified two inspection decisions pursuant to Article 20(4) and Article 21 of Regulation 1/2003. Both decision addressed L. Kok International Seafood BV.

(273) At the private home of [...], the lady of the house urged the inspectors to limit this private home intrusion to the minimum.<sup>474</sup> In order to comply with this request, a number of devices belonging to [...], where relevant material was found, were transferred for copying purposes to the business premises.<sup>475</sup>

(274) The lady of the house accompanied the devices to the business premises and upon arrival the procedure was explained to [...]. No objections were raised, and the material was added to the rest of the material.<sup>476</sup> Overnight the material was kept in a sealed environment and the next day copies were made.<sup>477</sup>

(275) Kok Seafood argues in its reply to the Statement of Objections that the Commission has arbitrarily and unreasonably extended its powers by removing material from a

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[...]

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Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. vs. Commission*, 2007 ECR II-3523, Paragraph 122-123.

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Case 155/79 *AM & S Europe Ltd. v. Commission* [1982] ECR 1575, Paragraph 23.

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[...]. Underlining added.

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See Recital (210).

Both Klaas Puul and Heiploeg declared that Kok Seafood used the recordings and/or transcripts and notes to put pressure on them..

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[...]

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Commission inspection report of 4.5.2009 [ID 695]: "*We had to limit the searching time as much as possible (children were coming home from school).*" and "*I was asked to immediately leave the house and do the rest of the job at the business premises.*"

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Agreement noted down in minute [ID 670/3].

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NMa report of 27.3.2009 on the inspection [ID 646]: "*I have transferred the laptop to my colleague, after giving an explanation to Mr L.J.M. Kok*". In the original language: "*Ik heb de laptop na uitleg aan L.J.M. Kok overgedragen aan mijn collega.*"

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Minute of sealing of 24.3.2009 [ID 653].

private home. On that basis, Kok Seafood concludes that this evidence is inadmissible.

- (276) According to Kok Seafood, 31 documents or records on file are inadmissible.<sup>478</sup> But the Commission notes that only five of them were effectively found at the private home and used in the Statement of Objections.<sup>479</sup> None of them has been relied upon in this Decision. This already makes the argument inadmissible.
- (277) But the Commission disagrees in any way with the alleged arbitrary character of the procedure explained in recitals (272) until (274). It is noted that none of the material was removed to the Commission premises. It was only transferred - for copying purposes - between two inspection sites that were covered by inspection decisions addressing the same legal entity.
- (278) The procedure was fully transparent and not imposed on the undertaking or the owner of the documents. At no single moment in time, the material was taken out of the supervision of Kok Seafood. Eventually, some copies were made and added to the Commission file. This cannot be considered a removal or taking of originals from an inspection.
- (279) The procedure was also not arbitrary or unreasonable. On the contrary, it was proportional and did not envisage benefiting the Commission. For the Commission, there was no difference between copying at the private home or at the business premises, and it was only proposed to accommodate the legitimate request to limit the private home intrusion.<sup>480</sup> Kok Seafood also fails to explain how this decision could have disadvantaged its position.
- (280) Kok Seafood argues that the deliberate misconduct of the Commission appears from the deleting of the word 'sealed' from the minute noting down the agreement of the lady of the house to transfer the material to the other inspection site.<sup>481</sup> This allegedly demonstrates that the Commission realised that it was legally prevented from sealing material at a private home.
- (281) But this is pure speculation without any ground. On the contrary, the word 'sealed' was removed as the lady of the house voluntarily accompanied the documents to the business premises and because of that there was obviously no further need to safeguard the integrity of the documents by means of sealing or otherwise during this transfer.
- (282) Article 20 (2) (c) of Regulation 1/2003 gives the Commission the power to take or obtain in any form copies of or extracts from examined books or records during inspections.<sup>482</sup> The Regulation does not explicitly foresee where these copies must be made. It is obvious that sometimes it may be necessary to remove documents or records for that purpose.<sup>483</sup> Such preparatory act constitutes a modality of this power to take or obtain copies.

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478 [...] ]

479 [...] ]

480 See letter to Kok Seafood of 14.5.2009 [ID 701/1].

481 Minute [ID 670/3].

482 Article 20 (2) (c) of Regulation 1/2003 applies to inspections at business premises ordered in accordance with Article 20 (1) of that Regulation. Article 21 (4) gives the same power *mutatis mutandis* for inspections at private homes ordered in accordance with Article 21 (1).

483 For instance, when copies are to be made of documents found in means of transport.

(283) As the material was transferred legitimately to the business premises, any subsequent treatment of the material must be evaluated under Article 20 of Regulation 1/2003, and Article 20 (2) (d) gives the Commission inspectors the power to seal. No objection was raised when sealing took place.<sup>484</sup> The rights of other parties in the proceeding were also not violated.

#### 5.2.3.2. Standard of proof

(284) Heiploeg claims that the statements of Klaas Puul are not credible. They are contested (by Heiploeg) and insufficiently supported by contemporaneous evidence. Heiploeg also claims that the evidence from Kok Seafood in the form of recordings of telephone conversations, and the transcripts or notes made thereof, is insufficiently conclusive. The content of these transcripts and notes is allegedly very unclear and the Commission has made subjective and wrong interpretations.

(285) Heiploeg correctly refers to jurisprudence according to which it is only the reliability of evidence that is decisive for its evaluation.<sup>485</sup> It also stresses that the reliability and therefore the probative value of a document depends on the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and its content.<sup>486</sup>

(286) But Heiploeg limits itself to a small selection of the jurisprudence on the standard of proof in cartel cases and isolates pieces of evidence, without taking into account the body of evidence viewed as a whole.

(287) Also Kok Seafood tends to isolate factual elements for denying its exact awareness of anticompetitive arrangements, failing to take into account the body of evidence in its entirety.<sup>487</sup>

(288) It is therefore important to first set out the case law applicable in this area.<sup>488</sup>

(289) It is apparent from Article 2 of Regulation 1/2003 that it is incumbent on the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement<sup>489</sup>. In that regard, it must produce sufficiently precise and coherent proof to establish that the alleged infringement took place.<sup>490</sup>

(290) Where, in establishing an infringement of Article 101 TFEU, the Commission relies on documentary evidence, the burden is on the undertakings concerned not merely to submit an alternative explanation for the facts found by the Commission, but to show that the evidence relied on in the contested decision is insufficient to establish the

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<sup>484</sup> Inspection minute [ID 653].

<sup>485</sup> Case T-44/00, *Mannesmannröhren Werke v Commission*, [2004] ECR II-2223, paragraph 84 and Joined Cases T-67/00 etc., *JFE Engineering and Others v Commission* [2004] ECR II-2501 paragraph 273.

<sup>486</sup> Case T-132/07, *Fuji electric Holdings Co. Ltd v Commission*, [2011] ECR II-4091, paragraph 88.

<sup>487</sup> See also Recitals (417) - (428).

<sup>488</sup> Case T-439/07, *Coats Holding Ltd. v Commission*, judgment of 27.6.2012, not yet published, Paragraphs 38 to 50.

<sup>489</sup> Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, Paragraph 58; Joined Cases C-2/01 P and C-3/01 P *BAI and Commission v Bayer* [2004] ECR I-23, Recital 62; and Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, Paragraph 688.

<sup>490</sup> Joined Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [1984] ECR 1679, Paragraph 20; Joined Cases C-89/85 etc. *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, Paragraph 127; and Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others v Commission* [1999] ECR II-93, Paragraph 47)

existence of an infringement.<sup>491</sup> It must be considered that, in a case such as the present one, where the Commission relies on direct evidence, the burden is on the undertakings concerned to show that the evidence adduced by the Commission is insufficient. Such a reversal of the burden of proof does not infringe the principle of the presumption of innocence.<sup>492</sup>

- (291) However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement.<sup>493</sup>
- (292) The items of evidence on which the Commission relies in the decision in order to prove the existence of an infringement of Article 101 TFEU by an undertaking must not be assessed separately, but as a whole.<sup>494</sup>
- (293) It is also necessary to take account of the fact that anti-competitive activities take place clandestinely, and accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.<sup>495</sup>
- (294) As regards the probative value which should be attached to the various pieces of evidence, it must be noted that the sole criterion relevant for evaluating freely adduced evidence is the reliability of that evidence.<sup>496</sup> According to the generally applicable rules on evidence, the credibility and, therefore, the probative value of a document depends on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliable nature of its contents.<sup>497</sup> In particular, great importance must be attached to the fact that a document has been drawn up in close connection with the events<sup>498</sup> or by a direct witness of those events<sup>499</sup>. Furthermore, it should be noted that the mere fact that the information has been provided by undertakings which sought to benefit from the 1996 or 2002 Leniency Notices does not call its probative value into question.
- (295) It is settled case-law that no provision or any general principle of European Union law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of

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<sup>491</sup> Joined Cases T-25/95 etc. *Cimenteries CBR and Others v Commission* cited above, , Paragraphs 725 to 728, and Joined Cases T-67/00 etc. *JFE Engineering and Others v Commission* [2004] ECR II-2501, Paragraph 187.

<sup>492</sup> Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, Recital 181.

<sup>493</sup> *JFE Engineering and Others v Commission*, cited above, Paragraph 180 and the case-law cited.

<sup>494</sup> Case T-53/03 *BPB v Commission* [2008] ECR II-1333, Recital 185 and the case-law cited

<sup>495</sup> Joined Cases C-204/00 P etc. *Aalborg Portland and Others v Commission* [2004] ECR I-123, Recitals 55 to 57.

<sup>496</sup> Case T-44/00 *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, Paragraph 84 and the case-law cited; Case T-50/00 *Dalmine v Commission* [2004] ECR II-2395, Paragraph 72, and *JFE Engineering and Others v Commission*, cited above, Paragraph 273.

<sup>497</sup> *Cement*, cited above, Recital 1053; Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, II-869, at II-956.

<sup>498</sup> Case T-157/94 *Ensidesa v Commission* [1999] ECR II-707, Paragraph 312, and *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*, cited above, Paragraph 181.

<sup>499</sup> *JFE Engineering and Others v Commission*, cited above, Paragraph 207.

proving conduct contrary to Article 101 TFEU, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty.<sup>500</sup>

- (296) Some caution as to the evidence provided voluntarily by the main participants in an unlawful cartel is understandable, since those participants might tend to play down the importance of their contribution to the infringement and maximise that of others. None the less, in view of the inherent logic of the procedure provided for in the Commission Leniency Notices, the fact of seeking to benefit from their application in order to obtain a reduction in the fine does not necessarily create an incentive to submit distorted evidence as to the other participants in the cartel. Indeed, any attempt to mislead the Commission could call into question the sincerity and the completeness of cooperation of the undertaking, and thereby jeopardise its chances of benefiting fully under the Leniency Notices.<sup>501</sup>
- (297) In particular, where a person admits that he committed an infringement and thus admitted the existence of facts going beyond those whose existence could be directly inferred from the documentary evidence, that implies, a priori, in the absence of special circumstances indicating otherwise, that person had resolved to tell the truth. Thus, statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.<sup>502</sup>
- (298) None the less, statements made by the undertakings concerned in the context of an application for leniency pursuant to the Commission Leniency Notices must be assessed with caution and, in general, cannot be regarded as particularly reliable evidence if they have not been corroborated by other evidence.
- (299) According to settled case-law, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.<sup>503</sup>
- a) Evidence value of statements and documents provided by Klaas Puul
- (300) Heiploeg contests the content of the statements of Klaas Puul and the authenticity of corroborating evidence provided by Klaas Puul. Heiploeg considers Klaas Puul an unreliable source of evidence and requests the Commission to disregard this source of evidence entirely.
- (301) In light of the case law referred at in recitals (288) until (299), it is however apparent that the Klaas Puul evidence is sufficiently credible, precise and conclusive.
- (302) First of all, the arguments as to the general unreliability of Klaas Puul are subjective, not supported by facts and denied by Klaas Puul.<sup>504</sup>

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<sup>500</sup> *JFE Engineering and Others v Commission*, cited above, Paragraph 192 and the case-law cited.

<sup>501</sup> Case T-120/04 *Peróxidos Orgánicos v Commission* [2006] ECR II-4441, Paragraph 70, and the judgment of 8 July 2008 in Case T-54/03 *Lafarge v Commission*, [2008] ECR II-120\*, Paragraph 58.

<sup>502</sup> *JFE Engineering and Others v Commission*, cited above, Paragraphs 211 and 212; Joined Cases T-109/02 etc., *Bolloré and Others v Commission* [2007] ECR II-947, Paragraph 166; and *Lafarge v Commission*, cited above, Paragraph 59.

<sup>503</sup> Case T-38/02 *Groupe Danone v Commission* [2005] ECR II-4407, Paragraph 285; *Bolloré and Others v Commission*, cited above, Recital 167; and *Lafarge v Commission*, cited above, Paragraph 293.

<sup>504</sup> Klaas Puul for instance denied during the oral hearing that it was in a financial difficult situation.

- (303) Fact is that the statements of Klaas Puul are detailed and complete. Apart from contesting the content in general, and giving few examples of inconsistencies, Heiploeg does not prove any element of the statements factually wrong (for example by proving that particular individuals could not have been at the meetings alleged).
- (304) The examples of inconsistencies given by Heiploeg in its reply to the Statement of Objections are answered in Chapter 4 or taken into account for this Decision. They can in no way prove that all statements are factually wrong. On the contrary, the fact that Heiploeg leaves most statements unanswered, and limits itself to contesting the authenticity in general, rather confirms the credibility of the content.
- (305) The credibility is further improved by the documentary evidence provided by Klaas Puul in support of its statements, some of the most important being [...]. [...].
- (306) Heiploeg uses the non-existence of the original rough copies, and the absence of a further trail [...] to contest the authenticity and credibility of these notes.
- (307) Against this, Klaas Puul stated in its immunity application that these are authentic notes - and this was reaffirmed in a reply to a request for information and by [...] at the oral hearing.<sup>505</sup> The file properties of these documents – author and date of creation and modification - are largely consistent with these statements. Klaas Puul also explained that documents were discovered by its legal adviser, in the framework of conducting an internal cartel investigation following the provision of cartel evidence by Klaas Puul.<sup>506</sup> This again supports the contemporaneous character of the evidence.
- (308) Heiploeg rejects these arguments, as clarifying statements are allegedly equally incredible and file properties can be easily manipulated. But this implies that Klaas Puul has gone beyond exaggerating the role of other cartelists - an incentive which exists for any immunity applicant – and engaged in deliberate fraud and falsification of evidence. As mentioned above, the fact of seeking to benefit from their application in order to obtain a reduction in the fine does not necessarily create an incentive to submit distorted evidence as to the other participants in the cartel apart from vague accusations as to the credibility of the undertaking Klaas Puul in general or [...], Heiploeg does not bring any evidence to support this claim of fraud. Heiploeg does not provide alternative explanations for the content of these documents.
- (309) More generally, the credibility of the statements and the supporting documents is indeed further improved by other independent sources of evidence on file. The recordings and transcripts/notes of telephone conversations of Kok Seafood with its competitors corroborate on various points the statements of Klaas Puul. Kok Seafood also admitted that it was aware in general about the existence of collusion between Heiploeg and Klaas Puul. In addition, Stührk admitted its participation in price coordination in Germany and even Heiploeg had no explanation in its reply to the Statement of Objections to a number of instances.
- (310) Heiploeg's own documents indeed confirm the credibility of the Klaas Puul statements: the existence of meetings between Heiploeg and Klaas Puul in Harlingen

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<sup>505</sup> [...]  
<sup>506</sup> [...]



is for instance confirmed by Heiploeg's own internal email of 21 January 2001 that refers to an agreement in Harlingen.<sup>507</sup>

- (311) The Commission therefore concludes that the statements and supporting documentary evidence provided by Klaas Puul is sufficiently credible, precise and conclusive and can be used as evidence.
- b) Evidence value of the evidence of Kok Seafood
- (312) Heiploeg and Kok Seafood claim that all transcripts/notes of audio recordings should be dismissed as evidence.
- (313) Heiploeg and Kok Seafood complain that the Commission relied on these transcripts/notes made of telephone conversations, but failed to take into account the original audio recording.
- (314) This argument first of all contradicts their complaints against the use of such audio recordings.<sup>508</sup>
- (315) Furthermore, the Commission reiterates that it has only limited audio recordings on file.<sup>509</sup> Kok Seafood has explained itself that many audio files were destroyed.<sup>510</sup> Most recordings therefore exclusively exist in written format and the Commission had no means to verify the written content with the audio recording.<sup>511</sup>
- (316) To the extent that the Commission had at its disposal both the audio recording and the transcripts/note made thereof, the Commission verified the content.<sup>512</sup> The fact that the Commission in the Statement of Objections sometimes only referred to the transcript/note, and not (also) to the corresponding audio recording, does in no way imply that the audio recording was disregarded.
- (317) Heiploeg and Kok Seafood also bring the argument that the transcripts/notes are not an exact copy of the original recording. Heiploeg raises the argument in general, but largely fails to explain exactly where the transcripts/notes deviate from the original recording, and how this has affected the Commission's assessment of the evidence. All parties had the opportunity to listen to the original recordings and read the original notes/transcripts on file.
- (318) Heiploeg supports its general argument with only one example and adds that this example demonstrates that the Kok Seafood transcripts are totally unreliable and that the Commission constructs non-existing evidence.<sup>513</sup> But the example exactly points to the opposite, i.e. that the transcripts are close copies of the original conversations and that the Commission's interpretation is plausible.
- (319) Heiploeg adds that the transcripts/notes sometimes only contain part of the original recording. This may be true, but it is unclear how this argument affects the reliability of the transcript/note.

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<sup>507</sup> See Recitals (58), (78), (84), (131) and (141). During the oral hearing, Heiploeg failed to provide a clarification on this apparent similarity between evidence from Heiploeg and Klaas Puul.

<sup>508</sup> See Recitals (264) to (271).

<sup>509</sup> [...]

<sup>510</sup> [...]

<sup>511</sup> [...]

<sup>512</sup> See for instance Recitals (138), (202) and (323).

<sup>513</sup> [...]

This example relates to the event of Recital (94) and is answered there in Recital (95) - (96).

- (320) Heiploeg and Kok Seafood add that the transcripts/notes are difficult to read (lack of interpunction, adding of personal comments by the author in the text, use of capital letters, etc.), and that the Commission has made a subjective interpretation and has included selective and wrong citations.
- (321) This argument is not acceptable. The Commission is well aware that a transcript or note made of a telephone recording is not necessarily an exact copy. When analysing the transcripts/notes and comparing them to the original audio recording, the Commission has well noted that the author sometimes added personal remarks or left out parts that he did not consider sufficiently important, that there is often no interpunction, and that there are sudden shifts between capital letters and normal font. This obviously did not make the reading of the transcripts/notes easy and required the Commission to analyse the text and make an interpretation.
- (322) But some of these textual difficulties, such as the absence of interpunction, rather supports than contradicts the conclusion that these transcripts/notes are close copies of original audio recordings.
- (323) As to the use of capital letters, this argument seems to suggest that all parts in capital letters in all transcripts are personal notes added by the author that must be ignored. But this is manifestly incorrect. When comparing a transcript affected by this 'problem' with the original audio recording, it appears that the transcript, including capital letters, is an on-going text and that the capital letters have no specific meaning at all.<sup>514</sup> As a consequence, when Heiploeg argues that a text in capital letters is not authentic but was added later on, it is not sufficient to support this claim by the alleged use of capital letters only.<sup>515</sup>
- (324) As to the adding of personal comments, this has been taken into account in the text analysis.<sup>516</sup> Furthermore, personal comments in a note/transcript of a conversation can be very significant and does not make the content of this note/transcripts unreliable.
- (325) Heiploeg's accusation that the Commission did not do any effort to verify the accuracy of the transcripts and manipulated the transcripts to make them more coherent is pertinent untrue and contradictory.<sup>517</sup> The format of the transcripts indeed forced the Commission to deduct a more coherent reading. This text interpretation was objective, reasonable and in most cases also double-checked with Kok Seafood, the author of the notes/transcripts. The Commission sent Kok Seafood various requests for information with its text interpretation, and Kok Seafood replied to all these requests, confirming or correcting the Commission's reading.<sup>518</sup> This cannot be qualified a text manipulation that disqualifies all transcripts from being used as evidence, but at least requires Heiploeg to make alternative text interpretations. The Commission however notes that in most cases Heiploeg is unable to provide such alternative explanation.
- (326) Heiploeg also supports its claim by referring to the existence of different versions of recorded conversations on file. The author of the recordings indeed not only made

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<sup>514</sup> [...]

<sup>515</sup> [...]

<sup>516</sup> See for instance Recital (189).

<sup>517</sup> [...]

<sup>518</sup> [...]

transcripts but sometimes also other (summary) notes. These (summary) notes are similar but not identical to the transcript.<sup>519</sup> Heiploeg argues that this text difference between transcripts and other (summary) notes proves that all transcripts or notes are unreliable.

- (327) This argument is wrong. The (summary) notes are made from the transcripts and largely confirm their content. Small textual differences can be easily explained by the fact that the (summary) note is a more indirect and therefore more subjective reproduction of the conversation. For interpretation purposes, the transcript therefore takes priority over the (summary) note. But the different versions in general reinforce and not undermine the credibility of the evidence used.<sup>520</sup>
- (328) It can be concluded that the Commission, to the extent that it had to make a text interpretation of notes and/or transcripts of recorded conversation, made an objective and reasonable interpretation.
- (329) None of the difficulties explained above in any way justify a general dismissal of all transcripts/notes as evidence. To the extent that Heiploeg or Kok Seafood claim that an individual text interpretation was arguably wrong and how such error affected the interpretation of the evidence, such claims were addressed individually in Chapter IV.<sup>521</sup>
- (330) Heiploeg also adds that Kok Seafood asked many leading and suggestive questions in the recorded conversations, and that these conversations contain merely suggestions and insinuations of anticompetitive agreements, and no hard facts. This is even more problematic for incriminating statements about Heiploeg in conversations where Heiploeg was not present. Heiploeg therefore concludes that the evidence should be disqualified as hearsay that cannot be used against Heiploeg.
- (331) Conversations about Heiploeg in which Heiploeg is not present obviously contain indirect evidence. But this evidence cannot be disqualified because it is indirect. Where the content of these conversations fits within the body of evidence of the cartel infringement and Heiploeg fails by and large to explain why the content of these conversations is factually wrong, this argument cannot convince the Commission not to use such indirect evidence against Heiploeg
- (332) The Commission understands that these transcripts/notes of the recorded conversations between competitors may to some extent contain subjective views of the individuals concerned on the events, or even that the individuals in these conversations may not always have spoken the truth and tried to manipulate each other. But it concerns contemporaneous documents discovered during an inspection, and Heiploeg largely fails to make clear where such subjective view or manipulation would have distorted the Commission's analysis of the events.
- (333) The argument should not distract from the overall conclusion that these transcripts/notes corroborate to a large extent the other independent sources of evidence, notably the statements and supporting documents of Klaas Puul, the inspection documents and the admission of events by Stührk. Together they form a

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<sup>519</sup> [...]

<sup>520</sup> See for instance Recitals (205) - (207).

<sup>521</sup> See Recitals (49), (60), (89), (95), (96), (104), (111), (113), (114), (117), (119), (134), (138), (139), (168), (182), (185), (190), (192), (195), (197), (202), (207), (212) and (218).

solid body of evidence that confirms the existence of anticompetitive agreements or concerted practices in the North Sea shrimps industry. The argument therefore cannot lead to a general and overall disqualification of this source of evidence, but it requires Heiploeg to individually explain and motivate why a specific interpretation given to the content of such inspection document is wrong.

- (334) Also the opposite argument, that the Commission makes use of a subjective selection of the notes/transcripts is too vague, and required Heiploeg to explain more specific what other parts of the notes/transcripts should have been taken into account and how these could or should have affected the Commission's conclusion. On the contrary, it is clear that for many events the Commission can find additional evidence in this source of evidence.<sup>522</sup> This proves that the Commission was prudent in using or relying on this source of evidence too much.

#### 5.2.3.3. Body of evidence

- (335) Heiploeg only admits that there are a number of instances where it may have been involved in the coordination of sales or purchases and for which it has no explanation.<sup>523</sup> It concerns events of 26 January 2001<sup>524</sup>, 31 July 2003<sup>525</sup>, 6 April 2006<sup>526</sup>, 13 January 2006<sup>527</sup> and 27 February 2009.<sup>528</sup>
- (336) Heiploeg claims that these were limited incidents that are too short and too far away from each other in terms of time and content for supporting the conclusion that Heiploeg participated in a price fixing and market sharing cartel for the period 2000 to 2009.
- (337) Heiploeg for instance claims that there is no evidence of agreed price increases (for [...]) in the period between 21 June 2000 and 15 January 2008.
- (338) But this claim starts from the wrong assumption that all evidence from Klaas Puul and Kok Seafood must be disqualified. However, there is well documented evidence on file that Heiploeg's involvement went far beyond these few instances for which Heiploeg was unable to provide an explanation. Heiploeg was involved in continuous collusion with Klaas Puul and other competitors since at least 21 June 2000.
- (339) To the extent that Heiploeg's argument relates to an alleged lack of agreed price increases for [...] in Belgium, it is noted that price increases for North Sea shrimps in general also applied to [...] in Belgium.<sup>529</sup> Not only Klaas Puul reported continuous coordination for [...] in Belgium<sup>530</sup>, but also information from Stührk<sup>531</sup> and Kok Seafood<sup>532</sup> points in that direction. Heiploeg itself uses and comments in its reply to

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[...]

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[...]

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See Recital (78).

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See Recital (87).

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See Recital (101).

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See Recital (149).

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Idem.

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See for instance Recitals (78), (93), (94) and (103).

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See Recital (74).

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See Recital (85) [...].

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See Recital (110) [...].

the Statement of Objections statements of Klaas Puul [...].<sup>533</sup> It is therefore not credible to maintain that there is no evidence for [...] in Belgium.<sup>534</sup>

- (340) Heiploeg also argues that evidence for price coordination with respect to customer [...] cannot be used as evidence for a wider price coordination beyond this customer. Heiploeg argues that the importance given to the [...] price is far-fetched and not supported by conclusive evidence.<sup>535</sup>
- (341) But the role of the [...] -price is clear. It was explained by Klaas Puul and corroborated through other evidence on file.<sup>536</sup> It was for instance also mentioned in 2008 in a conversation between [...]:

[...] <sup>537</sup>

- (342) Heiploeg does not provide an alternative explanation for the various references on file to this benchmark function of the [...] price, apart from disqualifying them in general as inadmissible evidence or as 'noncommittal assumptions' (in Dutch: 'vrijblijvende veronderstellingen').
- (343) Heiploeg also claims that it was never agreed among competitors to use [...] as a benchmark. But this argument clearly misses the point. The Commission does not hold against the shrimp traders that [...] is the benchmark, but it accuses them of coordinating the price level for this benchmark customer.
- (344) Heiploeg further tries to deny the existence of agreements in its reply to the Statement of Objections by bringing tables that allegedly demonstrate that its prices charged to [...] in Belgium were systematically lower than the prices allegedly agreed upon with Klaas Puul, and were different from prices charged to other retailers, and that its profit margins did not increase during the alleged period of infringement.<sup>538</sup>
- (345) As a matter of principle, a cartel infringement is an infringement by object, and the Commission is not obliged to enter into the effect of these arrangements.
- (346) Moreover, it is difficult for the Commission to judge upon the validity of tables for which the underlying data are not submitted.<sup>539</sup> For instance, it is not clear to which extent the qualities and sizes of the shrimps sold by Heiploeg are in line with the sizes and qualities for which the prices were agreed upon with Klaas Puul. There can be many reasons for price differences that do not necessarily contradict the benchmark function of the [...] price, even more when Heiploeg itself concludes that all prices followed a same pattern. Heiploeg for instance forgets to add in its comparison that also Klaas Puul reported that it sometimes cheated and offered [...] a lower price than agreed with Heiploeg.<sup>540</sup> These lower prices therefore cannot prove the absence of agreements between Heiploeg and Klaas Puul. The Commission has also never pretended that the prices to other retailers were the same as the prices charged to [...]. Finally, as to the alleged absence of an increase in profit margin,

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<sup>533</sup> [...] . These statements were repeatedly mentioned in the Statement of Objections; see for instance Recitals (80), (86) or (106).

<sup>534</sup> To the extent that Heiploeg contest the value of the evidence used, see Recitals (300) - (334).

<sup>535</sup> [...]

<sup>536</sup> See for instance Recitals (48), (189) and (217).

<sup>537</sup> [...]

<sup>538</sup> [...]

<sup>539</sup> Heiploeg refers to a study of PWC but does not submit the study.

<sup>540</sup> [...]

Heiploeg forgets that the Commission concluded that this cartel aimed to bring stability to the market. Stable profit margins only suggest that such aim was effectively met.<sup>541</sup> Moreover, even if the profit margin was similar in the past, this does not prove that there is no cartel behaviour. It might as well indicate that anticompetitive agreements existed already before the cartel that is the subject of this Decision (as also confirmed by the previous Decision of the NMa).

- (347) Heiploeg also denies that there is any specific evidence for [...] price coordination in the Netherlands. But it has already been explained Heiploeg was the only supplier of [...] in the Netherlands, and that there was no further need for any specific benchmark price coordination over and above the general and/or specific benchmark price coordination for [...] in Belgium.<sup>542</sup> Nevertheless, there is also evidence of price coordination for other customers in the Netherlands.<sup>543</sup>
- (348) Heiploeg also denies the existence of formal market sharing agreements between Heiploeg and Klaas Puul. When there is reference to mutual understandings not to approach or take over each other's customers or suppliers, Heiploeg suggests that each undertaking, individually may have come to the conclusion that it was economically better not to do that.
- (349) But it has been explained before that it is not necessary to prove formal agreement when the conduct can be qualified as a concerted practice, i.e. if it can be established that the parties knowingly adopt or adhere to collusive devices which facilitate coordination of their commercial behaviour and eliminated, or at least substantially reduce, the uncertainty as to the conduct they can expect from each other on the market.<sup>544</sup>
- (350) In the case at hand, it is clear that the parties engaged in price fixing contacts with the object of creating stability in the market and limiting competition. For any further market sharing practice supporting this anticompetitive objective it therefore matters little if it was formally agreed or emerged in practice in support of the price fixing arrangements.
- (351) [...] told the Commission that there was agreement in this respect.<sup>545</sup> The language used by Heiploeg in its conversations with Kok Seafood also suggests that there was at least silent agreement.<sup>546</sup>
- (352) For the exchange of purchase price information, for instance in Denmark with Klaas Puul, or in Germany with Stührk, Heiploeg claims that such exchanges, if at all, contained only information that was already known in the market.
- (353) It is indeed confirmed by all parties that the shrimps business was very transparent and that commercially sensitive information also may have been received from fishermen.
- (354) But the existence of market transparency does not justify all contacts. The evidence on file reveals that there were exchanges of commercially sensitive purchase

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[...]

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See Recital (47).

<sup>543</sup>

See for instance Recitals (124), (124), (195) and [...].

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See Recital (232) - (234).

<sup>545</sup>

See Recital (123).

<sup>546</sup>

See for instance Recital (137).

information between competitors in Denmark at times where it is unlikely that this information was already spread to the fishermen.<sup>547</sup> It is also clear that Stührk could directly receive or double-check purchase prices with Heiploeg.<sup>548</sup> Heiploeg raises the possibility that such information was already transmitted to its fishermen at the time of the exchange between competitors but fails in most cases to provide concrete evidence for this claim.

- (355) In its reply to the Statement of Objections, Stührk also did not deny the existence of arrangements with competitors concerning purchase prices, but stated that these were rare.<sup>549</sup> Stührk also explains that it was in practice impossible not to follow the purchase price policy of Heiploeg and Klaas Puul, because by paying less Stührk risked to lose fishermen to Heiploeg or Klaas Puul, and by paying more Stührk risked provoking a reaction from Heiploeg.<sup>550</sup> It also has to be taken into account that Stührk was not only a competitor, but also a customer of Heiploeg.
- (356) In view of Stührk's double role as competitor and customer of Heiploeg it is also difficult to assess when an exchange of contract fishing prices becomes an exchange of commercially sensitive information between competitors. But it must also be taken into account that Heiploeg and Stührk not only discussed contract fishing prices, but also the sales price level in Germany<sup>551</sup>. This sometimes happened simultaneously.<sup>552</sup> It also must be taken into account that Heiploeg did not want Stührk to buy at the auctions in the Netherlands and that Stührk abstained from doing that as it recognised that competing could indeed raise purchase prices.<sup>553</sup> In such context, any exchange of purchase price information, directly or indirectly, helped Stührk to better understand and follow Heiploeg's purchase and sales pricing strategy and therefore cannot be isolated completely.
- (357) Heiploeg adds that there is no evidence that the exchanges of price information amounted to price agreements and argues that there is no clear interest in obtaining such pricing information upfront.
- (358) But the exchange of price information, and reporting to the headquarter, clearly demonstrates that this information exchange was considered relevant and enabled the undertakings to take the pricing decisions of their main competitor into account for their own pricing strategy.
- (359) Heiploeg also denies that it prevented competitors from buying at the auctions. To the extent that it sold shrimps for low prices to other traders, or tried to convince them not to buy at the auctions, Heiploeg brings forward that this is not forbidden. Heiploeg also adds that the evidence used against it on this issue is unclear as to what exactly can be reproached to Heiploeg.
- (360) Taken in isolation, there may be some economic rationale for preventing customers becoming competitors by selling them products at low prices. But the evidence must not be interpreted in isolation, but in its context. This context learns that Heiploeg

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<sup>547</sup> See Recitals (149) - (151).

<sup>548</sup> See Recitals (168) - (178).

<sup>549</sup> [...]

<sup>550</sup> [...]

<sup>551</sup> See Recitals (85), (86), (88), (89), (99), (101), (107), (109), (111), (113), (114), (120) and (122).

<sup>552</sup> See for instance Recital (88).

<sup>553</sup> See Recitals (160) - (162).

and Klaas Puul tried to influence the sales and purchase price of North Sea shrimps, where necessary with the support of other traders. Limiting competition at the auctions was obviously supportive to such objective. Moreover, in such context, Heiploeg made it clear to its customers/competitors that competition from their side could bring prices up and was not desirable, and it actively supported this strategy by its actions.<sup>554</sup> This surely created the impression for these traders that they were not allowed to buy at the auctions and that Heiploeg and Klaas Puul manipulated to some extent the purchase prices.<sup>555</sup>

- (361) Stührk said in one of its internal communications in august 2007 that it refrained from buying at the auctions because it did not want to drive prices up artificially.<sup>556</sup> But, as a matter of fact, such deliberate refraining from competition on the contrary artificially brought the purchases prices down and helped the big traders in their attempts to better influence the purchase and sales price level of the North Sea shrimps. Heiploeg's defence that it is not clear what Stührk actually means in its internal communication is not convincing and Stührk's reply to the Statement of Objections confirms that this undertaking at least had the impression that it was not allowed to buy at the auctions in the Netherlands. The behaviour of Heiploeg and Klaas Puul can therefore not be considered innocent, even more when it can be seen that undertakings like Stührk adapted their own strategy to this anti-competitive strategy<sup>557</sup> of Heiploeg and Klaas Puul. This facilitated their anti-competitive arrangements in the North Sea industry.
- (362) Heiploeg also denies that arrangements with respect to the size of the sieves to be used were part of the cartel. Heiploeg claims that these were sector wide measures that were cleared by the Dutch Competition Authority as falling under the exemption of Article 101(3) TFEU.<sup>558</sup>
- (363) But this 'clearance' dates from 2011 and applies to a proposed Management Plan MSC for the North Sea shrimps industry. It does not apply to behaviour in the past. Moreover, this 'clearance' was informal only. The Dutch Competition Authority stressed that it had not conducted an investigation and that its informal view was entirely based on public information or information provided. It obviously started from the assumption that there are no anti-competitive arrangements in the sector. On this basis, the Dutch Competition Authority placed the proposed arrangements for setting minimum sieving sizes in a category of measures where the negative effects for competition seem to be limited and overall valued them positively as long as they did not give rise to an output limitation with price increasing effect. Any clear output limitation was explicitly excluded from the exemption.
- (364) These arrangements however cannot be separated from their anticompetitive context, unknown to the Dutch Competition Authority when rendering its informal view. Heiploeg and Klaas Puul had a strong influence on the sieving sizes and these arrangements supported their existing arrangements that aimed to improve or at least stabilise the price level of North Sea shrimps. So, even if they were informally cleared, they should not be ignored for the description and assessment of the cartel at

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<sup>554</sup> See Recitals (158), (157), (164) and (166).

<sup>555</sup> See Recitals (167) and (163).

<sup>556</sup> See Recital (160).

<sup>557</sup> See Recitals (161)

<sup>558</sup> Informal view of the NMa of 18.4.2011 in Case 7011 – Managementplan MSC Garanalenvisserij.



hand. The argument that other traders and/or the trade association were equally involved in any way cannot exempt Heiploeg and Klaas Puul from their own liability for their involvement in this conduct in support of their anticompetitive arrangements.

#### 5.2.3.4. Role of Kok Seafood

- (365) Kok Seafood claims that it took part in none of the constituent parts of the cartel: price fixing and market sharing agreements between Heiploeg and Klaas Puul and to some extent with Stührk.
- (366) The Commission indeed agrees that the role of Kok Seafood in this cartel was specific. Kok Seafood knew in general about the existence of the cartel and strengthened it by agreeing to refrain from active competition with the main cartel participants. In exchange, Kok Seafood was remunerated by means of a steady volume of sales for a cartelised price. The Commission considers that this support amounts to a participation in the cartel.
- (367) Kok Seafood and Heiploeg however claim that the contract was not exclusive and that there was no obligation for Kok Seafood to refrain from competing. Moreover, the remuneration of Kok Seafood was not set in function of a cartelised price.
- (368) The obligation for Kok Seafood not to become a viable competitor of Heiploeg and Klaas Puul was indeed not explicitly mentioned in the contract. Both Heiploeg and Kok Seafood knew that such clause would be illegal. But Heiploeg unambiguously referred to 'exclusivity' when explaining its strategic alliance with Kok Seafood'.<sup>559</sup> It appears from the conversations between Kok Seafood and Heiploeg that their business relation, if not formally exclusive, was meant to be quasi-exclusive. It equally appears from these conversations that the real purpose of the contract was to keep Kok Seafood of the market as a viable competitor.<sup>560</sup> Heiploeg's argument that these conversations express individual interpretations of individuals that read more in the agreements than there is actually written rather confirm than contradict the Commission's conclusion about the existence of an underlying anticompetitive purpose.<sup>561</sup>
- (369) It may be true that Kok Seafood sometimes felt restricted by this contract and tried to forget or interpret differently its underlying purpose, but Heiploeg then reminded Kok Seafood of the hidden clause and/or threatened Kok Seafood to end the contract.<sup>562</sup> The fact that Kok Seafood in return recorded its conversations with Heiploeg, in order to remind or blackmail Heiploeg, also shows that Kok Seafood knew very well that there was something to blackmail Heiploeg with.<sup>563</sup>
- (370) It therefore can be concluded that the long-term contract came with a (hidden) anticompetitive clause agreement that Kok Seafood would not formally enter the market as a viable competitor. This objective of the agreement was anti-competitive.

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<sup>559</sup> See Recital (199).

<sup>560</sup> See Recitals (201) - (205).

<sup>561</sup> [...]

<sup>562</sup> See Recitals (159) and (205).

<sup>563</sup> See Recital (210).

- (371) Kok Seafood was paid in function of the average Heiploeg sales price. For this calculation, the price charged by Heiploeg to [...] was undoubtedly important.<sup>564</sup> Kok Seafood and Heiploeg even developed a long conflict over the exact importance of the [...] price in this calculation.<sup>565</sup>
- (372) Heiploeg and Kok Seafood however use this conflict in their reply to the Statement of Objections to demonstrate that Kok Seafood was not paid in function of the [...] price. But this argument misses the point. It is not sufficient to undo the objection that Kok Seafood was aware of the existence of price coordination between Heiploeg and Kok Seafood<sup>566</sup> and knew or could have known that it was paid in function of a cartelised price. To what extent the [...] price played a decisive role in the calculation of Heiploeg's average price is a side issue that does not need to be answered by the Commission in this Decision.
- (373) Heiploeg finally argues that the contract with Kok Seafood, if anticompetitive at all<sup>567</sup>, was not agreed with Klaas Puul. But this argument again isolates events and fails to take into account the wider picture that this contract with Kok Seafood served the anticompetitive arrangements in place. Klaas Puul in any way was very well aware of the existence and underlying purpose of the contract and declared that it discussed the situation of Kok Seafood regularly with Heiploeg.<sup>568</sup> This appears from [...] and from other contemporaneous evidence on file, such as the transcripts/notes of conversations between Kok Seafood and Klaas Puul.
- (374) Kok Seafood also claims that it could not be aware of the existence of a cartel but this argument will be addressed below in recitals (417) to (432) of this Decision.
- (375) To the extent that the role of Kok Seafood was specific, this will be reflected in the fine of Kok Seafood.

### 5.3. Single and continuous infringement

#### 5.3.1. Principles

- (376) A 'complex cartel' may properly be viewed as a single and continuous infringement for the time in which it existed. The concept of 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.<sup>569</sup>
- (377) Such an infringement may evolve over time or its mechanisms may be adapted to take account of new developments. The validity of assessing a complex of practices as one single infringement is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct might also constitute a violation of Article 101 TFEU individually, taken in isolation. It would be artificial to split up such continuous conduct characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved

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<sup>564</sup> See Recital (217).

<sup>565</sup> [...]

<sup>566</sup> See for instance Recitals (101), (109), (204), (206), (211), (212), (213), (214) and (215) .

<sup>567</sup> See Recitals (365) - (372).

<sup>568</sup> See Recital (201) - (204).

<sup>569</sup> *Cimenteries CBR and Others v Commission*, cited above, Paragraph 3699.

was a single infringement which progressively manifested itself in both agreements and concerted practices that served a single aim.<sup>570</sup>

- (378) The reference to an "overall plan" does not mean that such a 'plan' must have been drawn in advance, or that there must be necessarily an overall decision-making structure in the infringement which unifies its different elements. The notion of a single infringement covers precisely a situation in which several undertakings participated in an infringement in which continuous conduct in pursuit of a single economic aim was intended to distort competition and where individual infringements were linked to one another by the same object (elements as a whole sharing the same aim) and the same subjects (same undertakings who are aware that they are participating towards the same object).<sup>571</sup> The existence of synergies and the complementarity between the different lines of conduct are objective indicia of the existence of such an overall plan.<sup>572</sup>
- (379) Although a cartel is a joint enterprise, each participant may play its own particular role. One or more participants may exercise a more prominent role, internal conflicts and rivalries or cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 101 TFEU where there is a single and continuing objective. The mere fact that each participant in a cartel plays the role, which is appropriate to its own specific circumstances, therefore, does not exclude responsibility of each of the participants for the single infringement as a whole, including acts committed by other participants, which shared the same unlawful purpose.<sup>573</sup>
- (380) An undertaking, which takes part in such a common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. It is constant case-law of the Courts that "an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel"<sup>574</sup>.
- (381) In order to do so, it has to be demonstrated that an undertaking took part in such an infringement through conduct of its own, which formed an agreement or concerted practice and had an anti-competitive object for the purposes of Article 101(1) TFEU, and that this conduct was intended to help bring about the infringement as a whole. This undertaking is then also responsible, throughout the entire period of its participation in the infringement, for conduct put into effect by other undertakings in the context of the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the offending conduct of the other

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<sup>570</sup> *Hercules Chemicals v Commission*, cited above, Paragraphs 262-263.

<sup>571</sup> See for example *Lafarge v Commission*, cited above, Paragraph 484.

<sup>572</sup> *Lafarge v Commission*, cited above, Paragraph 482; Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* [2007] ECR II-4949, Recital 182.

<sup>573</sup> *Commission v Anic Partecipazion*, cited above Paragraph 83.

<sup>574</sup> See for example Cases T-147/89 et al., *Buchmann v Commission*, Recital 121; *HFB and Others v Commission*, Paragraph 231; *BASF and UCB v Commission*, cited above, Paragraph 160.

participants or that the undertaking could reasonably have foreseen it and was still prepared to take the risk.<sup>575</sup>

- (382) An infringement of Article 101 TFEU necessarily results from collaboration by several undertakings, who are all co-perpetrators of the infringement, but whose participation may take different forms depending, in particular, on the characteristics of the market concerned, the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.<sup>576</sup>
- (383) The fact that an undertaking concerned did not participate directly in each of the constituent elements of the overall cartel cannot relieve it of responsibility for an infringement of Article 101 TFEU. Such a circumstance can nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed. As stated by the Court of Justice in *Commission v Anic Partecipazioni*, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and if and when it comes to determining the fine.<sup>577</sup> Moreover, the existence of a single infringement may also be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of such single infringement.<sup>578</sup>

### 5.3.2. *Application in the present case*

- (384) Some of the contacts between the traders of North Sea shrimps may qualify as separate infringements of Article 101 TFEU. For example, the bilateral anticompetitive contacts between Heiploeg and Klaas Puul<sup>579</sup>, or between Heiploeg and Stührk.<sup>580</sup> Also Kok Seafood knowingly contributed and benefitted to anticompetitive conduct.<sup>581</sup> There are sufficient grounds, however, to consider that the complex of arrangements constituted a single and continuous infringement of Article 101 TFEU.
- (385) The anti-competitive conduct of the cartel participants was linked by the following factors: (1) a single anti-competitive aim; (2) a single product; (3) same participants; (4) links between the geographic markets concerned, (5) continuity in time and (6) general awareness.

### 5.3.3. *Single anticompetitive aim*

- (386) The agreements and concerted practices formed part of an overall scheme which laid down the lines of participants' action on the market and restricted their individual commercial conduct with the aim of pursuing an identical anti-competitive objective

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<sup>575</sup> *Commission v Anic Partecipazioni*, cited above, Paragraphs 79 and 83.

<sup>576</sup> *Commission v Anic Partecipazioni*, cited above, Paragraph 79.

<sup>577</sup> *Commission v Anic Partecipazioni*, cited above, Paragraph 90.

<sup>578</sup> Case T-53/03, *BPB v Commission* [2008] ECR II-1333, Paragraphs 249-250.

<sup>579</sup> See for instance Recitals (56), (59), (61), (69), (74), (78), (79), (80), (81), (82), (84), (90), (93), (103), (105), (110), (115), (116), (118), (121), (127), (128), (129), (131), (135), (137), (141), (145) and (149). See also Recital (401) - (402).

<sup>580</sup> See for instance Recitals (63), (85), (87), (88), (99), (101), (112), (170), (171), (173), (174), (175), (176), (177), (178) and (179). See also Recital (407).

<sup>581</sup> See Recitals (403) - (406)

and a single economic aim, namely to jointly influence the price level for North Sea shrimps, limit competition and stabilise the market.

- (387) All participants aimed at achieving increases or at least the stabilisation of downstream sales prices for North Sea shrimps by way of coordinating price offers to customers.<sup>582</sup> Benchmark price fixing was used to ensure this objective, where needed supported by ancillary collusive action, be that concerning purchase prices<sup>583</sup>, market sharing and customer allocations<sup>584</sup> and specific actions towards potential competitors.<sup>585</sup> These ancillary arrangements further limited or reduced competition in the North Sea shrimps trade.
- (388) In this way, the participants in the complex of anti-competitive arrangements here at issue or parts thereof, directly or indirectly expressed their joint intention to behave on the market in a certain way and adhered to a common overall objective limiting decision-making choices in their individual commercial conduct. This artificial self-restraint necessarily affected their individual conduct on the market.

#### 5.3.4. *Single product*

- (389) All the manifestations of the complex of arrangements concerned North Sea shrimps. Discussions concerning downstream sales of North Sea shrimps interlinked with discussions on purchases from fishermen and discussions concerning market sharing or customer allocations.<sup>586</sup>

#### 5.3.5. *Same participants*

- (390) [...] Heiploeg, Klaas Puul, Stührk and Kok Seafood was directly involved in the anti-competitive contacts for their respective undertakings.<sup>587</sup> The same individuals [...] consistently appeared as direct participants in various anti-competitive arrangements and contacts between the participating undertakings.
- (391) As regards specific regions, collusive contacts could be sub-delegated to [...]. This happened for instance between Heiploeg and Klaas Puul for sales in France<sup>588</sup> and purchases in Denmark<sup>589</sup>. But the management kept an eye on these aspects as well<sup>590</sup>.

#### 5.3.6. *Links between geographic markets*

- (392) The anti-competitive arrangements took place notably in Belgium, Germany, the Netherlands, France and Denmark<sup>591</sup>, but affected the North Sea shrimps trade in the entire EU because they were connected in terms of prices and commercial strategy.

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<sup>582</sup> See the events in Recitals (69) - (122), and for Kok Seafood Recital (206) - (218).

<sup>583</sup> See Recitals (143) - (180).

<sup>584</sup> See Recitals (123) - (142).

<sup>585</sup> See Recitals (181) - (224).

<sup>586</sup> See for instance Recital (69) in combination with Recitals (73),(127), (128), (140) and (145); or Recitals (93), (135) and (141) combined; or Recitals (169) - (171).

<sup>587</sup> See for instance Recitals (40), (69), (74), (84), (87), (94), (98), (99), (101), (110), (121), (178), (206), (211), (213), (214), (215) and (216).

<sup>588</sup> See Recitals (62), (90), (91), (105), (108) and (115).

<sup>589</sup> See Recital (149).

<sup>590</sup> See Recitals (131) and (149).

<sup>591</sup> Evidence for Denmark only points to exchanges and coordination of purchase prices. See Recitals (56) and (149)

- (393) Arrangements specific to particular geographic regions like Belgium, the most important region in terms of North Sea shrimps consumption<sup>592</sup>, easily interconnected with arrangements concerning other areas like Germany, the Netherlands or France through the marked presence of Heiploeg and Klaas Puul everywhere in the market.<sup>593</sup>
- (394) This was reinforced by the main benchmark customer [...] that was in a position to compare prices across borders.<sup>594</sup> [...] prices tended to level out cross border, albeit with a mark-up for transport costs due to distance.<sup>595</sup> By influencing this benchmark price in Belgium, Heiploeg and Klaas Puul were able to influence downstream sales prices more generally, notably also in the Netherlands and Germany.<sup>596</sup>
- (395) Heiploeg and Klaas Puul needed the support of Stührk for Germany. In other countries such support was less obvious, or the competitive threat was already dealt with through long term contracts or otherwise.

### 5.3.7. *Continuity in time*

- (396) The complex of collusive arrangements was developed and implemented over a period of several years, at least from mid-2000 to early 2009. The cartel operated in a very informal way and did not leave many traces, making it not easy to trace back concrete evidence of specific contacts. The events described in this Decision nevertheless relate to incidents in 2000, 2001, 2003, 2004, 2005, 2006, 2007, 2008 and 2009<sup>597</sup> and there are various references to a continued involvement.<sup>598</sup>
- (397) It follows that contacts were maintained basically during the entire period from 2000 to 2009, at different levels of intensity<sup>599</sup>. For some periods the evidence is more rich, but there are no indications that the cartel was ever terminated or that the undertakings concerned explicitly distanced themselves from the cartel.<sup>600</sup> Only the duration of Stührk's and Kok Seafood's involvement in the complex of arrangements differed.<sup>601</sup>

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<sup>592</sup> See Recital (7).

<sup>593</sup> See Recital (8).

<sup>594</sup> See Recital (42) to (48).

<sup>595</sup> This to the extent that a regional arrangement for Germany became obsolete when this benchmark customer started considering prices for North Sea shrimps offered in different regions together. See Recitals (47) and (120).

<sup>596</sup> See Recital (217).

<sup>597</sup> Incidents concerning sales price fixing in 2000, 2001, 2003, 2004, 2005, 2006, 2007 and 2008; market sharing or customer allocations in 2000, 2003, 2004, 2005, 2006, 2009; purchase arrangements in 2000, 2003, 2004, 2005, 2006, 2007, 2008 and 2009; actions towards other competitors in 2007 and 2008.

<sup>598</sup> This applies for instance to references to an alleged market sharing arrangement between Heiploeg and Klaas Puul dating back to 1997 in Recital (156); the contract between Heiploeg and Kok Seafood since 2000 and renewed in 2005 and 2009; daily contacts between [...] Klaas Puul and Heiploeg until 2004 in Recital (40) and weekly meetings between Heiploeg and Klaas Puul in Harlingen until 2004 or between 2000 and 2003 in Recital (41) and (80); contacts on [...] Belgium since 2001 in Recital (81); arrangements between Klaas Puul and Heiploeg/Goldfish since 2000 in Recital (56) or 2001 in Recital (81); Stührk's participation since 2001 or at least since March 2003 in Recital (63) and arrangements for customer [...] from 2002 to 2008 in Recital (75).

<sup>599</sup> See Recitals (40) - (42) and (59).

<sup>600</sup> See for instance Recital (59).

<sup>601</sup> See Chapter 6. Duration.

### 5.3.8. Awareness

- (398) The existence of anti-competitive arrangements was widely known in the North Sea shrimps industry<sup>602</sup>, including the existence of the long-term contract between Heiploeg and Kok Seafood and its effect on the market.<sup>603</sup>
- (399) All four undertakings that are the subject of this Decision contributed in their own way to the idea of limited competition in a stable market with a coordinated price level.
- (400) This obviously applies to the conduct of Heiploeg and Klaas Puul, but also Stührk and Kok Seafood knew, or could have reasonably foreseen, that their individual conduct was part of this wider common plan to jointly influence the price level of North Sea shrimps. They knew or should have been reasonably aware that downstream sales prices, notably benchmark prices, were subject to coordination amongst the North Sea shrimps traders, at least between Heiploeg and Klaas Puul.<sup>604</sup> They aligned their own business decisions to the coordinated market behaviour of these competitors and made specific individual arrangements with them where necessary.
- (401) Heiploeg participated in and was aware of all aspects of the cartel.<sup>605</sup> Heiploeg had concluded a long-term contract with Kok Seafood and was aware of the underlying objective of this contract for the complex of arrangements.<sup>606</sup> Heiploeg was in contact with all other cartel participants and was fully aware of the role of all participants in this complex of anticompetitive arrangements.
- (402) Klaas Puul also participated in and was aware of all aspects of the cartel.<sup>607</sup> Klaas Puul was aware of the existence of a long-term agreement between Heiploeg and Kok Seafood, and knew that it served an anti-competitive purpose and contributed to the wider common plan.<sup>608</sup> Klaas Puul even stated that this contract was the subject of regular contacts and discussions between Klaas Puul and Heiploeg.<sup>609</sup> Klaas Puul also was aware of the exchange of information between Heiploeg and Stührk in Germany, mainly through contacts with Heiploeg.<sup>610</sup> Klaas Puul was in contact with

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<sup>602</sup> See Recitals (181) - (184).

<sup>603</sup> See Recitals (220) - (223).

<sup>604</sup> See Recitals (122), (181) and (184).

<sup>605</sup> See Recitals (40) - (42), (51) - (54), (55) - (66) and (181) - (186). For specific involvement in sales price fixing, see Recitals (69) - (121) and (213) - (215). For involvement in market sharing and customer allocations, see Recitals (124), (125), (127), (128), (129), (131), (133), (135), (137), (140) and (141). For involvement in coordination of purchase prices, see Recitals (144) - (146), (149) - (152), (154) - (158), (160), (162) - (164), (166) and (169) - (180). For involvement in conduct towards other traders, see Recitals (193) - (194), (196), (201), (211) and (216) - (217).

<sup>606</sup> See for instance Recital (201).

<sup>607</sup> See Recitals (40) - (42), (51) - (54), (55) - (66) and (181) - (186). For specific involvement in sales price fixing, see Recitals (69) - (76), (78) - (84), (90) - (96), (99), (102) - (106), (108), (110), (115) - (119), (121) and (213) - (215). For involvement in market sharing and customer allocations, see Recitals (123) - (135) and (136) - (141). For involvement in coordination of purchase prices, see Recitals (144) - (153), (154), (155) - (156) and (167). For involvement in conduct towards other traders, see Recitals (65), (189), (193), (194) and (204).

<sup>608</sup> See Recitals (77) and (204).

<sup>609</sup> [...]

<sup>610</sup> [...]

all other cartel participants<sup>611</sup> and was fully aware of the role of the other participants in the complex of anti-competitive arrangements.

- (403) Kok Seafood historically had close contacts with both Heiploeg and Klaas Puul<sup>612</sup> and was aware of the existence of collusive contacts in the industry, notably between Heiploeg and Klaas Puul with respect to sales prices (e.g. for the benchmark customer in Belgium, the Netherlands and Germany) and purchase prices.<sup>613</sup> Kok Seafood was even instrumental by transferring information that was coordinated between Heiploeg and Klaas Puul to another trader.<sup>614</sup>
- (404) Kok Seafood was therefore aware that its own conduct, in coordination with Heiploeg and/or Klaas Puul, contributed to the common objective of jointly influencing the price level of North Sea shrimps, limiting competition and stabilising the market.
- (405) Kok Seafood was well aware or, at the very least, could have reasonably foreseen that the purpose of its commercial relationship with Heiploeg was anti-competitive, that it facilitated the existence of anti-competitive arrangements between Heiploeg and Klaas Puul more widely and that its remuneration was determined in function of a coordinated price between Heiploeg and Klaas Puul.<sup>615</sup> This made Kok Seafood an accomplice in the complex of anti-competitive arrangements.
- (406) Kok Seafood was aware of its own role and the role of the other participants, Heiploeg and Klaas Puul in particular, and to some extent also Stührk<sup>616</sup>, and was prepared to take the risk of participating. Kok Seafood recorded telephone contacts with competitors and repeatedly threatened to reveal the existence of anti-competitive practices in the North Sea shrimps industry to the Dutch Competition Authority<sup>617</sup>.
- (407) Stührk exchanged price information with Heiploeg<sup>618</sup> and took this information into account for its own commercial decisions, at least in Germany.<sup>619</sup> Klaas Puul explained that it was no longer directly involved in these arrangements with Stührk after 2005 when its business relation with Stührk became troubled. Nevertheless, Stührk knew that Heiploeg was well informed about the prices of Klaas Puul<sup>620</sup> and that their prices were aligned.<sup>621</sup> Stührk therefore was aware or could have reasonably foreseen that its conduct formed part of a wider complex of arrangements. Stührk also knew that the contract between Heiploeg and Kok Seafood had an importance for the stability on the market.<sup>622</sup>

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<sup>611</sup> Albeit to a lesser extent with Stührk. *See* Recital (100).

<sup>612</sup> [...]

<sup>613</sup> *See* Recitals (94), (102), (103), (110), (137), (152) and (184).

<sup>614</sup> *See* Recitals (189) - (198).

<sup>615</sup> *See* Recitals (203) - (224).

<sup>616</sup> *See* Recital (162); [...].

<sup>617</sup> *See* Recital (210).

<sup>618</sup> For involvement in sales price coordination, *see* Recitals (85) - (89), (99)- (101), (109), (112) - (114) and for involvement in purchase price coordination, *see* Recitals (169) - (180).

<sup>619</sup> *See* Recital (250).

<sup>620</sup> *See* Recitals (88), (99) and (176).

<sup>621</sup> *See* Recitals (88) and (122).

<sup>622</sup> *See* the reaction of Stührk in Recital (122) when being informed of the end of the conflict between Heiploeg and Kok Seafood.



### 5.3.9. *Argument of the parties*

#### 5.3.9.1. Klaas Puul

(408) Klaas Puul considers that the anticompetitive behaviour reported formed one cartel covering the entire market for the purchase and sales of North Sea shrimps.<sup>623</sup> Klaas Puul confirmed this view during the oral hearing.

#### 5.3.9.2. Heiploeg

(409) As mentioned in recital (355), Heiploeg admits involvement to a few instances for which it has no explanation, and claims that these were limited incidents that are too short and too far away from each other in terms of time and content for supporting the conclusion that Heiploeg participated in one single a price fixing and market sharing cartel for the period 2000 to 2009.

(410) But it has been explained before that Heiploeg's theory of few limited and unrelated anticompetitive instances fails because it can be established that Heiploeg's involvement went way beyond these few instances.<sup>624</sup>

(411) The same applies to Heiploeg's arguments that evidence for price coordination with respect to customer [...] in a specific geographic area cannot be used as evidence for a wider price coordination beyond this customer or beyond this geographic area.

(412) Heiploeg's argument that the different markets do not operate in the same or that its subsidiaries operated in an autonomous way is not substantiated by any further evidence. On the contrary, the Commission has already explained the links between geographic markets<sup>625</sup>, that various individuals concerned had functions across borders<sup>626</sup> and that there was reporting – also on information exchanges - to the headquarter.<sup>627</sup>

#### 5.3.9.3. Stührk

(413) Stührk admits to the existence of an infringement but notes that its involvement was limited to Germany, and that it did not deliberately participate in a Europe wide price and market sharing cartel.

(414) But this argument does not mean that Stührk participated in a separate infringement. Prices were very much linked across borders and Stührk admits that it could presume that the Belgian [...] price had an influence also in Germany.<sup>628</sup> As a consequence, Stührk could also foresee that the German price setting formed part of an overall objective to influence the price level of North Sea shrimps more widely. To the extent that Stührk's participation was limited to Germany, this will be reflected in its value of sales to be taken into account for the fine.

(415) Stührk also argues that its participation did not go beyond coordination for customer [...].

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<sup>623</sup> [...]

<sup>624</sup> See Recital (338).

<sup>625</sup> See Recitals (392) - (395).

<sup>626</sup> See Recital (12).

<sup>627</sup> See Recital (149).

<sup>628</sup> [...]

(416) But the Commission has already explained above that the [...] price had an impact beyond this customer.<sup>629</sup> Moreover, the evidence on file also shows that contacts between Heiploeg and Stührk also spread to other customers<sup>630</sup> and purchase prices.<sup>631</sup> Stührk also admitted in its reply to the Statement of Objections that it happened that it was informed, without asking, about the prices of its competitors.<sup>632</sup> In any way, even if prices for other customers were not directly agreed or exchanged with other traders, it remains that Stührk, when setting the prices for these customers, indirectly must have taken into account the general price evolution for customer [...].

#### 5.3.9.4. Kok Seafood

(417) Kok Seafood admits that it had the strong impression that there was some coordination going on between Heiploeg and Klaas Puul, but claims that it was not aware let alone involved in price coordination with or between Heiploeg and Klaas Puul. Any hidden anticompetitive clause in its long-term contract with Heiploeg, if at all,<sup>633</sup> was purely a Heiploeg interpretation, not shared by Kok Seafood. The facts on the contrary demonstrate that Kok Seafood actually did step up competition with Heiploeg and Klaas Puul.

(418) The fact that Kok Seafood did not directly (have to) participate in price coordination itself should in no way detract from the assessment of its participation in the cartel as a whole. On the contrary, the facts demonstrate that Kok Seafood was well informed of the existence of anticompetitive arrangements between Heiploeg and Klaas Puul and was in contact with both of them, also concerning prices.<sup>634</sup> Through these contacts, Kok Seafood was also instrumental in passing on information from Heiploeg and Klaas Puul to other competitors, with the purpose of improving the general price level.<sup>635</sup>

(419) Kok Seafood and Heiploeg explain that it was only normal for Kok Seafood to take an interest in Heiploeg's price development, since it was paid in function of the Heiploeg price. This is, according to Kok Seafood, also the reason why it contacted not only Heiploeg, but also Klaas Puul or other traders, i.e. to verify if the price that Kok Seafood received from Heiploeg was market conform.

(420) Kok Seafood asserts, for instance with respect to the conversation with Klaas Puul mentioned in Recital (103) of this Decision, that it cannot be deducted from these conversations that it could or should be aware that the price was agreed upon between Heiploeg and Klaas Puul.

(421) But this argument ignores that in this conversation Klaas Puul clearly refers to a price that was agreed upon and to a discussion with Heiploeg in this respect.

(422) Kok Seafood further claims that these conversations, such as the ones with other traders or with Heiploeg referred at in Recitals (110), (184) or (211) of this Decision, to the extent that they refer to contacts between Heiploeg and Klaas Puul, do not reveal what Kok Seafood knew exactly about the content of these contacts or how

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<sup>629</sup> See Recitals (42) - (51) and (339) - (344).

<sup>630</sup> See Recitals (87), (101) and (109), which is admitted by Stührk, at least for customer [...].

<sup>631</sup> See Recitals (169) - (180).

<sup>632</sup> [...]

<sup>633</sup> See Recitals (368) to (371).

<sup>634</sup> See Recitals (206) - (215).

<sup>635</sup> See for instance Recitals (185), (194) and (197).

Kok Seafood or its conversation partner obtained such information. Kok Seafood claims that some of these conversations exactly demonstrate that Heiploeg and Klaas Puul competed with each other.

- (423) It is very well possible that Heiploeg did not inform Kok Seafood about all details of the discussions with Klaas Puul. Kok Seafood also did not have to be aware in detail on the details of the discussions.
- (424) But Kok Seafood did not only rely on information directly received from Heiploeg. Kok Seafood also discussed the market with Klaas Puul and other traders. Sometimes Kok Seafood was thus also indirectly informed about the contacts between Heiploeg and Klaas Puul.<sup>636</sup>
- (425) The evidence on file indicates that in these conversations with Heiploeg, Klaas Puul or other traders, the relation between Heiploeg and Klaas Puul was prominent. It confirms that Kok Seafood was aware of the key-elements of the anti-competitive arrangements between Heiploeg and Klaas Puul. This goes beyond a normal interest in the Heiploeg price. The conversations also demonstrate that Kok Seafood was not opposed to the existence of such collusive contacts between Heiploeg and Klaas Puul but took them for granted.
- (426) To the extent that Kok Seafood became aware through these conversations of discussions or even conflicting opinions between Heiploeg and Klaas Puul on the price setting, this shows that Kok Seafood knew that competition between them, if any, was limited and that both undertakings adapted their pricing strategy to each other following contacts. Kok Seafood was indeed very well aware that Heiploeg needed the support of Klaas Puul for price increases and that they were in contact also on purchase prices.
- (427) Kok Seafood admits that it was instrumental in transferring price information from Heiploeg to [...] and in establishing contacts between Klaas Puul and [...]. But Kok Seafood denies that it can be deduced from these events that Kok Seafood was aware of the existence of anticompetitive contacts between Heiploeg and Klaas Puul.
- (428) However, in the context of general awareness of Kok Seafood on the existence of collusion between Heiploeg and Klaas Puul, these actions cannot be isolated, but form part of the role that Kok Seafood played in support of the cartel.
- (429) It is correct that Kok Seafood set up a joint venture with another trader at the end of 2007.<sup>637</sup> It was set up at the time when Kok Seafood had a conflict with Heiploeg over the exact conditions and remuneration under the contract. It therefore may have been a circumvention of this contract and its hidden anticompetitive clause. The competition created by this joint venture is however limited and not necessarily entirely new business. It may include existing business of Kok Seafood's contract partner in the joint venture.
- (430) The development of business outside the contract in any way does not take away the fact that Kok Seafood was well aware of the anticompetitive interpretation and object of its contract with Heiploeg. Together with its awareness of widespread coordination between Heiploeg and Klaas Puul and that it indirectly benefitted from

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<sup>636</sup> See for instance Recital (152).

<sup>637</sup> See Recital (26).

such coordination through its remuneration under the contract, Kok Seafood could not be unaware that it played a specific role in the complex of arrangements.

- (431) Kok Seafood finally argues that even if the Commission can prove the knowledge of Kok Seafood of anticompetitive arrangements between Heiploeg and Klaas Puul, this does not make Kok Seafood accomplice in these arrangements.
- (432) But the Commission concludes that Kok Seafood was implicated in the overall complex of arrangements on the basis of the fact that Kok Seafood not only knew that it helped Heiploeg and Klaas Puul to reduce competition, but also benefitted from the cartel through the price it received from Heiploeg for its shrimps. The Commission acknowledges that the role of Kok Seafood in the cartel was specific; this circumstance will be reflected in the fine, but it does not take away from the fact that Kok Seafood knowingly contributed to the cartel.

#### **5.4. Restriction of competition**

- (433) Article 101 TFEU may apply to agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the internal market, such as those which: (i) directly/indirectly fix purchasing/selling prices or any other trading conditions; (ii) limit or control production and markets; (iii) share markets or sources of supply.
- (434) According to settled case law, there is no need for the Commission to demonstrate the existence of actual effects of an infringement for the purposes of applying Article 101(1) TFEU, where the infringement has as its object the prevention, restriction or distortion of competition within the internal market.
- (435) The cartel participants in this case engaged in price-fixing and some of them also in market sharing and customer allocation. These agreements and concerted practices were implemented on numerous occasions and therefore necessarily produced effects on competition within the EU.<sup>638</sup> Moreover, since this conduct had the object of restricting competition, there is no further need to demonstrate the actual anti-competitive effects of this behaviour.

#### **5.5. Effect on trade between Member States**

- (436) Article 101 TFEU concerns agreements and concerted practices which affect the structure of competition within the internal market or otherwise partition markets along geographic lines. It is not required that these agreements or concerted practices actually affect trade between Member States, when it can be established that they are capable of having such an effect.<sup>639</sup> According to constant case law, "*an agreement between undertakings may affect trade between Member States when it is possible to foresee with a sufficient degree of probability on the basis of a set of objective*

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<sup>638</sup> Price changes were coordinated: see for instance Recitals (73), (75), (78), (83), (85), (87), (88), (90), (93), (99), (101), (103), (108), (109), (110), (112), (115) and (116) on sales price coordination and Recitals (145), (146), (149), (150), (152) and (170) - (180) on purchase price coordination; customer allocations were respected: see for instance Recitals (124), (125), (127), (128), (129), (131), (133), (135) and (137); and output restrictions were put into practice: *see* Recitals (155) - (167) .

<sup>639</sup> Case C-306/96 *Javico*, [1998] ECR I-1983, Recitals 15-17; Case C-238/05 *Asnef-Equifax* [2006] ECR I-1125, Recital 43.

*factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".*<sup>640</sup>

- (437) The arrangements that are the subject of this Decision had an appreciable effect on trade between Member States. The participants in the infringement cover together easily more than 75% of the supplies of North Sea shrimps in the EU<sup>641</sup> and at least 2/3 of their combined turnover was sold cross-border.<sup>642</sup> The conduct that is described in this Decision related at least to Belgium, Germany, France and the Netherlands.<sup>643</sup> It affected specific customers in these countries<sup>644</sup>. The anticompetitive behaviour also affected other North Sea shrimp traders<sup>645</sup> for instance via attempts to dissuade traders located outside the Netherlands from purchasing shrimps at auctions in the Netherlands.<sup>646</sup> It can be concluded that the arrangements directly or indirectly affected the North Sea shrimps trade in the entire EU.

## **5.6. Application of Article 101(3) TFEU**

- (438) None of the parties to the present proceeding have claimed that their agreements or concerted practices contributed to improving the production or distribution of North Sea shrimps or to promoting technical or economic progress. There is also no indication that these agreements or concerted practices entailed any benefits or otherwise promoted technical or economic progress.
- (439) Only for arrangements concerning the minimum size of the sieves, Heiploeg refers to such benefit and the clearance already obtained from the Dutch Competition Authority. But, as explained above<sup>647</sup> this clearance was informal and obtained for future arrangements. More importantly, clearance was given without the knowledge that various traders were still involved in anticompetitive behaviour and that these arrangements for minimum sieving sizes could strengthen this collusion in the market.
- (440) On this basis, the conditions of Article 101(3) TFEU are not fulfilled in this case.

## **6. DURATION OF THE INFRINGEMENT**

### **6.1. Heiploeg**

- (441) The total duration of Heiploeg's participation in the cartel is 8 years and 6 months. Its participation started on 21 June 2000 with the meeting with Klaas Puul in Wieringerwerf<sup>648</sup> and must in principle have ended on 13 January 2009, when Klaas

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<sup>640</sup> Case 42/84 *Remia* and Others [1985] ECR 2545, Paragraph 22; Case C-238/05 *Asnef-Equifax* [2006] ECR I-1125, Recital 34 and *Cimenteries CBR and Others v Commission*, cited above, Paragraph 491.

<sup>641</sup> See Recital (7).

<sup>642</sup> Average percentage. The individual export percentages for Stührk and Kok Seafood are lower. Source data: [...]. Data used are 2008-2009.

<sup>643</sup> See Recitals (69) - (122) for sales and Recitals (143) - (180) for purchases.

<sup>644</sup> See Recitals (80), (82), (109), (115), (127), (128) and (128) for Belgian customers; Recitals (84), (86), (87), (98), (99), (108), (110) and (151) for Germany; Recitals (74), (124), (124), (125) and (127) for the Netherlands and Recitals (49), (89) and (90) for France.

<sup>645</sup> See Recitals (181) - (198).

<sup>646</sup> See Recitals (155) - (168).

<sup>647</sup> See Recitals (362) - (364).

<sup>648</sup> See Recital (69).

Puul ended the cartel by approaching the Commission and stopping its further participation to the cartel.

- (442) As mentioned below in Recital (463) Heiploeg Holding BV is only held liable as from 3 February 2006, i.e. for a period 2 years and 11 months.
- (443) There is no evidence of Heiploeg ending its participation during this period. On the contrary, there is consistent evidence referring to Heiploeg's participation on specific dates or periods.<sup>649</sup>
- (444) Heiploeg contests the evidence for the meeting of 21 June 2000 and therefore also the starting date of its participation. The first event that Heiploeg does not contest dates from 26 January 2001. But the Commission has already explained why it considers that the evidence for the meeting of 21 June 2000 is credible and therefore maintains this date as starting date for the participation of Heiploeg in the infringement.
- (445) Heiploeg also claims that events discussed at the meeting of 21 January 2001 took place before and therefore cannot form part of the infringement that is the subject of this decision.<sup>650</sup> But agreements or concerted practices not to compete actively for certain customers, even if agreed or started before 21 January 2001<sup>651</sup>, continue to take effect as long as there is no evidence that the undertakings concerned actively started competing for these customers. This argument therefore supports the existence of such practices, at least on 21 January 2001.

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<sup>649</sup> The evidence in this decision with respect to Heiploeg relates for instance to the following dates: 21 June 2000 (*See* Recital (73)), October 2000 (*See* Recital (76)), 26 January 2001 (*See* Recital(78)), 11 March 2003 (*See* Recital (88)), 14 March 2003 (*See* Recital (89)), 26 March 2003 (*See* Recital (127)), 28 April 2003 (*See* Recital (151)), 30 July 2003 (*See* Recital (90)), 12 January 2004 (*See* Recital (170)), 25 February 2004 (*See* Recitals (92) and (127) to (131)), 23 July 2004 (*See* Recital (146)), December 2004 (*See* Recital (206)), early 2005 (*See* Recital (137)), February 2005 (*See* Recital (152), (189)), April 2005 (*See* Recital (202)), 19 September 2005 (*See* Recital (172)), 23 September 2005 (*See* Recital (173)), December 2005 (*See* Recital (122)), 25 April 2006 (*See* Recital (212)), September 2006 (*See* Recital (213)), 8 September 2006 (*See* Recitals (101 and (225)), 14 September 2006 (*See* Recital (214)), 27 September 2006 *See* Recital (128)), 30 March 2007 (*See* Recital (175)), April 2007 (*See* Recital (211)), 3 May 2007 (*See* Recital (176)), July 2007 (*See* Recital (157)), 16 July 2007 (*See* Recitals (177) and (177)), 2 August 2007 (*See* Recital (178)), 25 September 2007 (*See* Recital (109)), 29 September 2007 (*See* Recital (162)), 4 October 2007 (*See* Recital (215)), 11 October 2007 (*See* Recital (216)), 23 November 2007 (*See* Recital (163)), 2008 (*See* Recital (165)), 15 January 2008 (*See* Recital (115)), 15 February 2008 (*See* Recital (118)), February 2008 ((152) and (189)), July-August 2008 (*See* Recital (154)) and 31 October 2008 (*See* Recital (120)) . The evidence in this decision with respect to Heiploeg also relates to the following periods: meetings in Harlingen from 2000 to 2003 (*See* Recital (83)); a strategic alliance with Kok Seafood since 12 October 2000 (*See* Recital (57)), renewed in 2005 and reconfirmed in 2009; arrangements for [...] in Belgium since 2001 (*See* Recital (56)), for [...] between 2002 and 2008 (*See* Recital (74)), for [...] at least in 2003 (*See* Paragraph (124)) and for [...] until 2006 (*See* Recital (124)); arrangements for contract fishing prices in Denmark and Germany since 2000 and since 2005 also in the Netherlands (*See* Recital (56)); purchase price proposals in Denmark between 2006 and 2009 (*See* Recital (174)); market sharing agreement for purchases at the auctions until 2004/2005 (*See* Recital (156)).

<sup>650</sup> [...]

<sup>651</sup> *See* Recital (128).

- (446) Heiploeg also argues that there is no evidence on file of Heiploeg's involvement in the period of 2007 and 2008. But this argument not only fails again to see the events in their wider context, it also ignores the evidence brought forward for that period.<sup>652</sup>
- (447) The participation is considered to have ended on 13 January 2009, when Klaas Puul ended the cartel by approaching the Commission and stopping its further participation. Stührk also reported possible anticompetitive conduct of Heiploeg after that period, but these events will not be taken into account for the duration of the infringement that is the subject of this decision, since these events were only reported after the Statement of Objections and Heiploeg did not have the possibility to properly defend itself against these new allegations.<sup>653</sup>

## 6.2. Klaas Puul

- (448) The total duration of Klaas Puul's participation in the cartel is 8 years and 6 months. Its participation started on 21 June 2000 with the meeting with Heiploeg in Wieringerwerf<sup>654</sup> and ended on 13 January 2009 when Klaas Puul first approached the Commission in the framework of the Leniency Notice.<sup>655</sup> There is no evidence of Klaas Puul ending its participation during this period. On the contrary, there is consistent evidence referring to its participation on specific dates or periods.<sup>656</sup>

## 6.3. Stührk

- (449) The total duration of Stührk's participation in the cartel is 4 years and 7 months. Its participation started on 14 March 2003, when it was informed by Heiploeg about the prices Heiploeg was going to offer to [...] <sup>657</sup> and the last evidence of its participation goes back to 5 November 2007.<sup>658</sup>

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<sup>652</sup> See Recitals (175), (211), (176), (157), (177), (178), (109), (162), (215), (216), (163), (165), (115), (118), (152), (189), (154), (120).

<sup>653</sup> See Recital (180).

<sup>654</sup> See Recital (69).

<sup>655</sup> See Recital (32).

<sup>656</sup> Between 21 June 2000 and 13 January 2009, Klaas Puul participated actively and continuously in the cartel. The evidence relates, in particular, to the following dates: 21 June 2000 (*See* Recital (73)), 26 January 2001 (*See* Recital (78)), 2003 (Meetings between Heiploeg and Klaas Puul in Harlingen. *See* Recital (124)), 11 March 2003 (*See* Recital (88)), 25 February 2004 (*See* Recital (92)), 23 July 2004 (*See* Recital (146)), early 2005 (*See* Recital (137)), 23 September 2005 (*See* Recital (173)), 8 September 2006 (*See* Recitals (101) and (225)), 14 September 2006 (*See* Recital (102)), 25 September 2007 (*See* Recital (109)), 3 October 2007 (*See* Recital 1 (196)), 15 January 2008 (*See* Recital (115)), 15 February 2008 (*See* Recital (118)), February 2008 (*See* Recital (152), (189)), July-August 2008 (*See* Recital (154)), 31 October 2008 (*See* Recital (120)). The evidence also relates to the following periods: meetings in Harlingen from 2000 to 2003 (*See* Recital (83)); arrangements for [...] in Belgium since 2001 (*See* Recital (56)), for [...] between 2002 and 2008 (*See* Recital (74)), for [...] at least in 2003 (*See* Paragraph (124)) and for [...] until 2006 (*See* Recital (124)); arrangements for contract fishing prices in Denmark and Germany since 2000 and since 2005 also in the Netherlands (*See* Recital (56)); purchase price proposals in Denmark between 2006 and 2009 (*See* Recital (174)). During the first period of the infringement (until 2004) Heiploeg and Klaas Puul operated under a market sharing agreement for purchases at fish auctions (*See* Recital (156)).

<sup>657</sup> *See* Recital (85).

<sup>658</sup> *See* Recital (112).

- (450) There is no evidence of Stührk ending its participation during that period. On the contrary, there is consistent evidence referring to its participation on specific dates or periods.<sup>659</sup>

#### **6.4. Kok Seafood**

- (451) The established total duration of Kok Seafood's participation in the cartel is 3 years and 11 months. Kok Seafood concluded a long-term supply agreement with Heiploeg already in October 2000, but it can be established that at least at the date of renewal of this agreement, i.e. on 11 February 2005, Kok Seafood was aware of the existence of collusive contacts between Heiploeg and Klaas Puul and knew or could not have been unaware of the anticompetitive objective of its contract with Heiploeg in this context of coordination between Heiploeg and Klaas Puul.<sup>660</sup>
- (452) For the purpose of this Decision, 11 February 2005 is considered to be the starting date of Kok Seafood's participation in the cartel. Any argument of Kok Seafood that evidence before 11 February 2005 should not be taken into account is to be rejected, because such evidence<sup>661</sup> is relevant for demonstrating the knowledge of Kok Seafood at the time of the renewal of its contract with Heiploeg. Likewise, arguments of Kok Seafood that evidence from the period after 11 February 2005 is also irrelevant for demonstrating that Kok Seafood renewed its contract with certain knowledge of the existence of collusion between Heiploeg and Klaas Puul must be rejected.
- (453) The participation is considered to have ended on 13 January 2009, when Klaas Puul ended the cartel by approaching the Commission and stopping its further participation.
- (454) There is no evidence of Kok Seafood ending its participation during this period. On the contrary, there is consistent evidence referring to Kok Seafood's involvement for specific dates or periods.<sup>662</sup>
- (455) Kok Seafood claims that because of the start of its participation on 11 February 2005 all facts from before that date are irrelevant and should not be taken into account. But the Commission notes that even if it has not been established with certainty that Kok Seafood could have been aware of its role in the cartel before that date, all facts demonstrating that Kok Seafood was aware of the existence of anticompetitive practices between Heiploeg and Klaas Puul before that date are very relevant. It proves that Kok Seafood renewed its contract with Heiploeg knowing that Heiploeg

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<sup>659</sup> The evidence of Stührk's participation for instance relates to the following dates/periods: 14 March 2003 (*See* Recital (84)), 28 April 2003 (*See* Recital (151)), 30 July 2003 (*See* Recital (86)), 12 January 2004 (*See* Recitals (87) and (170)), 7 November 2005 (*See* Recital (174)), 12 December 2005 (*See* Recital (98)), 5 April 2006 (*See* Recital (99)), 16 February 2007 (*See* Recital (175)), 3 May 2007 (*See* Recital (176)), 16 July 2007 (*See* Recitals (177) and (160)), 11 August 2007 (*See* Recital (160)), 16 August 2007 (*See* Recital (160)), 11 September 2007 (*See* Recital (108)) and 5 November 2007 (*See* Recital (112)).

<sup>660</sup> *See* Recitals (402) - (406).

<sup>661</sup> *See* for instance Recital (94).

<sup>662</sup> The evidence for Kok Seafood's involvement relates for instance to the following to the following dates/periods: March 2005 (*See* Recital (206)), April 2005 (*See* Recital (202)), December 2005 (*See* Recital (211)), 27 April 2006 (*See* Recital (101)), 8 September 2006 (*See* Recital (102)), April 2007 (*See* Recital (211)), September 2007 (*See* Recital (109)), 3 October 2007 (*See* Recital (196)), 4 October 2007 (*See* Recital (215)), 15 February 2008 (*See* Recital (118)), February 2008 (*See* Recital (152), (189)) and February 2009 (*See* Recital (123)).



coordinated prices with Klaas Puul, that Kok Seafood was remunerated in function of a cartelised price, and that its partnership with Heiploeg benefitted the cartel.

## **7. ADDRESSEES**

### **7.1. Liability for the infringement**

- (456) Article 101 TFEU applies to undertakings and associations of undertakings. The notion “undertaking” covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.
- (457) The term “undertaking” must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons. In order to determine whether separate legal entities form parts of the same undertaking, regard must be had especially to the economic, organisational and legal links between those entities.
- (458) Where several legal entities may be held liable for the participation in an infringement of one and the same undertaking, they must be regarded as jointly and severally liable for that infringement. In the specific case where a parent company has a 100% shareholding in a subsidiary, the Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company adduces sufficient evidence to show that its subsidiary acted independently on the market.

### **7.2. Addressees of this decision**

#### *7.2.1. Heiploeg*

- (459) The Commission holds Heiploeg BV, Goldfish BV, Heiploeg Beheer BV and Heiploeg Holding BV liable for the infringement committed by Heiploeg
- (460) As established in Chapter 4, Heiploeg BV and Goldfish BV were the main direct participants for Heiploeg in the infringement, through the involvement of [...].
- (461) As most of these individuals also held functions at Heiploeg Beheer BV [...] and Heiploeg Holding BV [...], these entities are equally considered to have participated directly in the infringement.
- (462) Heiploeg Beheer BV and Heiploeg Holding BV are also held jointly and severally liable with Heiploeg BV and Goldfish BV since they exercised decisive influence on the conduct of these subsidiaries on the market during the time of the infringement.
- (463) This control can be assumed, because Heiploeg BV and Goldfish BV were directly or indirectly wholly or almost wholly owned subsidiaries of Heiploeg Beheer BV and the latter was directly or indirectly wholly-owned by Heiploeg Holding BV as from 3 February 2006. The overlap between functions on the boards of Heiploeg BV, Goldfish BV, Heiploeg Beheer BV and Heiploeg Holding BV confirms this assumption.
- (464) Heiploeg BV, Goldfish BV and Heiploeg Beheer BV are liable for the entire duration of the infringement of Heiploeg as established in Chapter 6 and Heiploeg Holding BV is held liable as from 3 February 2006.
- (465) Heiploeg notes that it was in the hands of various private equity investors consecutively and that it would be unfair to put the burden of a cartel fine on Heiploeg exclusively without taking into account the responsibility of these ultimate parent companies.

- (466) Heiploeg however never raised this issue during the administrative investigation<sup>663</sup>, and the Commission is barred from adopting a Decision against entities that were not addressed in a Statement of Objections. But nothing prevents Heiploeg from asking/claiming other companies to contribute to the payment of the fine, if it finds that these companies have the capacity and a duty to contribute.

#### 7.2.2. *Klaas Puul*

- (467) The Commission holds Klaas Puul BV, Klaas Puul Beheer BV and Klaas Puul Holding BV liable for the infringement committed by Klaas Puul.
- (468) As established in Chapter 4, Klaas Puul BV was the main direct participant for Klaas Puul in the infringement, through the involvement of [...].
- (469) [...] Klaas Puul Beheer BV [...] and Klaas Puul Holding BV [...], these entities are equally considered to have participated directly in the infringement. Moreover, Klaas Puul Beheer BV and Klaas Puul Holding BV are also held jointly and severally liable with Klaas Puul BV since they exercised decisive influence on the conduct of Klaas Puul BV on the market during the time of the infringement.
- (470) This control can be assumed, because Klaas Puul BV was throughout the period of the infringement wholly owned by Klaas Puul Beheer BV, and the latter was wholly owned by Klaas Puul Holding BV until 24 November 2006. But even after 24 November 2006, when Klaas Puul Holding BV transferred the majority of shares of Klaas Puul Beheer BV, Klaas Puul Holding BV kept the majority of votes and remained the only statutory director under the articles of association of Klaas Puul Beheer BV. The overlap between functions on the boards of Klaas Puul BV, Klaas Puul Beheer BV and Klaas Puul Holding BV also confirms the assumption that Klaas Puul Beheer BV and Klaas Puul Holding BV exercised decisive influence over Klaas Puul BV.
- (471) Klaas Puul BV, Klaas Puul Beheer BV and Klaas Puul Holding BV are liable for the entire duration of the infringement of Klaas Puul established in Chapter 6.

#### 7.2.3. *Stührk*

- (472) As established in Chapter 4, Stührk Delikatessen Import GmbH & Co.KG was the direct participant for Stührk in the infringement, through the involvement of [...].
- (473) The Commission therefore holds Stührk Delikatessen Import GmbH & Co.KG liable for the infringement committed by Stührk, and this for the entire duration of the infringement of Stührk as established in Chapter 6.

#### 7.2.4. *Kok Seafood*

- (474) As established in Chapter 4, Kok Seafood directly participated in anticompetitive contacts via [...] of Holding L.J.M. Kok BV and its wholly owned subsidiary L. Kok International Seafood BV.
- (475) The Commission therefore holds L. Kok International Seafood BV and Holding L.J.M. Kok BV liable for the infringement committed by Kok Seafood, and this for the entire duration of the infringement of Kok Seafood as established in Chapter 6.

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<sup>663</sup> On the contrary, Heiploeg and its private equity investors argued that there was no exercise of decisive influence over Heiploeg.

- (476) Holding L.J.M. Kok BV is also held jointly and severally liable with L. Kok International Seafood BV, since it can be assumed that Holding L.J.M. Kok BV exercised decisive influence over the conduct of its wholly owned subsidiary on the market during the period of the infringement.
- (477) Kok Seafood argues that it has transferred all activities in 2007 to Heyko BV.
- (478) But the issue whether Heyko BV (and its parent Heyko Holding BV) can be held liable for the conduct of Kok Seafood as from this transfer, leaves the liability of L. Kok International Seafood BV and its parent Holding L.J.M. Kok BV intact. Fact is that when the business was transferred to the joint-venture Heyko, the legal entities L. Kok International Seafood BV and Holding L.J.M. Kok BV remained in place. The contract between Heiploeg BV and L. Kok International Seafood BV also remained in place, and supplies to Heiploeg continued to be invoiced through L. Kok International Seafood BV.
- (479) Any liability of Heyko BV (and its parent Heyko Holding BV) is therefore an additional liability, and should not replace the liability of L. Kok International Seafood BV and its parent Holding L.J.M. Kok BV.

## **8. REMEDIES**

### **8.1. Article 7 of Regulation (EC) No 1/2003**

- (480) Given the secrecy in which the infringement of Article 101 TFEU was carried out, it is not possible to determine with absolute certainty that the infringement has ceased. The Commission may therefore by decision require those undertakings to bring the infringement to an end, in so far as they have not already done so, and to refrain from any agreement, concerted practice or decision of an association of undertakings, which may have the same or a similar object or effect, pursuant to Article 7 of Regulation No 1/2003.

### **8.2. Article 23(2) of Regulation (EC) No 1/2003 – Fines**

- (481) The Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 101 TFEU (Article 23(2) of Regulation No 1/2003). For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.
- (482) The cartel participants committed the infringement intentionally. They were aware of the illegal character of their arrangements and they attempted to conceal them. In any event, the undertakings concerned acted at least negligently. A previous investigation of the very same market had led the national competition authority in the Netherlands to find an infringement and impose fines on some of the same undertakings.
- (483) Pursuant to Article 23(3) of Regulation No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. The Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.

(484) In setting the fines to be imposed, the Commission applies the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003<sup>664</sup> (hereafter, “*the Guidelines on fines*”) and the 2006 Leniency Notice. But the Commission may depart from the methodology set out in the Guidelines on fines where this is justified by the particularities of a given case or the need to achieve deterrence in a particular case.<sup>665</sup>

### 8.3. Basic amount of the fine

(485) The basic amount consists of an amount of between 0% and 30% of a company's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the company's participation in the infringement, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.<sup>666</sup>

(486) The basic amount is set by reference to the value of sales.<sup>667</sup> For this purpose, the Commission uses the value of each undertaking's sales of goods to which the infringement relates in the relevant geographic area.<sup>668</sup>

(487) The goods to which the infringement relates are North Sea shrimps (crangon crangon). The relevant geographic area is the entire EU but for Stührk the relevant geographic area is limited to Germany.

(488) The Commission normally takes the sales during the last full business year of participation in the infringement.<sup>669</sup> This would be the business year 2007/2008 for Heiploeg and Klaas Puul, the business year 2008 for Kok Seafood and the business year 2006 for Stührk.

(489) Heiploeg however argued in its reply to the Statement of Objections that the business year 2007/2008 was not representative.

(490) The Commission can indeed confirm that the price of North Sea shrimps is volatile and that in the last full business year of the infringement, the value of sales of Heiploeg was more than 10% above the average for the period 2000 – 2008. For Klaas Puul, the value of sales for 2007/2008 was even more than 40% above the average for that period. For Kok Seafood, on the contrary, the value of sales in 2008 was more than 30% below the average of the period 2005-2008. This can be explained by the business conflict between Kok Seafood and Heiploeg that led to a supply stop for several months in that year and a significant drop in the value of sales. For Stührk, the value of sales in 2006 was very similar to the average of the period 2005-2008 (average value of sales < 2% below the 2006 value of sales).

(491) The Commission concludes that it is more representative to use for every participant the average value of sale of the financial years covered by the individual infringement period.<sup>670</sup>

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<sup>664</sup> OJ C 210, 1.9.2006, p. 2.

<sup>665</sup> Point 37 of the Guidelines on fines.

<sup>666</sup> Points 19 to 26 of the Guidelines on fines.

<sup>667</sup> Point 12 of the Guidelines on fines

<sup>668</sup> Point 14 of the Guidelines on fines.

<sup>669</sup> Point 13 of the Guidelines on fines.

<sup>670</sup> Financial years that fall within the infringement period are taken into account. Financial years that only partially fall within the infringement period are not taken into account.

- (492) Intra-cartel sales have been deducted to avoid double-counting. However, for Kok Seafood any fines calculation based on value of sales is inevitably based on intra-cartel sales, because this undertaking almost exclusively supplies shrimps to Heiploeg. A deduction of these sales from Kok Seafood's value of sales would lead to a de facto impunity from fines. To avoid double-counting, these sales would then have to be deducted from Heiploeg's value of sales, but in the specific circumstances of the case it is considered fairer to split this value of sales on a 50/50 basis between Heiploeg and Kok Seafood for the years that Kok Seafood is held liable for its participation in the cartel.
- (493) On that basis, the following is an overview of the relevant sales in the relevant geographic area taken into account for the undertakings involved in this proceeding:
- in the case of Heiploeg, the value of sales to be taken into account for determining the basic amount of Heiploeg is EUR [...]. This covers the average sales of North Sea shrimps of all Heiploeg entities in the business year 2000/2001 to 2007/2008<sup>671</sup>, but not the sales of North Sea shrimps to other cartel participants in the periods for which these other participants are held liable and only 50% of the sales sourced from Kok Seafood in the period for which Kok Seafood is held liable.<sup>672</sup>
  - in the case of Klaas Puul, the value of sales to be taken into account for determining the basic amount of Klaas Puul is EUR [...]. This covers the average sales of North Sea shrimps of all Klaas Puul entities in the business years 2000/2001 to 2007/2008<sup>673</sup>, but not the sales of North Sea shrimps to other cartel participants in the periods for which these other participants are held liable.<sup>582</sup>
  - in the case of Stührk, the value of sales to be taken into account for determining the basic amount of Stührk is EUR [...]. This covers the average sales of North Sea shrimps of Stührk in the business years 2004 to 2006<sup>674</sup>, but not the sales of North Sea shrimps to other cartel participants in the periods for which these other participants are held liable.
  - in the case of Kok Seafood, the value of sales to be taken into account for determining the basic amount of Kok Seafood is EUR [...]. This covers half of the average sales of North Sea shrimps of L. Kok International Seafood BV to Heiploeg BV in the business years 2006 to 2008<sup>675</sup> (the other half being part of the Heiploeg value of sales).<sup>676</sup>

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<sup>671</sup> The Heiploeg business year runs from 1 April until 31 March. See Annex 1, for the individual (confidential) source data.

<sup>672</sup> See Recital (492).

<sup>673</sup> The Klaas Puul business year runs from 1 April until 31 March. See Annex 2, for the individual (confidential) source data.

<sup>674</sup> Stührk business years equal calendar years. See Annex 3 for the individual (confidential) source data..

<sup>675</sup> Kok Seafood business years equal calendar years. See Annex 4 for the individual (confidential) source data.

<sup>676</sup> See Recital (492).

### 8.3.1. Gravity

- (494) The basic amount consists of an amount between 0% and 30% of a company's value of sale, depending on the degree of gravity of the infringement.<sup>677</sup> For the gravity, the Commission had regard to a number of factors, notable the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.<sup>678</sup>
- (495) Horizontal price-fixing, market-sharing and output-limitation agreements are by their very nature among the most harmful restrictions of competition; the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.<sup>679</sup>
- (496) In addition, the Commission intends in the present case to take into account that the combined market share of the undertakings participating in the infringement was very high.
- (497) Heiploeg argues that the infringement consisted of sporadic incidents that cannot be qualified as a very serious infringement of Article 101 TFEU. However, it has been explained before why this argument is not valid, and that the infringement is far wider and therefore also more serious than Heiploeg claims.<sup>680</sup>
- (498) Given the specific circumstances of this case, taking into account the criteria discussed in recitals (495) and (496), the proportion of the value of sales to be taken into account for the calculation of the gravity should be [...] % for all addressees of this Decision.

### 8.3.2. Duration

- (499) The amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement.<sup>681</sup>
- (500) As established in Chapter 6, the respective duration of the individual participation in the infringement of the undertakings involved is 8 years and 6 months for Heiploeg and Klaas Puul, 4 years and 7 months for Stührk and 3 years and 11 months for Kok Seafood. The joint liability of Heiploeg Holding BV for the fine of Heiploeg is limited to a period of 2 years and 11 months.
- (501) The Commission may round down to the nearest value in months. This means that the multipliers used are 8.5 for Heiploeg and 2.91 for Heiploeg Holding BV, 8.5 for Klaas Puul, 4.58 for Stührk and 3.91 for Kok Seafood.

### 8.3.3. Additional amount

- (502) Irrespective of the duration of the undertakings' participation in the infringement, the Commission includes in the basic amount a sum of between 15% and 25% of the

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<sup>677</sup> Point 21 of the Fines guidelines.

<sup>678</sup> Point 22 of the Fines guidelines.

<sup>679</sup> Point 23 of the Fines guidelines.

<sup>680</sup> See Recital (338).

<sup>681</sup> Point 24 of the Guidelines on fines.

value of sales to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements.<sup>682</sup>

- (503) Given the specific circumstances of this case, and taking into account the criteria discussed above in recitals (495) and (496), the proportion of the value of sales to be taken into account for the additional amount should be [...] % for all addressees of this Decision.

8.3.4. *Calculation and conclusion on basic amounts*

- (504) Based on the criteria explained above, the basic amount of the fine is calculated as follows:

<b>Undertaking</b>	<b>Basic amount (EUR)</b>
Heiploeg out of which Heiploeg holding BV	[...]
Klaas Puul	
Stührk	
Kok Seafood	

**8.4. Adjustment of the basic amount**

- (505) The Commission may take into account circumstances that result in an increase or decrease in the basic amount.<sup>683</sup> The basic amount may be increased where the Commission finds that there are aggravating circumstances.<sup>684</sup> The basic amount may be reduced where mitigating circumstances exist.<sup>685</sup>

8.4.1. *Aggravating circumstances*

- (506) The Statement of Objections foresaw the possibility of increasing the fine of Heiploeg and Klaas Puul on the basis of a previous conviction by the Dutch Competition Authority for a similar infringement of Article 81 of the EC Treaty, now Article 101 TFEU.<sup>686</sup>

- (507) However, the fines of Heiploeg and Klaas Puul are already sufficiently deterrent, reaching the legal maximum, without applying this aggravating circumstance.<sup>687</sup> Under these specific circumstances, there is no need to increase the fine for such aggravating circumstance in this case.

8.4.2. *Mitigating circumstances*

- (508) Most parties claim mitigating circumstances. They first of all point to the concentrated and transparent character of the fishing industries, and the shrimps business in particular, with long term traditions of informal contacts between fishermen and traders. At the various places where shrimps are landed, the traders are physically neighbours of each other, frequently doing business with other. The individuals involved in these small communities know each other personally and some are even family or neighbours of each other. There is only a very thin line between what is visible in the market and what is sensitive commercial information

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<sup>682</sup> Point 25 of the Guidelines on fines.

<sup>683</sup> Point 27 of the Guidelines on fines.

<sup>684</sup> Point 28 of the Guidelines on fines.

<sup>685</sup> Point 29 of the Guidelines on fines.

<sup>686</sup> See Recital (31).

<sup>687</sup> See Recitals (545) - (546).

that should not be exchanged. Fishermen, but also customers like [...], use the price information received from the traders to their own benefit, i.e. to confront the traders with possible better price offers from competitors and play them out against each other. On that basis, it is argued that an infringement, if any, was committed by negligence only and was not intentional.

- (509) It is certainly true that there was a lot of transparency in the North Sea shrimps industry. This argument is however not an attenuating circumstance, but deals with the nature of the infringement.
- (510) As mentioned before, the infringement contains price fixing and market sharing and is therefore considered to be by its very nature a very serious infringement. Heiploeg and Klaas Puul had received an early warning via the investigation and the decision of the Dutch Competition Authority in 2003, and all other shrimps traders had indirectly received this warning as well, not least because many of them were also involved (even though not fined) in this investigation of the Dutch Competition authority. But this national investigation did not seem to have produced a culture change among the shrimps traders. It is therefore not credible that the parties committed such infringement by negligence only.
- (511) The fact that the general business culture in the fishing industries was not paying sufficient attention to compliance with competition rules cannot be used as an excuse for anti-competitive behaviour. On the contrary, in particular in such concentrated markets, parties should not foster transparency but should make sure that there can be healthy competition.
- (512) In addition, the parties make the following individual claims.

#### 8.4.2.1. Heiploeg

- (513) Heiploeg claims that various management changes make it difficult to recall exactly what happened in the past, or cooperate with the Commission.
- (514) But it is noted that various managers involved in the anticompetitive actions were still employed at Heiploeg at the time of the Statement of Objections.<sup>688</sup> Moreover, in its reply to the Statement of Objections, Heiploeg does not seem to have difficulties remembering exactly what happened when it comes to exculpatory information.
- (515) This argument therefore cannot constitute a mitigating circumstance.
- (516) Heiploeg also argues that it deserves a reduction, or at least that the fine should not be increased for deterrence, because it has introduced compliance programmes and has increased staff awareness of competition rules, in particular when [...].
- (517) Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements and to report infringements to the competent authorities, such measures cannot change the reality that infringements occur and need to be sanctioned<sup>689</sup>.
- (518) The Commission observes that [...] <sup>690</sup> and that this event or the subsequent implementations of compliance programmes do not change the fact that an

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<sup>688</sup> [...]

<sup>689</sup> See Joined Cases T-236/01 etc. , *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181, paragraph 343.

<sup>690</sup> See Recital (10).



infringement took place. It even could not stop the infringement and Heiploeg also did not report any anticompetitive conduct to the competition authorities.

- (519) Heiploeg refers to several audits performed by KPMG, at the request of its legal counsel, to control the compliance with competition rules, but it is quite telling that Heiploeg did not provide these audits to the Commission.
- (520) This argument therefore not only implies an admission that there was insufficient supervision throughout the most part of the infringement period, but it also shows that the compliance programme, if any, was insufficient. Such failed compliance programme should not constitute grounds for decreasing the amount of the fine.

#### 8.4.2.2. Stührk

- (521) Stührk admits participation in price exchanges for [...] in Germany until November 2007, but claims that it renounced further participation based on its own decision not to supply [...] any longer. But this claim is not supported by evidence. On the contrary, Stührk equally told the Commission that supplying [...] had become uneconomical.<sup>691</sup> On this basis, it is not possible to establish with certainty that Stührk voluntarily stopped supplying [...] to renounce its participation in the cartel.
- (522) Stührk also points to the heavy responsibility of the two main players, Heiploeg and Klaas Puul. In contrast, Stührk was only a minor player, that was heavily dependent on the strategy of the big traders, and that participated, if at all, only in Germany. Stührk reminds the Commission in its reply to the Statement of Objections that it was heavily dependent on Heiploeg for shrimps in case of volume shortages, and since 2007 also for peeling purposes. As a consequence, Stührk claims that it was in practice impossible for Stührk to deviate much from the pricing policy of Heiploeg or other big traders. In case of substantially more competitive prices offered by Stührk, these big traders would be immediately informed via the fishermen or via their customers and could easily retaliate.
- (523) But the 2006 Guidelines on fines, which are applicable in this case, no longer recognise an undertaking's purely passive role as a mitigating circumstance.<sup>692</sup> According to the 2006 Guidelines on fines, a substantially limited involvement of an undertaking will be taken into account as a mitigating circumstance if there is evidence that during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market. Moreover, where a company considers itself to be the victim of a lack of competition or the anticompetitive practices of its competitors in the market, this does not amount to an obligation to undergo and/or even join this anticompetitive conduct. Undertakings always have the option and choice to report the alleged anticompetitive conduct to the competent competition authorities.
- (524) Still, the list of circumstances set out in point 29 of the 2006 Guidelines is not exhaustive and specific circumstances of the case, in particular whether the undertaking participated in all the aspects of the infringement, must be taken into account.

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<sup>691</sup> [...]

<sup>692</sup> The 1998 Guidelines on fines recognised that the fine could be reduced if the undertaking had taken an exclusively passive or follow-my-leader role in the infringements.

- (525) The participation of Stührk was indeed limited to Germany, where Stührk's involvement in the cartel was moreover of a different kind than the anti-competitive conduct of the main players in the cartel. Stührk never expressly agreed upon prices with competitors, but was informed by Heiploeg of its prices and Stührk adapted its own pricing strategy in function of the information received. There is evidence on file that Stührk tried to purchase shrimps in the Netherlands, but was made understood that this was not possible. Stührk's experience of what happened when it took over customer [...] in the Netherlands also did not prompt it to step up competition outside Germany.<sup>693</sup> Furthermore, Stührk was not involved in any market sharing practices.
- (526) In the specific circumstance of this case, it is therefore proposed to apply a decrease of the fine [...] for Stührk.
- (527) Moreover, Stührk was very cooperative by admitting, outside leniency, to the infringement. Point 29 of the 2006 Guidelines on fines provides that "the basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as: (...) where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so."
- (528) Stührk not only admitted to the infringement, but also provided valuable corroboration of events that were explained by the immunity applicant Klaas Puul, but were denied by Heiploeg. This greatly enhanced the credibility of the statements of Klaas Puul and the solidity of the Commission decision in general.
- (529) Since there was, apart from the immunity applicant Klaas Puul, no other leniency applicant, this admission and corroboration created an exceptional circumstance that enabled the Commission to establish the infringement more easily, in particular in light of the Heiploeg contestations.<sup>694</sup> In the specific circumstances of the case, it is therefore proposed to apply an additional decrease [...] of the fine for Stührk.

#### 8.4.2.3. Kok Seafood

- (530) Kok Seafood brings up that there is no evidence that it directly participated in price fixing or market sharing arrangements. If at all, its participation would have been substantially limited and passive.
- (531) Kok Seafood claims that its actions at least show the willingness to compete, but brings up that it was constantly hindered, mainly by Heiploeg.<sup>695</sup> Moreover, Kok Seafood claims that the Commission's reliance on evidence in the form of transcripts/notes of telephone conversations of Kok Seafood ultimately gives the Commission a distorted and subjective view of the role of Kok Seafood in the events. By emphasising this evidence the Commission would forget that Kok Seafood was in fact a victim of the behaviour of the big shrimp traders, and that its role was certainly not more important than the role of many other shrimp traders, not addressed by this Decision.
- (532) But the fact that Kok Seafood started gathering evidence against Heiploeg and threatened Heiploeg to bring this information to the attention of the competition

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<sup>693</sup> See Recital (100).

<sup>694</sup> See Case T-48/02 *Brouwerij Haacht NV v Commission*, [2005] ECR II-5259, paragraph 104, and the case law cited therein, and *Fuji Electric*, cited above, paragraph 255.

<sup>695</sup> [...]. See also Recitals (158) and (167).

authorities confirms that Kok Seafood had a choice, but decided to go along with the cartel, while covering its position. As to the possible involvement of other traders, Kok Seafood makes speculations or refers to indications in that respect in the Statement of Objections, but stopped short of helping the Commission to detect further anticompetitive conduct, even when the Commission found substantial evidence against Kok Seafood at its premises. This choice does not seem to support Kok Seafood's claim that it was a victim of the cartel.

- (533) Moreover, the 2006 Guidelines on fines, which are applicable in this case, have removed the mitigating circumstance of minor or passive participation and recognise the limited role of an undertaking as a mitigating circumstance only if there is evidence that the involvement in the infringement was indeed substantially limited and that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market.
- (534) However, the list of circumstances set out in point 29 of the 2006 Guidelines is not exhaustive and specific circumstances of the case, in particular whether the undertaking participated in all the aspects of the infringement, must be taken into account.
- (535) In this specific case, it is clear that Kok Seafood did not directly participate in the main aspects of the cartel, such as price fixing agreements. Its role was mainly limited to accepting a contract with Heiploeg under which it was remunerated for supplying shrimps to Heiploeg in function of the cartelised Heiploeg price and that came with the hidden clause that Kok Seafood should not come to the market as a viable competitor.
- (536) The Commission also acknowledges that Kok Seafood may have tried to circumvent this clause by setting up a joint venture with another shrimps wholesaler.<sup>696</sup> Still, Kok Seafood developed a long term conflict with Heiploeg over the interpretation of their contract and it is not clear whether the development of alternative business was one of the causes or a consequence of this conflict with Heiploeg. Most alternative business concerned shrimps related services for other traders (peeling, freezing, packing). Directly competing sales of North Sea shrimps were limited.<sup>697</sup>
- (537) It follows that Kok Seafood had a specific role in the cartel that cannot be compared to the involvement of the main players in the cartel and that should be reflected in its fine. In the specific circumstances of the case, it is therefore proposed to apply a decrease of the fine [...] for Kok Seafood.

#### 8.4.3. *Adaptation of the fine*

- (538) This case is exceptional in the sense that all parties mainly operated on a single market where they participated in a cartel for a relatively long duration. This means in practice that all fines could reach the legal maximum of 10% of total turnover, and the application of this limit would be rather the rule than the exception.
- (539) As already observed by the General Court, this could raise possible concerns in view of the principle that penalties must be specific to the offence and the offender, because it could lead in certain circumstances to a situation where any distinction on

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<sup>696</sup> See Recital (429).

<sup>697</sup> [...]. It is not certain if and to what extent these sales effectively constitute new business or existing business of the other partner in the joint venture that was continued within the joint venture.

the basis of gravity or mitigating circumstances would have no impact on the fines anymore.<sup>698</sup>

- (540) In view of the specific circumstances of this case, the Commission deems it appropriate to exercise its discretion and to apply point 37 of the Guidelines on Fines which allows departing from the methodology of the Guidelines.
- (541) In the present case, the basic amount is adapted in a way that takes into account for each undertaking the proportion that the value of sales of the cartelized product represent of the total turnover, as well as differences between the parties in view of their individual participation in the infringement. Overall, the fines will be set at a level that is proportionate to the infringement and achieves a sufficiently deterrent effect.
- (542) As a result, a reduction will be applied to the calculated fines of all parties. In the specific circumstances of the case, and in view of the fact that all parties are dealing to a different but important extent in North Sea shrimps, it is proposed to apply a decrease [...] to the fine of Stührk, [...] to the fines of Heiploeg and Klaas Puul and [...] to the fine of Kok Seafood.

#### 8.4.4. Conclusion on adjustments of the basic amount

- (543) As a result of mitigating circumstances, based on point 29 of the Guidelines on fines, the fine of Kok Seafood is decreased [...] and the fine of Stührk is decreased [...].
- (544) As a result of the specific circumstances of this case, based on point 37 of the Guidelines on fines, the fine of Stührk is decreased [...], the fines of Heiploeg and Klaas Puul are decreased [...] and the fine of Kok Seafood is decreased [...].

Undertaking	Basic amount	Adjustment (Point 29)		Adaptation (Point 37)	
		(%)	Fine (EUR)	(%)	Fine (EUR)
Heiploeg					
of which					
Heiploeg Holding BV					
Klaas Puul					
Stührk					
Kok Seafood					

#### 8.5. Application of the 10% turnover limit

- (545) Article 23(2) of Regulation No 1/2003 provides that the fine imposed on each undertaking shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision.
- (546) As the fines of Heiploeg and Klaas Puul exceed their legal maximum, they will be reduced to this amount.

Undertaking	Calculated fine	Legal maximum	Amended fine
Heiploeg			
of which			
Heiploeg Holding BV			
Klaas Puul			

<sup>698</sup>

Judgement of 16 June 2011, case T-211/08 *Putters v Commission*, paragraph 75.

Stührk	
Kok Seafood	

## 8.6. Leniency

- (547) Klaas Puul was the first undertaking to inform the Commission about a secret cartel in the North Sea shrimps industry and to apply for immunity from fines on the basis of the 2006 Leniency Notice. The information provided enabled the Commission to adopt a decision to carry out surprise inspections and Klaas Puul was granted conditional immunity from fines.<sup>699</sup>
- (548) Klaas Puul ended its involvement in the infringement and continued to provide the Commission with information throughout the administrative procedure.<sup>700</sup> Klaas Puul had not taken steps to coerce other undertakings to participate in the infringement.
- (549) As a result, the Commission grants Klaas Puul immunity from fines that would otherwise have been imposed on it. The fine to be imposed on Klaas Puul is decreased by 100 % to 0 EUR.
- (550) Stührk applied for leniency on [...].<sup>701</sup> Stührk did not however provide more information than it had already provided in reply to the request for information of the Commission and also in the subsequent meeting of 18 February 2010, Stührk did not provide information with a significant added value.<sup>702</sup> The Commission explained Stührk that an expression of an interest in cooperating is not sufficient to meet the conditions for leniency as outlined in the leniency notice. Stührk was provided with a copy of the leniency notice and would further consider the issue. However, there was no further effort from Stührk to have its expression of interest in a leniency application completed with any further evidence.
- (551) In its reply to the Statement of Objections and the subsequent Oral Hearing Stührk admitted to the infringement in Germany. Since this admission was not made in the context of any application for leniency, the Commission cannot assess it as cooperation under the Leniency Notice. To the extent that this admission was helpful for the Commission, it is however recognised as a mitigating circumstance.<sup>703</sup>
- (552) No other party provided the Commission with a leniency application.

## 8.7. Conclusion: final amount of the individual fines

- (553) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:
- (a) Heiploeg BV  
Goldfish BV  
Heiploeg Beheer BV  
jointly and severally: EUR 14 262 000
- Heiploeg BV

<sup>699</sup> See Recitals (32) to (34).

<sup>700</sup> See Recital (35)

<sup>701</sup> [...]

<sup>702</sup> [...]

<sup>703</sup> See Recital (527) - (529).

- Goldfish BV  
Heiploeg Beheer BV  
Heiploeg Holding BV  
jointly and severally: EUR 12 820 000
- (b) Klaas Puul BV  
Klaas Puul Beheer BV  
Klaas Puul Holding BV  
jointly and severally: EUR 0
- (c) Stührk Delikatessen Import GmbH & Co. KG: EUR 1 132 000
- (d) L. Kok International Seafood BV  
Holding L.J.M. Kok BV  
jointly and severally: EUR 502 000

### **8.8. Inability to pay**

- (554) According to point 35 of the Guidelines on fines, "...the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that the imposition of the fine as provided for in the Decision would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."
- (555) In exercising its discretion under point 35 of the 2006 Guidelines on fines, the Commission carries out an overall assessment of the undertaking's financial situation, with the primary focus on the undertaking's capacity to pay the fine in a specific social and economic context.
- (556) [...] evoked point 35 of the Guidelines on fines in its reply to the Statement of Objections and at the oral Hearing.
- (557) The Commission considered this claim and carefully analysed the available financial data on this undertaking. [...] received requests for information pursuant to Article 18(1) and (2) of Regulation (EC) No 1/2003 asking it to submit details about its individual financial situation and the specific social and economic context it operates in.
- (558) Insofar as the undertaking argues that the estimated fine would have a negative impact on its financial situation, without adducing credible evidence demonstrating its inability to pay the expected fine, the Commission points to settled case law according to which the Commission is not required, when determining the amount of the fine to be imposed, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving

unjustified competitive advantages to undertakings least well adapted to the conditions of the market.<sup>704</sup>

- (559) Accordingly, in recitals (563) to (565), the financial position of [...] and the impact of the fine upon it are assessed in the specific social and economic context. The financial situation of the undertaking concerned is assessed at the time the Decision is adopted and on the basis of the financial data and information submitted by the undertaking.
- (560) In assessing the undertaking's financial situation, the Commission considers the financial statements (annual reports, consisting of a balance sheet, an income statement, a statement of changes in equity, a cash-flow statement and notes) of the last (usually five) financial years, as well as their forecasts for the current year and the next two years. The Commission takes into account and relies upon a number of financial ratios measuring the solidity (in this case, the proportion which the expected fine would represent of the undertaking's equity and assets), its profitability, solvency and liquidity, all of which are commonly used when evaluating risks of bankruptcy. In addition, the Commission takes into account relations with outside financial partners such as banks, on the basis of copies of contracts concluded with those partners in order to assess the undertaking's access to finance and, in particular, the scope of any undrawn credit facilities it may have. The Commission also includes in its analysis the relations with shareholders in order to assess their confidence in the undertaking's economic viability (shareholder relations may be illustrated by recent dividend payments and other outflows of cash paid to the shareholders), as well as the ability of the shareholders to assist the undertaking concerned financially.<sup>705</sup> Attention is paid both to the equity and profitability of the undertaking and, above all, to its solvency, liquidity and cash flow. The analysis is both prospective and retrospective but with a focus on the present and immediate future of the undertaking. The analysis is not purely static but rather dynamic, whilst taking into account consistency over time of the submitted forecasts. The analysis takes into account possible restructuring plans and their state of implementation.
- (561) The fact that an undertaking goes into liquidation does not necessarily mean that there will always be a total loss of asset value and, therefore, this may not, in itself, justify a reduction in the fine which would have otherwise been imposed.<sup>706</sup> This is because liquidations sometimes take place in an organised, voluntary manner, as part of a restructuring plan in which new owners or new management continue to develop the undertaking and its assets. Therefore, the applicant which has invoked an inability to pay needs to demonstrate that good and viable alternative solutions are not available. If there is no credible indication of alternative solutions being available within a reasonably short period of time, which would ensure maintaining the

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<sup>704</sup> See Joined Cases 96/82 etc., *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraphs 54 and 55, and *Dansk Rørindustri and Others v Commission*, cited above, paragraph 327, Case C-308/04 P, *SGL Carbon AG v Commission* [2006] ECR I-5977, paragraph 105.

<sup>705</sup> By analogy to the assessment of "serious and irreparable harm" in the context of interim measures, the Commission bases its assessment of the undertaking's ability to pay on the financial situation of the undertaking as a whole, including its shareholders, irrespective of the finding of liability (Case C-335/99 P (R), *HFB v. Commission*, [1999] ECR I-8705; Case C-7/01 P(R), *FEG v. Commission*, [2001] ECR I-2559), and Case T-410/09 R *Almamet v. Commission* (not yet reported), at paragraphs 47 *et seq.*

<sup>706</sup> See case law above such as *Tokai Carbon and Others v Commission*, cited above, paragraph 372 and Case T-64/02 *Heubach v Commission* [2005] ECR II-5137, Paragraph 163.

undertaking as a going concern, the Commission considers that there is a sufficiently high risk that the undertaking's assets would lose a significant part of their value if, as a result of the fine to be imposed, the undertakings were to be forced into liquidation.

- (562) The inability to pay claim submitted by [...] should be rejected for the following reasons.
- (563) [Confidential]
- (564) [Confidential]
- (565) [Confidential]
- (566) [Confidential]



HAS ADOPTED THIS DECISION:

*Article 1*

The following undertakings have infringed Article 101(1) TFEU by participating, for the periods indicated, in a single and continuous infringement in the North Sea shrimps industry in the EU, and which consisted of sales and/or purchase price fixing and the exchange of sensitive commercial information on prices, customers and volumes, and for some of them also market sharing and customer allocations:

- (a) Heiploeg from 21 June 2000 until 13 January 2009
- (b) Klaas Puul from 21 June 2000 until 13 January 2009
- (c) Stührk from 14 March 2003 until 5 November 2007
- (d) Kok Seafood from 11 February 2005 until 13 January 2009.

*Article 2*

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

- (a) Heiploeg BV,  
Goldfish BV and  
Heiploeg Beheer BV  
jointly and severally for: EUR 14 262 000
- Heiploeg BV,  
Goldfish BV,  
Heiploeg Beheer BV and  
Heiploeg Holding BV  
jointly and severally for: EUR 12 820 000
- (b) Klaas Puul BV,  
Klaas Puul Beheer BV and  
Klaas Puul Holding BV  
jointly and severally for: EUR 0
- (c) Stührk Delikatessen Import GmbH & Co. KG: EUR 1 132 000
- (d) L. Kok International Seafood BV and  
Holding L.J.M. Kok BV  
jointly and severally for: EUR 502 000

The fines shall be paid in euro within three months of the date of the notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT  
1-2, Place de Metz  
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000  
BIC: BCEELULL

Ref.: European Commission – BUFI / COMP/39.633

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012<sup>707</sup>.

### *Article 3*

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article in so far as they have not already done so.

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

### *Article 4*

This Decision is addressed to

- Goldfish BV, Panserweg 14, 9974 SL Zoutkamp, Nederland
- Heiploeg BV, Panserweg 14, 9974 SL Zoutkamp, Nederland
- Heiploeg Beheer BV, Panserweg 14, 9974 SL Zoutkamp, Nederland
- Heiploeg Holding BV, Panserweg 14, 9974 SL Zoutkamp, Nederland
- Holding L.J.M. Kok BV, Voorland 11, 1601 EZ Enkhuizen, Nederland
- Klaas Puul BV, Lupinestraat 1-17, 1131 JT Volendam, Nederland
- Klaas Puul Beheer BV, Lupinestraat 1-17, 1131 JT Volendam, Nederland
- Klaas Puul Holding BV, Lupinestraat 1-17, 1131 JT Volendam, Nederland
- L. Kok International Seafood BV, Voorland 11, 1601 EZ Enkhuizen, Nederland
- Stührk Delikatessen Import GmbH & Co. KG, Alter Kirchweg 31, 25709 Marne, Duitsland

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<sup>707</sup> OJ L 362, 31.12.2012, p. 1.

This Decision shall be enforceable pursuant to Article 299 TFEU.

Done at Brussels,

*For the Commission*

*Vice-President*