



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28.11.2007
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COMMISSION DECISION

of 28 November 2007

**relating to a proceeding under Article 81 of the EC Treaty
and Article 53 of the EEA Agreement**

Case COMP/39165 - Flat glass

(Only the English and French texts are authentic)

(Text with EEA relevance)

To be addressed to:

**Asahi Glass Company Limited
AGC Flat Glass Europe SA/NV
Guardian Europe S.à.r.l.
Guardian Industries Corp.
Pilkington Deutschland AG
Pilkington Group Limited
Pilkington Holding GmbH
Compagnie de Saint-Gobain SA
Saint-Gobain Glass France SA**

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COMMISSION DECISION

of 28 November 2007

**relating to a proceeding under Article 81 of the EC Treaty
and Article 53 of the EEA Agreement**

Case COMP/39165 - Flat glass

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

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 Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 3 January 2006 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 EC Treaty²,

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

Having regard to the final report of the hearing officer in this case,

Whereas:

¹ OJ L 1, 4.1.2003, p.1. Regulation as last amended by Regulation (EC) No 1419/2006 (OJ L 269, 28.9.2006, p. 1).

² OJ L 123, 27.4.2004, p. 18. Regulation as amended by Regulation (EC) No 1792/2006 (OJ L 362, 20.12.2006, p. 1).

1. INTRODUCTION

1.1. Addressees

(1) This Decision is addressed to the following companies:

- Asahi Glass Company Limited
- AGC Flat Glass Europe SA/NV
- Guardian Europe S.à.r.l.
- Guardian Industries Corp.
- Pilkington Deutschland AG
- Pilkington Group Limited
- Pilkington Holding GmbH
- Compagnie de Saint-Gobain SA
- Saint-Gobain Glass France SA

1.2. Summary of the infringement

(2) The addressees of this Decision participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, covering at least the territory of the EEA, by which they fixed price increases, minimum prices and other commercial conditions for four categories of flat glass products. They also exchanged sensitive commercial information.

(3) The cartel lasted at least from 9 January 2004 until 22 February 2005.

(4) Evidence of this infringement has been found in documents copied during inspections at the premises of the undertakings concerned, supplemented by information sent in reply to the Commission's requests for information and by information provided on a voluntary basis.

1.3. World-wide market value

(5) During the year 2004 the annual market value of the products concerned by this Decision was approximately EUR 8 000 million world-wide.³

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

(6) The four product categories concerned by this Decision are flat glass products for use in buildings.

(7) Float glass is the basic flat glass product category. It is by far the most common flat glass type and accounts for more than 90 per cent of flat glass capacity. The float glass process is an uninterrupted process where a stream of molten glass is poured continuously from a furnace onto a large shallow bath of molten tin. The molten glass floats on the tin, as oil floats on a pool of water, and forms a level

³ (...) [Throughout the Decision '(...)' signifies a passage which was removed for publication purposes by the Commission.]

surface. Thickness is controlled by the speed at which solidifying glass ribbon is drawn off from the bath. After annealing (controlled cooling) the glass emerges as a polished product with virtually parallel surfaces.⁴

- (8) Float glass can be produced in different colours and thicknesses and can be processed through on-line and off-line processes in order to get different glass products with additional properties. So called on-line products include the float glass as such and glass products that are produced by further processing on the actual float line. The off-line products are further processed after the float line manufacturing. The additional properties can have different purposes, for instance to control energy usage, to provide safety and security or to decorate and create privacy.
- (9) Low-E glass (or low emissivity glass) is glass to which a low emissive coating has been applied either on-line or off-line. The Low-E coatings are used for creating glass that minimises condensation and heat loss.
- (10) Laminated glass is used where safety and security are required. The German name for this product is Verbundsicherheitsglas, in abbreviated form “VSG”.⁵ It consists of two or more sheets of glass bonded together by means of interlayers. The interlayers can ensure the integrity of the glass by holding the broken pieces in place should damage occur.
- (11) Unprocessed mirrors, or (unprocessed) silvered glass, are produced by the application of a layer of reflective material to one surface of the glass for use as a mirror.

2.2. The undertakings subject to the proceedings

2.2.1. The Asahi/Glaverbel Group

- (12) Asahi Glass Company Limited, based in Tokyo, Japan, is the parent company of the Asahi Group. It is active in glass operations, electronics and display operations, chemical operations and other operations, such as ceramics.
- (13) Asahi Glass Company Limited is the parent company of the Belgian company Glaverbel SA/NV (now named AGC Flat Glass Europe SA/NV, see recital (17)). Since December 2002 Asahi Glass Company Limited owns 100 per cent of the voting rights in Glaverbel SA/NV.⁶
- (14) Glaverbel SA/NV, based in Brussels, Belgium, is the parent company of the Glaverbel Group, which is a sub-group within the Asahi Group. It is active in raw glass (float glass, coated glass, patterned glass, laminated glass and mirrors in large sizes) and processed glass (glass and mirrors for the building industry and for

⁴ (...)

⁵ (...)

⁶ (...)

furnishing and interior decoration, fire resistant glass, and glass for transport and certain other sectors of industry).⁷

- (15) Since April 2002, the business operations within the Asahi Group have been divided into four “in house companies”; the Chemicals company, the Display Company, the Automotive Glass Company and the Flat Glass Company. The Flat Glass Company, which has its headquarters in Brussels, covers three operational regions: Europe, America and Asia. The Glaverbel Group of companies comprises the European business of the Flat Glass Company. In 2004, the Flat Glass Company was renamed AGC Flat Glass.⁸
- (16) Asahi’s world-wide turnover in 2004 was EUR 10 979 million.⁹ Glaverbel’s turnover in 2004 was EUR (...).¹⁰
- (17) On 1 September 2007 Glaverbel SA/NV changed its name into AGC Flat Glass Europe SA/NV. To clarify, it is AGC Flat Glass Europe SA/NV which is the addressee of this Decision, but in the text of the Decision the old name, Glaverbel SA/NV, will be used. Thus, in this Decision, and unless otherwise specified, AGC Flat Glass Europe SA/NV (previously Glaverbel SA/NV) will be referred to as ‘Glaverbel’ and Asahi Glass Company Limited will be referred to as ‘Asahi’.

2.2.2. *The Guardian Group*

- (18) Guardian Industries Corp., based in Michigan, United States of America, is a privately held company and is the ultimate parent company of the Guardian Group. The Guardian Group has been operating in Europe since 1981.¹¹
- (19) The subsidiary Guardian Europe S.à.r.l., based in Dudelange, Grand Duchy of Luxembourg, is the European Headquarters of the activities of the Guardian Group in Europe¹². On 14 December 2004 it changed its legal denomination from Guardian Europe SA to Guardian Europe S.à.r.l.¹³ To clarify, when reference is made in this Decision to the legal entity Guardian Europe S.à.r.l. (previously Guardian Europe SA), the name Guardian Europe S.à.r.l will be used, also for the period prior to 14 December 2004.

⁷ <http://www.glaverbel.be/en/about/profile/profile.cfm>

⁸ (...)

⁹ (...)

¹⁰ (...)

¹¹ <http://www.guardian.com/en/locations.html>, (...).

¹² (...)

¹³ (...)

- (20) Guardian Industries Corp. is the 100 per cent owner of Guardian Europe S.à.r.l. via two intermediate holding companies: (...).¹⁴
- (21) The activities of the Guardian Group in Europe are divided into a Flat Glass Division and an Automotive Glass Division.¹⁵ The total turnover of the group in 2004 was EUR (...).¹⁶
- (22) In this Decision, and unless otherwise specified, companies of the Guardian group which participated in the cartel will be referred to as ‘Guardian’.

2.2.3. *The Pilkington Group*

- (23) Pilkington Group Limited (previously named Pilkington plc, see recital (27)), based in Merseyside, United Kingdom, is the parent company of the Pilkington Group. It is active in manufacturing of glass and glazing products for the building and automotive markets.¹⁷
- (24) Pilkington Group Limited owns 100% (indirectly, through several intermediate companies) of the German holding company Pilkington Holding GmbH, which in turn owns approximately 96% of Pilkington Deutschland AG. Additionally, there is an agreement between Pilkington Holding GmbH and Pilkington Deutschland AG which has been in place since 1989. This agreement allows Pilkington Holding GmbH to exercise direct and unlimited control over Pilkington Deutschland AG. The latter company is active in float glass production, manufacturing of semi finished products (online and offline coated glass products, toughened and laminated glass) and manufacturing of fire protection glass.¹⁸ Pilkington Holding GmbH and Pilkington Deutschland AG are both based in Gelsenkirchen, Germany.
- (25) The activities of the Pilkington Group are divided into two main business lines; Building Products and Automotive Products. The operations within Building Products are organised into four businesses world-wide, of which Building Products Europe (BPE), which is further sub-divided in regions and support functions, comprises the building products operations across Europe.¹⁹
- (26) Pilkington’s world-wide annual turnover in 2004 was EUR 3 528 million.²⁰

¹⁴ (...)

¹⁵ (...)

¹⁶ (...)

¹⁷ (...)

¹⁸ (...)

¹⁹ (...)See also <http://www.pilkington.com/about+pilkington/this+is+pilkington/our+company/two+strong+business+lines.htm>

²⁰ (...)

- (27) The previous name of Pilkington Group Limited was Pilkington plc. The new name was registered on 30 June 2006 as a part of the acquisition by the Japanese company Nippon Sheet Glass Ltd. Through that transaction²¹ Nippon Sheet Glass Ltd acquired sole control of Pilkington Group Limited. Therefore, today, the Pilkington Group is a sub-group within the Nippon Sheet Glass group. Prior to Nippon Sheet Glass Ltd.'s acquisition of sole control of Pilkington Group Limited, it held approximately 20 per cent of the shares. The rest of the shares were floated on the stock market and – apart from Nippon Sheet Glass Limited and fund managers – no shareholder held an interest in excess of 5 per cent.²² To clarify, when reference is made in this Decision to the legal entity Pilkington Group Limited (previously Pilkington plc), the name Pilkington Group Limited will be used, also for the period prior to 30 June 2006.
- (28) In this Decision, and unless otherwise specified, companies of the Pilkington Group which participated in the cartel will be referred to as 'Pilkington'.

2.2.4. *The Saint-Gobain Group*

- (29) Compagnie de Saint-Gobain SA, based in Courbevoie, France is the ultimate parent company of the legal entities that constitute the Saint-Gobain Group. The group is established in more than 50 countries and has about 199 000 employees.²³
- (30) Compagnie de Saint-Gobain SA is active in performance and management of industrial, business, financial, plant, equipment and property operations related to industrial and commercial activities, notably through its subsidiaries and affiliated companies.²⁴ The product areas concerned include, in particular, production, processing and distribution of glass and glass products.²⁵
- (31) The French company Saint-Gobain Glass France SA is active within the flat glass operations of the Saint-Gobain Group. Saint-Gobain Glass France SA is 100 per cent owned by the holding company Vertec SAS, which in turn is a wholly owned subsidiary of Compagnie de Saint-Gobain SA.²⁶
- (32) Vertec SAS and Saint-Gobain Glass France SA are both based in Courbevoie, France.
- (33) The activities of the Saint-Gobain Group are divided into the following sectors: building distribution, High-Performance Materials (HPM), packaging,

²¹ This transaction was notified to the Commission on 28 April 2006, (OJ C 109, 9.5.2006., p. 9.) and was approved by the Commission on 7 June 2006 (Commission press release IP/06/750).

²² (...)

²³ (...).

²⁴ (...)

²⁵ (...)

²⁶ (...)

construction products and flat glass ('Pôle Vitrage'). The flat glass sector, which represents approximately 13 per cent of the Group's activities, is sub-divided into business units, among which the "Saint-Gobain Glass" (SGG) unit is in charge of production, supply and commercialisation of float glass and certain glass products processed from float for building applications in the EEA and world-wide. The operations related to integrated processors and distribution of glazing for building applications were previously integrated within the SGG business unit, but have been organised within the separate business unit "Vitrage Saint-Gobain" since January 2006.²⁷

- (34) The total turnover of the Saint-Gobain group in 2004 was EUR 32 025 million, of which EUR 4 394 million for the flat glass sector.²⁸
- (35) In this Decision, and unless otherwise specified, companies of the Saint-Gobain Group which participated in the cartel will be referred to as 'Saint-Gobain'.

2.2.5. *Other market players*

- (36) GEPVP (Groupement Européen des Producteurs de Verre Plat) is the European association of flat glass manufacturers. It was founded in 1978 and is based in Brussels, Belgium. GEPVP has submitted that its members are Glaverbel (founding member), Guardian Industries Corp. (member since 2004), Pilkington Group Limited (founding member) and Saint-Gobain Glass (part of Saint-Gobain Group (founding member)). Membership of GEPVP is open to any European-based flat glass manufacturer.²⁹ GEPVP activities are subdivided into different committees, such as the Marketing and Communication Committee ("Marcomm").
- (37) The principal activities of GEPVP are to represent the Community flat glass manufacturers as a trade association, to promote the use of flat glass in Member States and world-wide, to encourage European-wide and world-wide standardisation and to provide information on flat glass characteristics, performances and uses.³⁰
- (38) In addition to the addressees of this Decision, which are the major producers and suppliers of flat glass in the EEA (and world-wide), there are also other (minor) players on the EEA market, such as Glas Trösch AG/Euroglas,³¹ Interpane Glas Industrie AG,³² Gruppo Sangalli,³³ Scheuten³⁴ and Şişecam.³⁵

²⁷ (...) see also <http://www.saint-gobain.com/en/html/groupe/metiers.asp>

²⁸ http://www.saint-gobain.com/fr/html/investisseurs/resultats_2004_5bis.asp

²⁹ (...)

³⁰ (...)

³¹ <http://www.luxar.ch> and <http://www.euroglas.com/>

³² <http://www.interpane.de>

³³ <http://www.sangalligroup.com/>

2.3. Description of the market

2.3.1. Supply of flat glass

- (39) Float glass production is highly capital intensive³⁶, and there is a history of commercial relationships, such as cross supply agreements and joint-ventures between the addressees of this Decision and between them and other actors on the market.³⁷
- (40) Today's major global flat glass producers are Asahi/Glaverbel, Nippon/Pilkington, Guardian and Saint-Gobain. Based on information provided by the addressees of this Decision, the world-wide value of the flat glass products concerned in 2004 is estimated to be approximately EUR 8 000 million.³⁸
- (41) The EEA market in 2004 for the products relevant in this proceeding (float glass, low-e, laminated glass and unprocessed mirrors) in total, has been estimated at approximately 7 million tonnes. It is estimated that the relevant sales values and market shares in the EEA in 2004 as regards the undertakings' sales to independent customers were as follows:

Table 1

EEA flat glass sales and market shares in 2004³⁹

2004		EEA sales in EUR million	Market share EEA in %
Glaverbel		(...)	[20-30%]
Guardian		(...)	[20-30%]
Pilkington		(...)	[10-20%]
Saint-Gobain		(...)	[10-20%]
Others (including imports)		(...)	20%
Total		1 700	100%

³⁴ <http://www.scheuten.nl/index.html>

³⁵ <http://www.sisecam.com/>

³⁶ See "Pilkington and the Flat Glass Industry 2006" at <http://www.pilkington.com/resources/pfgi2006.pdf>

³⁷ (...) See also Commission Decision Pilkington-Techint/SIV of 21 December 1993, case No IV/M.358.

³⁸ (...)

³⁹ (...) The sales in the 10 new Member States are included for the time period 1 May 2004 – 31 December 2004.

2.3.2. *Demand for flat glass*

- (42) Demand is largely driven by the building industry and tends to be greatest during periods around March/April and October/November.⁴⁰
- (43) It has been estimated that the growth of producers' sales in the 25 Member States at that time was 2,4% in 2005 and was forecast to be 2,5% - 4% in 2006.⁴¹ Basic float glass is still the biggest flat glass product category, but the demand for value-added glass such as laminated glass and coated glass is increasingly growing due to, for instance, safety requirements. In particular, tougher legislation in the field of energy efficiency is enhancing the demand for low-e glass and other energy saving products.⁴²

2.3.3. *The geographic scope of the flat glass business*

- (44) The flat glass business is a world-wide business where Europe, China and North America together account for 75 per cent of global demand for glass. Europe is the most mature glass area with a high proportion of value-added products.⁴³ In the EEA, the biggest countries (calculated on the basis of sales volume) are Germany, Italy, France and the United Kingdom.⁴⁴
- (45) As regards float glass products produced in the EEA, the Commission has concluded in previous merger decisions⁴⁵ that the market is EEA-wide. Notwithstanding relatively high transport costs and a limit of approximately 600 km of travel distance (by truck) from plant, there is significant cross-border trade. The market has been described as a series of overlapping circles with their centres at the float glass plant. The sales markets of each plant do not cover the whole of the EEA, but since there are a large number of production sites dispersed throughout the EEA and the sales markets overlap, the production sites jointly cover the EEA.

2.3.4. *The parties' arguments in response to the Statement of Objections as regards the description of the market and the Commission's findings*

⁴⁰ (...)

⁴¹ (...) Pilkington has estimated that demand for float glass is growing by nearly 4% per annum, see "Pilkington and the Flat Glass Industry 2006" on <http://www.pilkington.com/resources/pfgi2006.pdf>

⁴² The Kyoto Protocol targets encourage tougher legislation regarding energy saving. See for instance Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 on the energy performance of buildings, OJ L 1, 4.1.2003, p. 65.

⁴³ See "Pilkington and the Flat Glass Industry 2006" on <http://www.pilkington.com/resources/pfgi2006.pdf>

⁴⁴ (...).

⁴⁵ Decision Nippon Sheet Glass/Pilkington of 9 June 2006, case M.4173, see also Decision Glaverbel/PPG of 7 August 1998, Case No M. 1230, Decision Pilkington-Techint/SIV of 21 December 1993, case No IV/M.358. See also Commission Decision of 20 December 2006 on State aid C 12/05 (ex N 611/03) which Germany is planning to implement for E-glass AG.

- (46) Guardian and Pilkington challenged the Commission's description of the market.⁴⁶ Guardian maintains that there are separate regional markets due to the absence of overlapping sales radii (owing to transportation costs), different price levels and lack of homogeneity of market conditions. Pilkington considers that each national market has its own demand characteristics, reflected in, amongst other things, different price levels and non-synchronised price movements, price and supply negotiations with customers on a national basis and the use of national selling organisations.
- (47) Guardian claimed that the merger decisions to which the Commission refers (see footnote 45) did not give clear guidance and that the Commission had not demonstrated why the overlapping circles would create an EEA-wide market. It maintained that the Commission had not provided evidence to corroborate the concept of chains of substitution as required by the Commission Notice on the definition of the relevant market for the purposes of Community competition law⁴⁷, nor any analysis of whether sales markets actually do overlap throughout the EEA and pricing within the overlapping circles is constrained by a chain substitution effect. Finally, it claimed that the Commission had not considered that the geographic scope of the alleged restriction and/or distortion of competition was already set out in the alleged agreements.⁴⁸
- (48) Pilkington observed that it is not necessary to decide finally the exact geographic scope of the relevant market, since the allegations primarily relate to price increases in a limited number of Member States at specific times and the relevant geographic area is limited to those Member States.⁴⁹
- (49) Firstly, in this case, the geographic scope of the infringement is the entire EEA (see for instance recitals (2), (297), (298), (348) and (368) to (371)). For the purpose of establishing the existence of the infringement, it is not relevant whether the market should be defined as separate national markets, as regional markets or as an EEA-wide market.
- (50) Indeed, in *Mannesmannröhren-Werke AG v Commission* the Court of First Instance of the European Communities held in this connection that, assuming it is established “*that the Commission defined the market affected by the infringement found in Article 1 of the contested decision insufficiently or incorrectly in the present case, that circumstance could not have an impact on the existence of that infringement*”⁵⁰.

⁴⁶ (...).

⁴⁷ OJ C 372, 9.12.1997, p. 5.

⁴⁸ Guardian referred to Case T-34/92 *Fiatagri v Commission*, ECR [1994] II-905, paragraph 56.

⁴⁹ (...).

⁵⁰ See judgment of 8 July 2004 in Case T-44/00, *Mannesmannröhren-Werke AG* not yet reported, paragraphs 132 and 133. See also Case T-61/99, *Adriatica di Navigazione Spa*, [2003] ECR II-5349, paragraph 29. The Commission's findings as regards distortion of competition and effect on trade are further dealt with in sub-sections 5.3.3 and 5.3.5.

- (51) In cartel cases, undertakings, by concluding anticompetitive agreements de facto determine the parameters within which they compete with one another. As the Court of First Instance has held in a long line of cases, “ ... for the purposes of applying Article 81 EC, the reason for defining the relevant market, if at all, is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market⁵¹]. Consequently, there is an obligation on the Commission to define the relevant market in a decision applying Article 81 EC only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market”⁵².
- (52) Thus, contrary to what Guardian suggests, defining the market in a cartel case does not call for a degree of precision equal to that which is required when assessing infringements of Article 82 of the Treaty or in certain merger cases. By describing the product categories, the undertakings concerned, the supply and the demand as well as the geographic scope of the flat glass business, the Commission has examined the market and placed the cartel conduct in its relevant context.
- (53) If the actual object of a cartel arrangement is to restrict competition by price coordination, it is not necessary to define the geographic markets in question precisely, provided that actual or potential competition on the territories concerned was necessarily restricted, whether or not those territories constitute "markets" in the strict sense.⁵³ Therefore, if there were several national markets or regional markets, for the purposes of this Decision, the flat glass business could be described as a set of markets (in the strict sense), centred around various plants, covering the EEA.
- (54) Furthermore, documents in the file establish that the geographic scope of the business is EEA-wide and that there is effective competition in the EEA between the cartel members. As already shown in Table 1 the four undertakings have all generated their turnover by sales in the EEA. Glaverbel, Guardian, Pilkington and Saint-Gobain are all members of the GEPVP⁵⁴, which in a complaint regarding a State aid project sent to the Commission, stated that "... the flat glass market is

⁵¹ Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 74, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 1093.

⁵² See judgment in Case T-213/00 *CMA CGM and Others v Commission (FETTCSA)* [2003] ECR II-913, paragraph 206.

⁵³ See Court of First Instance judgment of 18 July 2005, not yet reported, in Case T-241/01, *SAS v Commission*, paragraph 99, judgement of 19 March 2003, Case T-213/00 *CMA CGM (FETTCSA)*, cited above, paragraph 206 and judgement of 14 May 1998, Case T-348/94 *Enso Española v Commission*, [1998] ECR II-1875, paragraph 232.

⁵⁴ Guardian is member since mid-2004.

pan-European with significant inter-state trade".⁵⁵ This finding alone suffices to establish that, according to the GEPVP's members, European wide competition necessarily existed.

- (55) Lastly, documents in the file show that Guardian's sales are not limited to each plant's home market. (...).⁵⁶ The "*Monthly report for the NOR, SWE and FIN area*" contains information inter alia about Guardian's deliveries to that geographic area divided per country and per delivering plant as well pricing information per product and country.⁵⁷ An e-mail with the subject matter "September 2003" shows Guardian's sales in Italy divided per delivering plant.⁵⁸

2.4. Trade between Member States

- (56) In Europe, the Glaverbel Group has industrial locations in Belgium, Czech Republic, France, Germany, Italy, the Netherlands, Poland, Russia, Slovakia, Spain, Sweden and the United Kingdom.⁵⁹ The Guardian Group has plants located in France, Germany, Hungary, Luxemburg, Poland, (...) Spain and the United Kingdom.⁶⁰ The Pilkington Group has float glass manufacturing or processing operations located in Austria, Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Poland, Russia, Sweden, Switzerland and the United Kingdom.⁶¹ The Saint-Gobain Group has flat glass industrial and retail sites located in Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Spain, Sweden, Switzerland and the United Kingdom.^{62,63}
- (57) From those sites and through the commercial relationships mentioned in recital (39), the undertakings supply the EEA market. As described in recital (45), the markets of the plants overlap and there is significant cross-border trade of flat glass across the EEA.

⁵⁵ (...)

⁵⁶ (...)

⁵⁷ (...)

⁵⁸ (...).

⁵⁹ See http://www.glaverbel.com/en/about/indus_location/indus_location.cfm

⁶⁰ See <http://guardian.com/en/locations.html>

⁶¹ See <http://www.pilkington.com/about+pilkington/company+briefing/building+products/default.htm>

⁶² See <http://www.saint-gobain.com/en/html/groupe/implantations.asp>

⁶³ (...).

- (58) The sales figures of Glaverbel, Guardian, Saint-Gobain and Pilkington show that customers can at least be found in practically all 25 Member States and in Norway, Iceland and Liechtenstein.⁶⁴
- (59) Accordingly, there is a substantial volume of trade between Member States and the Contracting Parties to the EEA Agreement in the market for the flat glass products relevant for this proceeding.

3. PROCEDURE

- (60) The Commission initiated the investigation leading to this Decision as a result of information exchanged under Article 12 of Regulation (EC) No 1/2003 as well as informal exchange of information from the German, French, Swedish and British Competition Authorities in late 2004 and early 2005. The information received consisted mainly of letters and/or informal complaints from some customers of the largest Community flat glass suppliers, namely Glaverbel, Saint-Gobain, Pilkington and Guardian, about systematic parallel price increases for similar product ranges and the parallel application of an energy surcharge calculated in similar fashion by those suppliers.
- (61) On 22 and 23 of February 2005 the Commission carried out unannounced inspections at the premises of Pilkington (Pilkington Group Ltd including its subsidiaries Pilkington Glass Products Ltd and Pilkington United Kingdom Ltd in the United Kingdom,⁶⁵ Pilkington Holdings SA including its subsidiary Pilkington France in France⁶⁶ and Pilkington Sverige AB in Sweden⁶⁷), Glaverbel (Glaverbel SA/NV in Belgium⁶⁸ and Glaverbel Holding France and Glaverbel France in France⁶⁹), Saint-Gobain (Compagnie de Saint-Gobain including its subsidiary Saint-Gobain Glass France SA⁷⁰ in France and Glashuset i Sverige AB in Sweden⁷¹) pursuant to Article 20(4) of Regulation (EC) No 1/2003. At the same time, inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003 were carried out on behalf of the Commission by the German and French national competition authorities under Article 22(2) of Regulation (EC) No 1/2003. Those inspections were carried out at the premises of Pilkington Glass France and Pilkington Glass Service S.à.r.l. in France⁷² and at the premises of Pilkington

⁶⁴ As from 1 January 2007 there are 27 Member States. (...)

⁶⁵ (...)

⁶⁶ (...)

⁶⁷ (...)

⁶⁸ (...)

⁶⁹ (...)

⁷⁰ (...)

⁷¹ (...)

⁷² (...)

Holding GmbH including its subsidiary Pilkington Deutschland AG,⁷³ Saint-Gobain Glass Deutschland GmbH including its subsidiary Saint-Gobain Deutsche Glas GmbH⁷⁴ and Guardian Flachglas GmbH in Germany⁷⁵.

- (62) On 15 March 2005 the Commission carried out further unannounced inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003 at the premises of the GEPVP (Brussels, Belgium)⁷⁶ and of Guardian Europe S.à.r.l., including its subsidiary Guardian Luxguard I SA in Luxemburg⁷⁷.
- (63) During those inspections, the Commission inspectors found evidence of agreements and/or concerted practices by the inspected flat glass producers which are described in detail in Chapter 4.
- (64) On 2 March 2005⁷⁸, Asahi Glass Company Limited and all its subsidiaries, including Glaverbel SA/NV, submitted an oral application for immunity from fines as regards flat glass related products or, in the alternative, reduction of fines pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (the “Leniency Notice”)⁷⁹. (...) ⁸⁰(...)⁸¹
- (65) The Commission opened formal proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and Article 2 of Regulation (EC) No 773/2004 in this case on 3 January 2006.⁸² The Commission informed the parties of this on 6 March 2006.⁸³
- (66) On (...) the Commission sent requests for information under Article 18 of Regulation (EC) No 1/2003 to (...), Guardian Industries Corp., Guardian Europe S.à.r.l., Compagnie de Saint-Gobain SA, Pilkington Group Limited and the GEPVP.

73 (...)

74 (...)

75 (...)

76 (...).

77 (...).

78 (...).

79 OJ C 45, 19.2.2002., page 3.

80 (...)

81 (...)

82 (...).

83 (...).

- (67) Guardian Europe S.à.r.l. replied on 10 March 2006.⁸⁴(...)⁸⁵(...)⁸⁶ Saint-Gobain Glass France SA replied on 15 March 2006, supplemented by a reply on 7 April 2006.⁸⁷ GEPVP replied on 17 March 2006, supplemented by a reply on 24 March 2006.⁸⁸ Pilkington Group Limited replied on 31 March 2006.⁸⁹
- (68) Thereafter the Commission has, on several occasions, sent further requests for information under Article 18 of Regulation (EC) No 1/2003 to the undertakings involved in this case.
- (69) (...)⁹⁰,(...)⁹¹,(...)⁹²,(...)⁹³,(...)⁹⁴,(...)⁹⁵(...)⁹⁶.
- (70) On 2 February 2007 the Commission rejected Asahi and Glaverbel's request for immunity under point 8 of the Leniency Notice.⁹⁷ On 5 February 2007 they were notified of that decision.⁹⁸
- (71) Pursuant to point 26 of the Leniency Notice, Glaverbel SA/NV and Asahi Glass Company Limited were informed in writing, on (...), of the Commission's intention to grant those companies a reduction of 30 to 50 % of the fine which would otherwise have been imposed.⁹⁹

84 (...)

85 (...)

86 (...).

87 (...)

88 (...).

89 (...).

90 (...)

91 (...)

92 (...)

93 (...)

94 (...)

95 (...)

96 (...)

97 (...)

98 (...)

99 (...)

- (72) On 9 March 2007 the Commission adopted a Statement of Objections (hereinafter "the SO") which was notified to the parties on 13 and 14 March 2007. The parties simultaneously received a DVD that contained the accessible parts of the Commission's file.
- (73) (...).
- (74) Asahi Glass Comp. Ltd, Glaverbel SA/NV, Compagnie de Saint-Gobain SA, Saint-Gobain Glass France SA, Guardian Industries Corp., Guardian Europe S.à.r.l. and Pilkington (joint reply of Pilkington Group Limited, Pilkington Holding GmbH and Pilkington Deutschland AG) made known in writing to the Commission their views on the SO before the deadline imposed on them.
- (75) Guardian indicated its willingness to express its views orally at a hearing. An Oral Hearing was therefore held on 7 June 2007, in which Guardian, Asahi and Glaverbel participated.
- (76) (...).

4. THE CARTEL

- (77) The evidence relied on by the Commission in this Decision consists of documents found during the inspections, (...) as well as the parties' replies to the Commission's requests for information.
- (78) (...). In their responses to the SO, (...) did not contest the facts as set out by the Commission.
- (79) Guardian, in its response to the SO, acknowledged that its employee was present at meetings, but argued that the Commission had not shown to the requisite legal standard that Guardian had committed an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement. Similarly, Pilkington in its reply acknowledged that the meetings took place, that its employee participated in the meetings and that the notes referred to by the Commission were made by him. Pilkington did, however, disagree with the Commission's characterisation of the meetings and its interpretation of the documentary evidence. Guardian and Pilkington's arguments pertaining to the facts will be addressed as regards price setting in sub-section 4.1.3, as regards each meeting and contact in sub-section 4.2 and generally as regards assessment of the facts and proof of the infringement in sub-section 5.4.

4.1. Basic principles of the cartel

4.1.1. Objectives and organisation of the cartel

- (80) Saint-Gobain, Pilkington and Glaverbel conducted multilateral and bilateral meetings with the object of limiting competition on the European flat glass market.¹⁰⁰ Guardian was informed of the arrangements at least (...) from March 2004 by the representative of Pilkington, who had offered to be the line of

¹⁰⁰ (...)

communication for the competitors not taking part in the meetings.¹⁰¹ Subsequently, Guardian started participating in the meetings.¹⁰²

- (81) The European flat glass market has been characterised by a steady price decrease.¹⁰³ The main purpose of the cartel meetings was to discuss and agree on prices and price increases for flat glass in certain markets in order to reverse the general downward trend for prices. Amongst other things, the participants discussed their main European flat glass customers and the prices they charged to them.¹⁰⁴ (...).¹⁰⁵ The representative of (...) generally did not take any notes during the meetings or would normally throw away notes taken during the meetings shortly afterwards. The other participants would also have discarded their notes as all participants regularly jointly expressed their opinion that the secrecy of the meetings needed to be preserved.¹⁰⁶
- (82) Participants at the meetings were representatives of the flat glass producers who held responsibilities within their respective groups at different levels, including the level of (...).¹⁰⁷ These meetings were held either in hotels and restaurants across Europe or in the fringe of GEPVP meetings.¹⁰⁸
- (83) The product categories discussed in the meetings were float glass, low-e glass, laminated glass and unprocessed mirrors. Float glass is the most important flat glass product category (see recitals (7) and (43)) (...).¹⁰⁹
- (84) The aim of the meetings was to agree on price increases and the timing thereof, including which company was to lead the increase, to establish minimum prices for certain countries or groups of countries, to agree on additional commercial conditions such as bonuses and rebates and to exchange information. The agreements were concluded orally. The exchange of information concerned general price levels, prices applied to certain customers, capacity utilisation, volumes of sales to customers, bonus levels to customers, the question whether road taxes that glass companies had to pay in certain countries should be included

¹⁰¹ (...).

¹⁰² (...).

¹⁰³ (...).

¹⁰⁴ (...).

¹⁰⁵ (...).

¹⁰⁶ (...).

¹⁰⁷ (...).

¹⁰⁸ (...).

¹⁰⁹ (...).

in the prices applied to customers, the financial situation of customers, takeovers or disappearance of customers and new customers on the market.¹¹⁰

- (85) Discussions regarding Germany were understood to also cover Austria, Denmark and (...). Germany was always extensively discussed and formed an overall reference for the entire European flat glass market. Germany would usually, albeit not always, be the first country in relation to which price increases were agreed. If an agreed price increase was successful in Germany, the increase would be extended to first Belgium, the Netherlands and Luxemburg, then France, then subsequently Italy, normally in that sequence, and then to other countries without any regular sequence.¹¹¹
- (86) The meeting of 9 January 2004 is an example of a meeting where a price increase for Germany was discussed which was then supposed to be followed by other countries. In view of the success of the price increase in Germany, the extension of the price increase to other countries, including Belgium, the Netherlands and Luxemburg, was agreed at a subsequent meeting which took place on 2 March 2004.¹¹² Germany was also discussed in the meetings on 20 April 2004 (see recitals (163) and (165)), on 2 December 2004 (table 3, recital (236) and (243)) and 11 February 2005 (recitals (274), (282) and (283)).
- (87) Discussions among competitors also covered particular customers in each market supplied by them. The main discussions relating to Germany were often about (...) and (...). Competitors would exchange prices with regard to those customers.¹¹³

4.1.2. *Price setting in the flat glass sector*

- (88) In the flat glass industry price increases are normally announced by standard letters from the flat glass manufacturers to their regular customers in different countries.
- (89) The prices of flat glass products are normally set on the basis of industry-wide standard sizes for different product categories. The price set for the standard size is used to calculate the prices for other glass products, for instance other thicknesses and/or colours, of that product category.
- (90) Accordingly, in the letters and circulars by which flat glass manufacturers usually announce a price increase of any flat glass product category to their regular customers, the following information is provided (examples taken from the price increase referred to in recital (86)).
- (91) Glaverbel's announcement, dated 26 January 2004¹¹⁴:

¹¹⁰ (...)

¹¹¹ (...) In its response to the SO, Pilkington objected to Germany being a price indicator, see recitals (98) and (102).

¹¹² (...).

¹¹³ (...).

“ <i>Float blank</i> [= clear float]	4 mm	+ (...) €/qm [= €/m^2]
<i>LowE</i>	4 mm	+ (...) €/qm
<i>Spiegel</i> [= mirror]	4 mm	+ (...) €/qm
<i>VSG</i> [= laminated]	6 mm 33.1	+ (...) €/qm ”.

Each line mentions the flat glass product category, followed by the thickness and the price increase per square meter.

- (92) Pilkington's announcement in the “*Glasbrief Januar 2004*” mentions the same price increases, although by referring to the trade mark names of its products in each category.¹¹⁵ ‘Glasbrief’ is a periodical used by Pilkington to i.a. announce price increases to its customers.¹¹⁶
- (93) Saint-Gobain’s announcement, dated 3 February 2004¹¹⁷, provides the same information, referring to both the flat glass product category and the trade mark names of its products in each category.

Saint-Gobain’s announcement contains the following statement:

“*Alle andere Dicken ändern sich entsprechend* [All other thicknesses change correspondingly]”

- (94) Thus, the prices for all other glass thicknesses are derived from these four “reference prices”, by using a matrix of multiplying factors, which is more or less common to the industry sector.¹¹⁸
- (95) The same method was applied as far as the cartel discussions and agreements were concerned. Discussion and agreements on 'float glass' or 'float' related to the 4 mm standard size glass sheet. If a price agreement was reached with respect to that standard size, the competitors could also imply the prices for sheets of glass from 3 mm to 10 mm with the same length and width dimensions as all glass producers would apply the same coefficients to calculate the prices of these other sized glass sheets. Prices of coloured glass are also determined on the basis of fixed coefficients taking clear 4 mm float glass as the basis for calculation. Similarly discussions and agreements concerning 'Low-E' glass related to the general industry reference standard size of 4 mm thickness.¹¹⁹
- (96) As regards laminated glass, the standard format is different in different countries. For instance in Germany, Austria, the United Kingdom, Belgium, the Netherlands,

114 (...)

115 (...).

116 (...)

117 (...).

118 (...).

119 (...).

Luxemburg and Italy the standard format is the same and competitors would agree on the price of this standard format for those Member States. In France, another standard format is used and competitors would agree on the price of that standard size.¹²⁰ As regards unprocessed mirrors, prices for industry-wide standard sizes were discussed and agreed upon in the meetings of the European sales directors.¹²¹

4.1.3. *The parties' arguments in response to the SO as regards price setting in the flat glass sector and the Commission's findings*

- (97) Pilkington and Guardian challenged the Commission's description of price setting in the flat glass sector and the use of price announcements.
- (98) Pilkington claimed that the Commission, by focusing on the general price announcements and disregarding the individual price negotiations, committed an error of assessment. It alleged that the Commission erred in assuming that the price announcements contained in the standard letters were the same as prices actually invoiced to customers or had a direct bearing on invoiced prices¹²². Pilkington also contested that Germany was an indicator as far as prices are concerned.¹²³
- (99) Contrary to what Pilkington argued, the Commission does not assume that the general price announcements are the same as the prices invoiced to customers. It is a recognised fact in the industry, (...) ¹²⁴, that prices are eventually negotiated by the manufacturers with individual customers. The Commission has focused primarily on the agreements pertaining to the price increase announcements, which are for the most part the subjects of the collusive meetings described in this Decision. The fact that prices are eventually negotiated by the manufacturers with individual customers or that price announcements do not have a direct bearing on invoiced prices does not affect the conclusions of the Commission in respect of the agreements regarding the general price increase announcements.
- (100) It should also be noted that the Court of First Instance has already held that price announcements normally have an impact on the final outcome even if the final price is negotiated with the customer.¹²⁵

¹²⁰ (...) the standard format of laminated glass consists of three figures, for example 3.3.1, where the first two figures stand for the thickness of the two sheets of glass, in this case 3 mm, and the latter figure stands for the number of interlayers between the two sheets of glass.

¹²¹ (...).

¹²² (...).

¹²³ (...).

¹²⁴ (...).

¹²⁵ Judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, paragraphs 450-453.

(101) Furthermore, in the cartel meetings considered in this Decision, there were also agreements regarding the application of minimum prices and bonuses/rebates applied to individual customers, notably as regards the meetings on 2 December 2004 and 11 February 2005.¹²⁶

(102) (...)¹²⁷.

(103) (...).¹²⁸

(104) (...).¹²⁹(...)¹³⁰(...).

4.1.4. *The individual participants and their respective positions within the companies*

(105) The known representatives of the companies in cartel meetings were the following individuals:

Glaverbel:

- Mr. (...), employed by Glaverbel SA/NV.¹³¹

Guardian

- Mr. (...), employed by Guardian Europe S.à.r.l..¹³²

Saint-Gobain

- Mr. (...), employed by Saint-Gobain Glass France SA.¹³³

Pilkington

- Mr. (...), employed by Pilkington Deutschland AG.¹³⁴

¹²⁶ In this regard see recitals (243) to (248) and (290).

¹²⁷ (...)

¹²⁸ (...)

¹²⁹ For example, price increase announcements for Italy to be effective from 1 June 2000 were sent out on 28 May 2000 by the Guardian Israeli and Hungarian plants, (...). Another price increase announcement of 27 April 2004 is sent from the Luxemburg plant and concerns all Guardian European production sites, (...). At the Oral Hearing Guardian stated that its plants do not compete with one another so that the same client gets charged the same price by different plants, which obviously requires coordination among the different plants or on a central level.

¹³⁰ E-mail dated 29/09/03, (...). The subject matter of the e-mail is "September 2003" which indicates that such reporting is done monthly or at least on a regular basis.

¹³¹ (...)

¹³² (...)

¹³³ (...).

- (106) Mr (...) of the Pilkington group, responsible for sales and marketing of the building products, as from October 2003.¹³⁵ In that function, he progressively succeeded Mr (...), who retired in April 2004.^{136,137} From October 2003 until he formally retired, Mr (...) “*continued to be employed by Pilkington to assist in the hand-over to Mr (...)*”.¹³⁸
- (107) In October 2003, and until his formal retirement in April 2004, Mr (...) was chairman of the Marketing and Communication (“Marcomm”) group of the GEPVP.¹³⁹ Amongst the other members of that working group, at least from early 2003 until early 2005, were Messrs (...) and (...).¹⁴⁰ Mr (...) replaced Mr (...) as a member of that group.¹⁴¹

4.2. The cartel meetings and other contacts

- (108) The Commission file contains evidence of specific cartel meetings and contacts which took place from October 2003 until 11 February 2005. That evidence is presented in chronological order in this Section. The specific meetings and contacts described are coherent and consistent with the general description of the organisation and functioning of the cartel set out in sub-section 4.1.

4.2.1. E-mail exchange 17 October 2003

- (109) Mr (...) was at that time (...). He used to be a regular representative of Pilkington in the cartel meetings, with Mr. (...) as his successor also in that role.¹⁴²
- (110) At the time Mr (...) succeeded Mr (...), he did not know Messrs (...) and (...), as can be derived from an email exchange between both Pilkington representatives of 17 October 2003¹⁴³ and from Mr (...)’ handwritten notes about a meeting he had with Mr (...) on 4 December 2003¹⁴⁴ respectively.

134 (...).

135 (...)

136 (...).

137 (...)

138 (...).

139 (...)

140 (...).

141 (...).

142 (...).

143 (...).

144 (...).

- (111) In the email exchange of 17 October 2003, on the subject “Germany, Poland, Benelux”, Mr (...) informs his successor of the following:

“Have been asked what is our view of the price increases in above markets ?

Also, I spoke to (...) yesterday and he agrees it would be a good idea to have a meeting of the senior members of the GEPVP marketing group asap.”

and asks him to organise that meeting. As the addressee does not know Mr (...), he asks his predecessor to organise the meeting and adds: “Besides a few other advantages I see how it was done in the past.”¹⁴⁵

- (112) In the following email exchange with his secretary, on the same subject, Mr (...) refers to “the 4 of us (GEPVP Marcomms Principals)”¹⁴⁶, meaning himself plus Messrs (...) and (...).¹⁴⁷

- (113) According to those emails, a meeting is to be organised only between the same four members of the GEPVP Marcomm group and similar meetings appear to have been organised in the past. As, in the period from October 2003 to 23 April 2004, no meetings of that group were organised by the GEPVP’s secretariat and the email exchange clearly relates to price increases in Poland, Belgium, the Netherlands, Luxemburg and Germany, it is considered that email exchange concerned the planning of a cartel meeting on the subject of price increases of the same kind as those mentioned in recitals (80) to (87).¹⁴⁸

- (114) In its response to the SO Pilkington stated that the Commission had misinterpreted the e-mail exchange which dealt with two distinct matters. The price increase issue, to which the subject field related, was an internal Pilkington discussion and the meeting was a formal or informal GEPVP meeting to introduce Mr (...) to his counterparts in that organisation. The phrase “see how it was done in the past” refers to the workings of the GEPVP. Pilkington also noted that the prices and price increases were not discussed at the meeting on 4 December 2003.

- (115) That explanation is not convincing. From the face of the e-mail, it does not seem logical that the subject matter of such a two-part message would be indicated as “Germany, Poland, Benelux” ,where the second and largest part separately related to an introductory GEPVP-meeting. In Mr. (...)’ reply, and in the subsequent e-mails, only the meeting is discussed – not a single item relates to the alleged internal discussion. Pilkington has not substantiated its explanation by providing evidence of that internal discussion either prior to or after the e-mail exchange. In addition, as referred to in recital (139), none of the other undertakings mention the existence of any unofficial GEPVP-meetings. Ultimately, Germany, Belgium, the Netherlands, Luxemburg and Poland were among the countries where price

¹⁴⁵ (...)

¹⁴⁶ (...).

¹⁴⁷ The Commission notes, that, at that time, Guardian was not yet a member of the GEPVP.

¹⁴⁸ (...).

increases were agreed, see for instance sub-section 4.2.3 and 4.2.4. as well as recital (229).

4.2.2. Meeting on 4 December 2003

(116) On 4 December 2003 a meeting took place between Pilkington and Saint-Gobain where they exchanged sensitive information and agreed to convene a forthcoming cartel meeting.

(117) The meeting on 4 December 2003 is documented in handwritten notes¹⁴⁹ found in the course of the inspections carried out at the premises of Pilkington in Essen. More precisely, they were found in the office of Mr (...) (...), at the time (...) of the Pilkington group. By comparing the handwriting on those notes with other handwritten notes found in Mr (...)’ office, including some of his notebooks, it can easily be concluded that Mr (...) is the author of the notes. The top of the first page reads as follows:

“...4/12/03 Meeting with (...), SG

Objective: Get to know (...) better and

exploit areas of mutual interest

such as the Saint Gobain SWAP

and its potential extension

to coated Products for the UK

General points:

...”

(118) Under point “②” the participants are reported to have exchanged information on the UK market for flat glass products, such as the estimated sales of competitors and details regarding Saint-Gobain's sales on this market.

(119) On the second page, the following is written:

“④ Spain. SG lead a price increase of Monday

After they have fought back ((...)) for the most part of the year

price level now the highest in Europe”

(120) At the end of the notes, the following is written:

“ ⇒ Marketing meeting tba.

(...)”

¹⁴⁹ (...).

(121) The abbreviations stand for:

tba = to be announced;

(...) = (...) (of Pilkington),

(...) = (...) (of Saint-Gobain) and

(...) = (...) (of Glaverbel).^{150, 151}

(122) As to when this planned “marketing meeting” took place, Pilkington believes “*this was a reference to the next GEPVP Marcom meeting. This was held on 23 April 2004 in Brussels*”.¹⁵²

(123) The meeting of the GEPVP Marcomm group on 23 April 2004 was not attended by Messrs (...) and (...).¹⁵³ Furthermore, the Commission has a document reporting on a meeting between Messrs (...) and (...), held on 9 January 2004. It is considered that this is the planned meeting originally referred to by Mr (...) in the email exchange of 17 October 2003 related to the subject of price increases in Germany, Poland, Belgium, the Netherlands and Luxemburg and mentioned under subsection 4.2.1.

(124) In its response to the SO, Pilkington stated that the information exchanged at the 4 December 2003 meeting was not sensitive as it was relevant to the SWAP arrangement between the two companies and/or related to historical data and/or data that was known to Pilkington due to the transparency of the market.

(125) The Commission disagrees with this reasoning. According to the notes¹⁵⁴ “[t]he Ø float price [Saint-Gobain has] achieved in November 2003 was 2.22 [€]”. Such information can hardly be considered as historic data that Pilkington would have been aware of because of transparency of the market. It seems doubtful that the transparency of the market would reveal such an accurate figure, only a few days after the end of the month in question, that is to say, November 2003. Saint-Gobain also shares its estimation of Saint-Gobain's market share with Pilkington: “[Saint-Gobain has] 50% market share of a 3.0 mill sqm off-line Low-E market as they sell about 1.5 mill sqm p.a.” and “the laminated market has a size of 5.5 mill sqm out of which they supply 1.1 mill sqm”, which is not historic or public information.

4.2.3. Meeting on 9 January 2004

¹⁵⁰ (...)

¹⁵¹ (...)

¹⁵² (...).

¹⁵³ (...).

¹⁵⁴ See footnote 149.

- (126) On 9 January 2004 representatives of Glaverbel, Saint-Gobain and Pilkington met in Brussels to discuss price increases to be implemented in at least Germany. The Commission has evidence that the same undertakings announced identical price increases for Germany.
- (127) (...).¹⁵⁵
- (128) The meeting on 9 January 2004 was not a GEPVP Marcomm meeting.^{156,157}
- (129) Following the meeting in January 2004 the three flat glass producers announced identical price increases, expressed in nominal terms, for each of the four flat glass product categories in Germany: an increase of EUR (...)/sqm for float, low-e and mirrors and an increase of EUR (...)/sqm for laminated glass. Pilkington announced a price increase in the German market in its “*Glasbrief Januar 2004*”, effective as from 16 February 2004¹⁵⁸. Glaverbel announced identical price increases by letter dated 26 January 2004, also effective as from 16 February 2004.¹⁵⁹ Saint-Gobain announced identical price increases by letter of 3 February 2004, also effective as from 16 February 2004.¹⁶⁰
- (130) In its request for information of (...), the Commission asked the parties to list all price increases they had announced since January 1990 for specific flat glass product categories and for sales in each Member State/Contracting Party to the EEA Agreement. Guardian, in its reply, did not provide any such information. (...). In its request for information of (...) the Commission repeated its request and emphasised that - contrary to Guardian's statement - the Commission's file contained several copies of Guardian price increase announcements. Guardian, in its reply, still did not provide any price increase announcements. It acknowledged that some of the documents the Commission referred to amounted to "announcements", but explained that such announcements "*are rarely retained in files or archives as they have a very limited use in time*".¹⁶¹
- (131) Pilkington stated in its reply of 6 July 2006 to the Commission's request for information of (...), that Mr (...) attended a meeting in Brussels with Messrs (...) and (...) on 10 January 2004 and that “*(n)o documents such as minutes ... exist in relation to this meeting*”¹⁶². In the same reply, Pilkington provided the

¹⁵⁵ (...).

¹⁵⁶ (...).

¹⁵⁷ (...)

¹⁵⁸ (...)

¹⁵⁹ (...).

¹⁶⁰ (...).

¹⁶¹ (...).

¹⁶² (...).

Commission with a document entitled “*Minutes of the meeting Friday, 9th January 2004*”¹⁶³ without any explanations of its content and not relating it to the meeting on that date and the expenses of Mr. (...) for a trip to Brussels on the same day.¹⁶⁴ It is considered that that document contains at least a part of the minutes of a meeting on 9 January 2004.

(132) The minutes start by naming the participants: Messrs (...),(...) and (...).¹⁶⁵ Two numbered items follow. Under the first item, amongst others the time-schedule for all GEPVP Marcomm group meetings in 2004 is reported. From an e-mail provided by Pilkington, it is concluded that those minutes were prepared by Mr (...), and sent, by his secretary at Pilkington’s subsidiary in Germany, to Messrs (...) and (...) at the Pilkington headquarters in the United Kingdom, on 12 January 2004.¹⁶⁶

(133) Among the documents provided by Pilkington is an email of the same day, sent by Mr (...) and addressed to Mr (...)’ secretary. In that email Mr (...) asks Mr (...):

“For my benefit, could you please expand on item 3 of the agenda ? Is this a proposal ? Whose initiative was it ?”

(134) An “*item 3*” is clearly lacking in the copy of the minutes Pilkington provided in response to the Commission's request for information.

4.2.3.1. The parties' arguments in response to the SO as regards the meeting on 9 January 2004 and the Commission's findings

(135) Pilkington submitted that the Commission had based its assessment on circumstantial and incomplete evidence and misunderstood the meeting. It explained that the third item on the agenda originally sent by Mr (...) to Mr (...) on 9 January related to the German glass fair Glasstec, and provided final versions of the agenda and minutes of the said meeting.¹⁶⁷

(136) Pilkington also explained that there were unofficial meetings of members of various bodies of the GEPVP, which were not formal GEPVP meetings. The reason for this was that the official meetings involved a wider agenda including also technical matters. The primary objective of the meeting on 9 January 2004 was to introduce Mr. (...) to his counterparts. As regards the price increase in Germany, Pilkington had already decided in December 2003 to introduce a price increase, but had decided to delay the announcement to January 2004 matching the price increase by Glaverbel. In any event, there was no implementation and/or effect on actual invoiced prices.

¹⁶³ (...).

¹⁶⁴ (...).

¹⁶⁵ (...).

¹⁶⁶ (...).

¹⁶⁷ (...).

- (137) It should be observed that general aspects of the parties' arguments will be considered in sub-section 5.4 (see also sub-sections 8.3 and 8.4.). Pilkington's specific arguments regarding the meeting on 9 January 2004 cannot be accepted. (...) fit with other evidence available to the Commission, such as the undertakings' price announcements (see recital (129)), and (...) regarding the meeting on 2 March 2004 (see recital (143)) and are coherent and consistent with the outlined general description of the organisation and functioning of the cartel. A statement which runs counter to the interests of the declarant must in principle be regarded as particularly reliable evidence (see further recital (354)).
- (138) Furthermore, as regards the meeting on 9 January 2004, Pilkington does not provide any evidence of its alternative explanation that it had already decided to introduce a price increase in December 2003. It is also noteworthy that, when first asked about any meetings between the relevant people in the period 8-10 January 2004, Pilkington first replied that there had been a meeting on 10 January 2004, without any further details, and supplied the Commission with the Minutes of a meeting on 9 January 2004 without even referring to it in its reply to the request for information. Subsequently, Pilkington confirmed there had been a meeting on 9 January 2004 between the same individuals, which it only later qualified as an 'unofficial' GEPVP meeting, in its reply to the SO.
- (139) If there were such unofficial meetings of the GEPVP between the (...) of Glaverbel, Saint-Gobain and Pilkington, it is surprising that none of those undertakings, except Pilkington, mentioned them to the Commission, and that Pilkington only did so in its response to the SO, not at an earlier stage. For example, in its reply to the Commission's request for information of (...), where the Commission had asked Pilkington, in relation to meetings held between the relevant individuals in the period 8-10 January, to provide amongst other things, the subject matters on the agenda, Pilkington did not specify what the meeting of 9 January 2004 was about and made no reference to such 'unofficial' GEPVP meetings.
- (140) As regards the meeting of 2 March 2004, which was also mentioned as a future meeting date in the Minutes of the meeting of 9 January 2004 provided by Pilkington, the latter did not argue that it consisted of an 'unofficial' GEPVP meeting¹⁶⁸.
- (141) It is therefore concluded, on the basis of the evidence described in recitals (126) to (140), that an agreement was reached on 9 January 2004 between Pilkington, Glaverbel and Saint-Gobain to increase prices for float (by EUR (...)/sqm) low-e (by EUR (...)/sqm), unprocessed mirrors (by EUR (...)/sqm) and laminated glass or 'VSG' (by EUR (...)/sqm) at least in Germany.

4.2.4. Meeting on 2 March 2004

- (142) A new meeting was held between Glaverbel, Pilkington and Saint-Gobain on 2 March 2004, during which the participants evaluated the price increase in Germany and agreed on consecutive price increases for other countries. Those

¹⁶⁸ See in this regard recital (145) and footnote 173.

price increases were implemented in at least Belgium, the Netherlands and Luxemburg.

- (143) The meeting was again held at the Sheraton Brussels Airport Hotel. (...) ¹⁶⁹ (...) (...) ¹⁷⁰
- (144) Although in its reply to the Commission's request for information Pilkington did not provide any information on the meeting of 2 March 2004, nor did it confirm that it took place, it nevertheless provided the following travel expense records of Mr (...) ¹⁷¹: The “*Reisekostenabrechnung*” (Reimbursement of travel expenses) form shows a “*Kundenbesuch*” (customer visit) in “*Venlo*” (a town in The Netherlands, near the German border) from 08:00 to 18:00 on 2 March 2004. In addition, however, a copy of a parking ticket is also provided for which Mr (...) claimed reimbursement, showing that he had used the airport car-park at Zaventem (Belgium) from 09:39 to 14:53 on that day. ¹⁷² The bill settled by Mr (...) of Glaverbel, referred to in recital (143), mentions 14:52, coinciding with Mr (...)’s presence in Zaventem.
- (145) The date of 2 March 2004 also corresponds to the time-schedule for the alleged 2004 GEPVP Marcomm group meetings as shown in Pilkington's minutes of the meeting on 9 January 2004, described in recital (132). Once again, that meeting was not a GEPVP Marcomm meeting. ^{173, 174}
- (146) (...) ¹⁷⁵
- (147) Furthermore, there is an undated entry in a notebook belonging to Mr (...), found in the course of the inspections on 22 February 2005 at the premises of Pilkington in Essen. It states, under the heading “*Benelux*” ¹⁷⁶:

“Preiserhöhung 15 März Ankündigung – 1. April

Ankündigung einer (...) % Preiserhöhung die individuell

mit den Kunden diskutiert werden.

[...]

¹⁶⁹ (...).

¹⁷⁰ (...).

¹⁷¹ (...).

¹⁷² (...).

¹⁷³ (...).

¹⁷⁴ (...).

¹⁷⁵ (...).

¹⁷⁶ (...).

Freier Markt ist stärker umkämpft!

Guardian muß Preisankündigung in freien Markt

mittragen. (...) ”

Unofficial translation:

“Price increase 15 March announcement – 1 April

Announcement of a (...) % price increase which are to be discussed with customers individually.

[...]

The free market is more hard-fought!

Guardian has to support price-announcement in the free market. (...) ”

- (148) From the replies to the Commission’s request for information dated (...) and addressed to Pilkington, (...) Saint-Gobain and Guardian, asking them, amongst other things, to provide price increase announcements since 1999, it is concluded that the first price increases in Belgium, the Netherlands and Luxemburg in 2004 were announced in March 2004, presumably following the meeting on 2 March 2004. Table 2 sets out the last price announcements and effective date thereof in 2003 for Belgium, the Netherlands and Luxemburg and the first price increase announcements and effective date thereof for 2004.

Table 2

	Last price increase 2003			First price increase 2004		
Glaverbel	NL	a	1 October ¹⁷⁷	NL	a	18 March ¹⁷⁹
		e	13 October		e	5 April
	BE &	a	29 Sept. ¹⁷⁸	BE &	a	17 March ¹⁸⁰
	LUX	e	13 October	LUX	e	5 April
Saint-Gobain ¹⁸¹	BE	a	6 October	BE	a	25 March
		e	20 October		e	13 April
Pilkington	BENELUX ¹⁸²			BENELUX ¹⁸³		
		a	21 October		a	30 March
		e	1 November		e	14 April

¹⁷⁷ (...).

¹⁷⁸ (...).

¹⁷⁹ (...).

¹⁸⁰ (...).

¹⁸¹ (...).

a = date of announcement, **e** = effective date of price increase

- (149) As pointed out in recital (130) Guardian has not provided any price increase announcements, even though the Commission asked it to do so twice.
- (150) The entry on the following page of the 67 page notebook belonging to Mr (...) shows the date “9/03/2004” and dated entries on the following pages all mention later dates. It is therefore concluded that the notes quoted in recital (147) were entered on 9 March 2004 at the latest, more than a week before Glaverbel was the first flat glass manufacturer to announce the price increases in Belgium, the Netherlands and Luxemburg. Although the price increases announced by Glaverbel and Saint-Gobain are expressed in nominal amounts, they correspond to the (...)% increase, referred to in the notes.
- (151) In its response to the SO Pilkington did not dispute that a meeting took place between Messrs (...), (...) and (...) on that date but argued that the Commission did not have any reliable evidence to prove that an agreement took place on price increases in Belgium, the Netherlands and Luxemburg. It claimed that the notebooks belonging to Mr (...) did not support the Commission's conclusion as they constituted a record of an internal discussion about the possibility of increasing Pilkington's price for certain products in Belgium, the Netherlands and Luxemburg and did not mention either Glaverbel or Saint-Gobain's intention to increase prices. Furthermore it claimed that it was implausible Pilkington would have agreed to increase prices in Belgium, the Netherlands and Luxemburg as it had few independent customers in those Member States.
- (152) Despite not disputing the existence of the meeting on 2 March 2004, Pilkington did not provide any justification or explanation for it. In addition, it is clear from Mr (...)’s travel expenses claim forms that he attempted to hide the real destination and purpose of his travels. As regards the notebooks, it may well be that they do not make any reference to Glaverbel or Saint-Gobain's intentions but they date from a period between the 2 March 2004 meeting and the price increase announcement of Glaverbel for Belgium, the Netherlands and Luxemburg and refer to exactly the same percentage increase. As regards the plausibility of Pilkington agreeing to price increases in Belgium, the Netherlands and Luxemburg, as mentioned in sub-section 4.2.7.2, the Commission has contemporaneous evidence that Pilkington agreed on a price increase for these Member States at the meeting on 2 December 2004. Second, Pilkington itself, in its response to the SO, stated that the internal notes of Mr (...) referred to in recital (147) relate to an internal Pilkington discussion on the possibility of increasing prices in the Belgium, the Netherlands and Luxemburg by (...)%. Pilkington also stated that, because there were so few independent customers in these Member States, competition (the 'free market' referred to in Mr (...)’s notebooks) was fierce among the glass manufacturers.¹⁸⁴ Finally, there are also internal Pilkington

182 (...).

183 (...).

184 (...).

monthly commercial reports which show that Belgium, the Netherlands and Luxemburg was of interest to that company¹⁸⁵.

(153) . (...)

(154) It is therefore concluded, on the basis of the evidence described in recitals (143) to (153), that an agreement was reached on 2 March 2004 between Pilkington, Glaverbel and Saint-Gobain to increase prices of float glass by (...) % for at least Belgium, the Netherlands and Luxemburg.

4.2.5. Meeting on 20 April 2004

(155) On 20 April 2004 a meeting was held in Germany between representatives of Pilkington and Guardian. It is considered that the purpose of this meeting was, amongst other things, for Pilkington to inform Guardian about the cartel arrangements between Pilkington, Saint-Gobain and Glaverbel.

(156) Two pages of handwritten notes entitled “*Meeting Minutes*” and dated 20 April 2004¹⁸⁶ were found in the course of the inspections on 22 February 2005, carried out at the premises of Pilkington in Essen. More precisely, they were found in the office of Mr (...). Once again, by comparing the handwriting with other handwritten notes found in Mr (...)’s office, it can easily be concluded that Mr (...) is the author of those notes.¹⁸⁷

(157) Those two pages form part of a notebook belonging to Mr (...), totalling 67 pages. As indicated by the title and the date, the two pages contain contemporaneous notes of a meeting held on 20 April 2004.¹⁸⁸

(158) In those notes, Mr (...) reports on a meeting with Mr (...). According to Pilkington “*The purpose of the meeting was to meet Mr (...)*”.¹⁸⁹ The meeting was held during a dinner in the Koblenz region in Germany. The bill was settled by Mr (...).¹⁹⁰

(159) At that meeting Mr (...) communicated to Mr (...) the upcoming price increase of (...) % for float glass in the United Kingdom and in Ireland, agreed upon by Pilkington, Saint-Gobain and Glaverbel (...) ¹⁹¹ and which was to be announced by

¹⁸⁵ (...).

¹⁸⁶ (...).

¹⁸⁷ (...).

¹⁸⁸ (...).

¹⁸⁹ (...)

¹⁹⁰ (...)

¹⁹¹ See recital (143).

Pilkington first.¹⁹² At the top of the first page and following the terms “UK +IREL”, put in a cloud-like icon, these notes read:

“ → *Price increase agreed*
→ *Announcement next week – implementation 2 weeks*
later
→ *(...)% Price increase under certain conditions*
→ *market 135.000 tons*
→ *no aggression on Low-E*
→ *no attack of known SG/Glaverb. strongh*
→ *no price only focus*¹⁹³
→ *confirmed by*”

(160) (...) Guardian was informed of the discussions by Mr (...) of Pilkington, at least as of March 2004, when the latter succeeded Mr (...) from Pilkington as a member of the GEPVP Marcomm group and offered to be the line of communication for certain competitors who were not members of the GEPVP.¹⁹⁴ Guardian formally joined the GEPVP as from mid 2004.¹⁹⁵

(161) It is considered that the first three “*conditions*” under which the price increase has been agreed are as follows:

- “*market 135.000 tons*” is the total volume of flat glass Guardian would/wanted to sell in the United Kingdom in 2004, taking into consideration that Guardian’s new float line in Goole (UK) started its operations at the end of 2003¹⁹⁶, as estimated by the parties to this agreement;

¹⁹² Pilkington announced this (...)% increase in the UK and Ireland by letter of 29 April 2004, effective as from 24 May 2004. (...). Saint-Gobain followed with announcement of the same increase on 11 May 2004, effective as from 1 June 2006. (...). Glaverbel’s announcement of the same increase dates from 18 May 2004, also effective as from 1 June 2004 (...). As stated in recital (130) Guardian has not – although the Commission requested it twice – provided any price increase announcements. (...)

¹⁹³ (...).

¹⁹⁴ (...).

¹⁹⁵ (...).

¹⁹⁶ (...).

- “no aggression on Low-E” means that Pilkington’s strong position in the United Kingdom in respect of that flat glass product category¹⁹⁷ will not aggressively be attacked by the other parties to the agreement;

- “no attack of known SG/Glaverb. strongh.” (Saint-Gobain/Glaverbel strongholds) means that Pilkington will abstain from competing with the other parties to the agreement for certain customers of Glaverbel and Saint-Gobain.

(162) During that meeting, Mr (...) also reported on Guardian's position in the United Kingdom and Ireland markets for flat glass products to Mr (...). Following the word "Information" in a cloud-like icon, the following points are listed:

“
◦ Guardian got 150 accounts !
◦ Find¹⁹⁸ it very difficult to win in Key Accounts !
◦ Smaller Account Focus 48 hour service
◦ No Float imports anymore
◦ 20 Containers VSG p.m. Phoen[i]cia¹⁹⁹
◦ Goole running at lowest load possible
◦ 1.1 – Low E started with fewer customers
customers very positive
⇒ (...)/(...) discussion”

(163) Mr (...) also provided information to Mr (...) regarding an upcoming price increase in Germany for all four flat glass product categories, agreed upon by Pilkington, Saint-Gobain and Glaverbel, to be announced by Saint-Gobain first.²⁰⁰ Following the term “DE”, also put in a cloud-like icon, the notes read:

“
◦ Price increase agreed to us back
to 3.00 true invoice price → 20 – 30 cts
increase
◦ SG to leads²⁰¹ . increase
◦ Low-E should be included – 30 cts
◦ 1st May – 15th May – 1st June big customers
Action ◦ VSG – (...) needs to be informed

¹⁹⁷ (...).

¹⁹⁸ (...).

¹⁹⁹ Phoenicia is the name of a Guardian subsidiary in Israel. (...).

²⁰⁰ Indeed, Saint-Gobain is the first to announce price increases in the German market, for all four flat glass product categories and expressed in nominal value, by letter dated 25 May 2004, effective as from 14 June 2004. (...). The Commission notes that in a meeting of the General Board of Pilkington, also held on 25 May 2004, the Chief Executive informed "that Saint-Gobain had increased their prices significantly in Germany". (...). Pilkington was second with announcement of exactly the same price increases in its "Glasbrief June 2004", effective as from 14 June 2004. (...). According to the minutes of a management meeting of Saint-Gobain's subsidiary in Germany of 7 June 2004, customers received this "Glasbrief" on 4 June 2004. (...). Glaverbel announced exactly the same price increases by letter of 7 June 2004, effective as from 21 June 2004. (...). As stated in recital (130) Guardian has not – although the Commission requested it twice – provided any price increase announcements.

²⁰¹ (...).

by (...).”

(164) It is considered that the “*Action*” needed on the part of Mr (...) was for him to contact Mr (...) (Glaverbel), in order to have the latter instruct (...), not to undermine the efforts to increase the price for VSG in Germany, by selling the processed glass products in that Member State at too low prices. Pilkington stated that it was aware that various glass manufacturers, including Guardian, wanted (...) to cease this conduct.²⁰²

(165) In the next part of the notes, following the word “*Information*” in a cloud-like icon, the following points are listed:

“*° Guardian has 2 price[s] with*

(...) → Eigenbedarf (Marktpreis)

→ Handler (marktpreis –

to cover the costs)

° ...

Action ⇒ Guardian to confirm (...) Price.

⇒ Guardian felt the price increase delivered depending on customer size.

Price increase – delivered 40-25 ct [...].”

(166) That extract reports on information provided by Mr (...) to Mr (...), on Guardian's pricing to (...): for (...)’s own consumption (“*Eigenbedarf*”) as a processor of flat glass Guardian sells at market prices and for reselling by (...) Guardian sells at market prices minus (“*marktpreis –*”), in order to cover the costs of reselling. Under “*Action*” it is noted that Guardian was to inform Pilkington about the actual price of Guardian's sales to this customer.²⁰³

(167) The last part of the notes reads as follows:

“Italy No price increase planned

Guardian happy to step out of

the market for 2 months to allow

price increase to happen.

° oder [= or in English] new prices with a 3 months

delay to allow Phoen[i]cia to apply”

²⁰² (...)

²⁰³ (...).

⇒ *Action: We need to evaluate stockdays in Merchants in high & low season to best manage a price increase.*”

- (168) The first point reflects information provided by Mr. (...) on the outcome of discussions between Pilkington, Saint-Gobain and Glaverbel on prices and possible price increases for flat glass in the Italian market. The rest of the extract shows Guardian's agreement to cooperate with those three flat glass manufacturers in any price increase exercise in the Italian market: either by not selling in that market for a period of two months in order to enable the other three effectively to push such price increases through, or by joining the other three in raising prices three months later.
- (169) Guardian describes the subject matter(s) of the meeting of 20 April 2004 as follows: “(...) *has had occasional contacts, in case of need but no more than on average once or twice per year, with Mr (...) (or Mr (...), see below) and/or Mr (...) (from Pilkington Germany) regarding sale of float glass to Guardian Automotive for the latter’s automotive glass production in Grevenmacher, Luxembourg and Llodio, Spain (...). The dinner in Koblenz is an example of one such contacts.*”²⁰⁴
- (170) No single item or element, as reported on in Mr. (...)’ handwritten notes, relates to such subject matters as identified in Guardian’s description. The meeting of 20 April 2004 either only, or at least also, dealt with completely different subject matters. Mr (...) met with Mr. (...) in order to communicate to him the agreements reached on the price increase between the other flat glass manufacturers for the United Kingdom and Ireland and for Germany as well and to discuss the position of Guardian on those markets and exchange additional sensitive market information. Guardian agreed to step out of the Italian market should the others agree on a price increase or, alternatively, agreed to join if the prices were increased with 3 month delay.²⁰⁵
- (171) It is therefore concluded that when Mr (...) met with Mr (...) on 20 April 2004, an agreement existed between Pilkington, Saint-Gobain and Glaverbel on an upcoming price increase in the United Kingdom and Ireland and in Germany. As regards Italy, if Pilkington, Saint-Gobain and Glaverbel decided on a price increase, Guardian agreed to cooperate by either stepping out of the market or by joining the price increase under certain circumstances.

4.2.5.1. The parties' arguments in response to the SO as regards the meeting on 20 April 2004 and the Commission's findings

- (172) The arguments of Pilkington and Guardian do not, in the Commission's view, explain this meeting in a way that is consistent with competitive behaviour.
- (173) Firstly, as regards the purpose of the meeting, Pilkington explained that it was intended as an opportunity for Mr. (...) to meet Mr. (...) as they had to work

²⁰⁴ (...)

²⁰⁵ (...)

together in the context of the commercial relationships between Guardian and Pilkington.²⁰⁶

- (174) Guardian submitted that Mr. (...) initiated the meeting referring to subjects of common interest. It also mentioned that they discussed the supply of float by Pilkington to Guardian's automotive operation in Luxemburg (see also recital (169)),²⁰⁷ but also stressed that it has not entered any form of institutionalised cooperation with Pilkington.²⁰⁸
- (175) Not a single item in Mr. (...)’s minutes of the meeting refers to the commercial relationships mentioned by Pilkington and Guardian. Although both parties claim that the meeting took place in the context of their commercial relationships, neither of them has provided any explanation, on the basis of the notes, of what exactly was discussed which related to their commercial relationships (both of them acknowledge that the United Kingdom, Germany and Italy were discussed). It also seems somewhat contradictory that Mr. (...) and Mr. (...) "had to" work together, as Pilkington submitted, when Guardian prides itself on being independent from its competitors and emphasises that its commercial relationships are of a purely *ad hoc* character.²⁰⁹ It is therefore considered that the two sales managers met to discuss either only, or at least also, completely different subject matters than matters related to the commercial relationships between Pilkington and Guardian.
- (176) In terms of the contents of the notes, Guardian emphasised that Mr. (...)’s notes appear to contain his own thoughts and wishes and are therefore not reliable. It cannot therefore be concluded on the basis of those notes that Mr (...) communicated any agreement to Mr (...). Guardian added that the information Mr. (...) communicated was either well known to Pilkington or deliberately contained errors. Guardian further explained that the UK discussion related to Guardian's plant in Goole. (...) and stated that, while Mr. (...) did mention that price increases there had not worked out, Mr (...) did not enter into any agreement but sarcastically replied that should competitors agree on a price increase Guardian could only be put in a position to follow the price increase if the price increase announcement were to be made three months in advance as its supplies to Italy originated in Israel. Guardian also claimed that it always maintained its competitive behaviour on the market.²¹⁰ At the Oral Hearing Guardian added that it would not be possible for it to "step out" of the Italian market (...).
- (177) Pilkington confirms that the minutes are contemporaneous notes of the meeting (see recital (157)). It can therefore be concluded that what is noted in the minutes reflects what was actually said during the meeting. The minutes clearly reflect a

²⁰⁶ (...).

²⁰⁷ (...).

²⁰⁸ (...).

²⁰⁹ (...)

²¹⁰ (...).

communication between the two participants and contain the result of the discussions with final action points such as "*Guardian to confirm (...) glass Price*" or, as regards Italy, "*We need to evaluate stock day in merchants ...*". The minutes state "*price increase agreed*" for United Kingdom/Ireland and Germany which points to the fact that this was actually communicated during the meeting.

- (178) Guardian's explanation does not contradict the anti-competitive nature of the meeting. There is no legitimate explanation as to why Guardian would provide its competitor with information relating to its Goole plant or to its prices with (...). Furthermore, the argument that the information provided was incorrect or already known to Pilkington cannot be accepted. For instance, Guardian's intention to step out of the Italian market to enable a price increase to be implemented by the others can not be considered as already known to Pilkington. It is obvious that Mr (...) considered the information Mr. (...) provided to be useful as he recorded it in his notes and again contacted Mr. (...) on 15 June (see recitals (189) and (196)). The latter also participated in the meetings on 2 December 2004 and 11 February 2005.
- (179) Nor can Guardian's arguments as to its aggressive competition be accepted. Guardian's response to the SO²¹¹ suggests that its prices in Germany actually increased. That increase may not have been on the same level as the increases of Glaverbel, Pilkington and Saint-Gobain mentioned in footnote 200, but that does not prove that Guardian did not act in line with the others. An agreement to increase prices leaves some room for manoeuvre, with the possibility for a company to have lower prices than its competitors, that is to say to increase prices (and thus margins) to some extent while at the same time trying to increase market shares by staying below the competitors' prices. It is clear from the case law that the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objective.²¹²
- (180) As regards Italy, Guardian's arguments do not contradict the Commission's interpretation of the notes as presented in the SO. Guardian claimed that Italy was not an important market for them because they sold comparatively less in that market and only excess supplies from other markets. The suggestion that Guardian would step out of the Italian market to enable the price increase of its other competitors to take place makes sense in a market such as Italy, where there is a significant merchanting sector. The sale of excess supplies by Guardian to independent customers, even in small quantities, could therefore potentially destroy a price increase agreed by its competitors²¹³.

²¹¹ (...).

²¹² Case T-64/02, *Dr. Hans Heubach GmbH & Co. KG v Commission*, [2005] ECR p.II-05137, paragraph 111.

²¹³ (...)

- (181) Furthermore, documents in the file show that there is a Guardian Marketing Manager working with the Northern part of Italy²¹⁴, and that he informed Mr. (...), amongst others, about the sales in Italy per product and per plant and also provided data regarding prices and price increases for specific Guardian product categories and price increase announcements sent out by Saint-Gobain, Glaverbel and Pilkington²¹⁵. As referred to in recital (104), there was or had been some form of Guardian coordination as regards prices in Italy. From those documents it appears that Guardian had a sales force in Italy, that Mr. (...) was informed about all Guardian plants' flat glass supplies to Italy and that some kind of internal Guardian coordination and monitoring existed in relation to that market, which contradicts Guardian's argument that the excess sales there were (...). The delayed implementation of any price increase on the Italian market by Guardian's Phoenicia plant appears to be a real issue, as Guardian does not produce in Italy. In any case there is no trace of the alleged sarcasm of Mr (...) in Mr (...)’s notes nor that he made clear in the conversation that the delayed implementation was a totally unrealistic scenario.
- (182) According to Pilkington, the notes do not support the existence of a previous agreement between Pilkington, Saint-Gobain and/or Glaverbel to increase prices in the United Kingdom and Ireland, nor do they disclose evidence of an agreement to increase prices in Italy or Germany. Pilkington stated that it is not Mr. (...)’ recollection that the notes record that he communicated an alleged agreement to Mr. (...). It acknowledged that there was an exchange of information during the meeting but argued that the information was mostly historic and, in any case, not sensitive. As regards the United Kingdom, Pilkington claimed that the 'agreement' referred to was an internal Pilkington agreement to announce a price increase in Pilkington's home market. Pilkington provided an internal memo of 16 April 2004 referring to 'letter to be sent to customers 28th April', 'flat price increase for all customers by (...)%' and 'the price increase will apply to Ireland as well'. It also stated that it is implausible that the glass manufacturers would have agreed on a price increase on 2 March 2004, as alleged by the Commission, to be announced nearly two months later.
- (183) As stated in recital (176), what is noted in the minutes must be considered to reflect what was actually said during the meeting. Pilkington's claim that the notes do not support the existence of agreements or that Mr. (...) does not recall that he communicated any agreement must therefore be dismissed.
- (184) Pilkington's own explanation does not contradict the anti-competitive nature of the meeting. There is no legitimate explanation as to why Pilkington would communicate its own plans to increase its prices to Guardian or as to why those two undertakings would discuss "market conditions" such as Guardian's accounts or Guardian's prices with (...). The claim that the information exchanged was mostly historic and not sensitive cannot be accepted. Information pertaining to a future price increase (for example, the (...)% price increase announcement of Pilkington in the United Kingdom and Ireland the following week or to the price

²¹⁴ (...).

²¹⁵ (...).

increase in Germany to be led by Saint-Gobain in May 2004) or to Guardian's intention to step out of the Italian market to enable a price increase to be implemented by the others cannot be considered as either historic or non-sensitive. These are future issues that relate to the very sensitive area of pricing and timing of price increases which are key factors in deciding on a company's commercial strategy.

- (185) As regards Pilkington's reference to its internal price increase decision, in terms of timing it is technically possible that the glass manufacturers agreed a price increase to be announced on the market only two months later as illustrated by the contemporary evidence relating to the meeting on 2 December 2004, where price increase agreements were made on 2 December for announcement or implementation in March the following year.²¹⁶ Mr (...) 's notes of the meeting on 20 April 2004 also refer to 'no attack of known SG/Glaverb. Strongh' which is not included in the alleged internal Pilkington decision reflected in the memo of 16 April 2004 provided by Pilkington. The internal memo provided by Pilkington is therefore not incompatible with the Commission's allegation that the glass manufacturers agreed to increase prices in the United Kingdom and Ireland on 2 March 2004, nor with the allegation that Mr (...) communicated the existence of that agreement to Guardian on 20 April 2004. Furthermore, the percentage increase indicated in the internal memo corresponds exactly to (...), that the price increase agreed for the United Kingdom and Ireland at the meeting on 2 March 2004 was between 10 and 15%.
- (186) Pilkington also contested the claim that Mr. (...) was the line of communication between the cartel members and certain competitors who were not members of the GEPVP.²¹⁷
- (187) However, the notes of the meeting on 20 April 2004 reflect that Mr (...) communicated the existence of the said agreements to at least Guardian, at a time when the latter was not yet a member of the GEPVP but when its application was being considered.²¹⁸ As Mr (...) participated in two subsequent cartel meetings on 2 December 2004 and 11 February 2005 with the other (...) after Guardian had adhered fully to the GEPVP and was contacted on the occasion of the meeting on 15 June 2004 (see sub-section 4.2.6), it is not unlikely that he would have been kept informed of the agreements before Guardian became a full member. Whether Mr (...) took up the role of go-between systematically or only on that occasion has no material impact on the Commission's conclusions. His role as line of communication (...)
- (188) As a result, it can be concluded that the meeting of 20 April 2004 either only, or at least also, dealt with completely different subject matters from the commercial relationship between the undertakings as alleged by Pilkington and Guardian. Mr (...) met with Mr. (...) in order to communicate to him the agreements reached on

²¹⁶ (...).

²¹⁷ (...).

²¹⁸ (...)

the price increase between the other flat glass manufacturers for the United Kingdom and Ireland and for Germany and to discuss the position of Guardian should a price increase be agreed for Italy.²¹⁹ The arguments put forward by Guardian and Pilkington do not give a different and coherent explanation of the notes that shows that that meeting was consistent with competitive behaviour.

4.2.6. Meeting on 15 June 2004

- (189) (...) Glaverbel, Pilkington and Saint-Gobain met on 15 June 2004 in Aachen in a hotel close to the Casino and price increases for Finland and Italy were agreed upon during that meeting. The Guardian representative Mr (...) was not present at the meeting but was called by Mr (...) during the meeting in front of the other participants. Over the telephone, Guardian was understood by the other cartel participants present during the telephone conversation to have expressed its intention not to undermine the price agreements.²²⁰
- (190) Pilkington and Saint-Gobain state that there was a meeting between Messrs (...), (...), (...) and (...) on that day at the Dorint Quellenhof Hotel in Aachen, Germany (which is indeed close to the Casino) and that no documents exist in relation to the meeting.²²¹
- (191) Guardian stated that Mr (...) was on holiday at the time but specifies that he remembers having had telephone contact with either Mr (...), Mr (...) or Mr (...) around that date but does not remember the exact date.²²²
- (192) In the travel expenses claim form attached to Pilkington's reply ("Reisekostenabrechnung"), against Mr (...)’s name, the "Zweck" (purpose) is stated as "Trainingkonzept und Personalcoaching" (programme for training and coaching of personnel) in "Aachen" from 08:00 to 17:00 on 15 June 2004.²²³ Annexed copies of bills show a parking ticket for the Dorint Quellenhof Hotel car-park from 10:06 to 14:47 that day²²⁴, and three bills for meeting room, drinks and lunch²²⁵.
- (193) From one of Mr (...)’s notebooks, it can be deduced that he organised the meeting, as shown by the entry on 8 June 2004 which refers to "Meeting in Aachen in the Dorint ⇒ Check and invite".²²⁶

219 (...)

220 (...)

221 (...)

222 (...)

223 (...)

224 (...)

225 (...)

226 (...)

4.2.6.1. The parties' arguments in response to the SO as regards the meeting on 15 June 2004 and the Commission's findings

- (194) Guardian contested that it had been informed about or accepted any price increase agreement relating to Finland and Italy. It stated that during the phone call from (probably) Mr. (...), the caller and Mr. (...) discussed Italy and Mr (...) explained that even if Guardian wanted to it could not influence the current pricing situation in that market. Guardian also emphasised that it continued its competitive market behaviour.²²⁷
- (195) Pilkington, for its part, explained that Mr (...) recalls attending the meeting but does not remember calling Mr. (...). It submitted that the Commission had no reliable evidence of any agreement reached at the meeting, or of the identity of the person who called Mr. (...) or of the content of their discussion.²²⁸
- (196) That reasoning cannot be accepted. It is clear from Guardian's own arguments that Mr. (...) did receive a phone call from (probably) Mr. (...) and that Italy and the pricing situation in that country were discussed during that phone conversation²²⁹. Guardian has given no alternative explanation as to why Mr. (...) would accept to discuss such a subject with a competitor. Pilkington and Saint-Gobain initially stated (see recital (190)) that there was a meeting between Messrs (...), (...), (...) and (...) on 15 June 2004, which points to the fact that in their minds, Mr (...) was indeed involved in the meeting. Furthermore, Pilkington provided no alternative justification or explanation for the meeting and it is clear from the travel expenses claim forms of Mr (...) (see recital (192)) that he attempted to hide the real destination and purpose of his travels on that day. (...) regarding the meeting, the location, the individuals attending, the fact that Italy was discussed and that Guardian was informed over the phone, are coherent and consistent with the statements of Guardian, Pilkington and Saint-Gobain on the activities of their representatives on that date and with Pilkington's bills and parking ticket (recital (192)) and the note book entry (recital (193)). It is therefore concluded that when the representatives of Glaverbel, Pilkington and Saint-Gobain met on 15 June 2004 they discussed at least the pricing situation in Italy and that this was reported to Guardian's representative over the phone.

4.2.7. Meeting of 2 December 2004

- (197) On 2 December 2004, Glaverbel, Pilkington, Saint-Gobain and Guardian met in a restaurant in Luxembourg and agreed on a series of price increases, minimum prices and other commercial conditions relating to the sale of flat glass products in several countries throughout Europe. The Commission has evidence that those agreements were implemented at least as regards Italy.

4.2.7.1. Introduction and context

²²⁷ (...)

²²⁸ (...)

²²⁹ (...)

- (198) An eight-page handwritten document²³⁰ entitled '*GEPVP meeting in Luxembourg*' was found in the course of the inspections carried out on 22 February 2005 at the premises of Pilkington in Essen. Following the cover page²³¹, only containing the title "*GEPVP meeting in Luxembourg*" and written on Novotel paper, is a report of three pages, without page numbering. Following the report, is a document entitled '*Minutes 2/12/04*'²³² which consists of four pages, the first three of which are numbered from 1 to 3. The cover page indicating "*GEPVP meeting in Luxembourg*" suggests that the meeting reported on was held in the framework of the GEPVP, or around a scheduled meeting of the GEPVP.
- (199) Pilkington confirmed that Mr (...) wrote those notes and that the first 4 pages are notes made by him on 3 December for himself while reflecting on the meeting the previous evening at a restaurant in Luxembourg with Messrs (...), (...) and (...). The last 4 pages of the document comprise notes made by him on 2 December 2004.²³³ Although Mr (...)’ handwriting permits easy reading of the notes, the Commission asked Pilkington for a typed transcript thereof, together with explanation of abbreviations, figures, etc.²³⁴
- (200) Guardian claims that the meeting took place during a dinner in the evening of 2 December 2004, at a restaurant in Hostert (Luxembourg), called "Chez Pascal Le Gastronome".²³⁵ On the bill settled by Mr (...), the names of the four participants are written down: Messrs (...), (...), (...) and (...). Pilkington stated that there was no connection between that meeting and the GEPVP meeting held the following day.²³⁶
- (201) Further confirmation of the participation of those four persons in the meeting on 2 December 2004 is provided by Pilkington.²³⁷ Saint-Gobain did not provide any information as to the dinner meeting. With reference to an agenda entry, as copied during the inspections on 22 and 23 February 2005, Saint-Gobain stated that Mr. (...) attended "*in the context of GEPVP ... a meeting in Luxembourg on 3 December 2004*"²³⁸. However, Mr. (...)’s agenda also contains the note "Luxemburg" on the date of 2 December 2004. Moreover, as an annex to its earlier replies of 23 June 2006 to this request for information, Saint-Gobain

230 (...)

231 (...)

232 (...)

233 (...)

234 (...)

235 (...)

236 (...)

237 (...)

238 (...)

provided a hotel bill concerning Mr. (...)’s stay in Luxembourg which reads “SEJOUR: MR. (...) / CHB: 461 DU 02/12/04 AU 3/12/04”.²³⁹ On the basis of this information it is concluded that Mr. (...) went to Luxembourg on 2 December 2004 and stayed there during the night of 2/3 December 2004.

- (202) Inspection documents also show the presence of Glaverbel's representative: entries in Mr (...)’s agenda for 2 December 2004 read “17:00 – 19:00 *départ Luxembourg*” and “19:00 – 22:00 *Dinner GEPVP*” and entries in his agenda for 3 December read “10:00 – 14:30 *GEPVP Marcom*” and “14:30 – 17:00 *Retour Luxembourg*”²⁴⁰. The presence list in the minutes of the GEPVP Marcomm meeting of 3 December in Luxembourg shows the names of all four individuals.²⁴¹
- (203) As will be described in sub-section 4.2.7.2, the eight-page document entitled “*GEPVP meeting in Luxembourg*” contains Pilkington's reports on discussions and agreements with, as well as exchanges of information between the main European flat glass producers, during the dinner meeting on 2 December 2004.
- (204) (...).²⁴²

4.2.7.2. Details of the agreements and discussions

- (205) The words ‘float’, ‘mirror’, ‘lami’ and ‘low-e’ are used several times in the handwritten notes referred to in recital (198) and clearly point to the product categories which were the subject of the meeting: raw float glass, unprocessed mirror glass, laminated glass and low-emissivity glass, which are the subject of this Decision.
- (206) On the second page of the handwritten notes under the heading “*Price increase concept for next year*”, appears the information set out in Table 3 (for ease of reference, the Commission has added grid lines and letters at the very bottom).

Table 3
“Price increase concept for next year

	<i>SG</i>	<i>Gua</i>	<i>Gla</i>	<i>Pilk</i>
<i>Ireland</i>	√ 01/05			
<i>UK</i>				√ 03/05
<i>France</i>		√ 03/05		
<i>Benelux</i>			√ 03/05	

²³⁹ (...)

²⁴⁰ (...)

²⁴¹ (...)

²⁴² (...)

<i>Scand</i>	?	?	?	?
<i>Poland</i>		√ 03/05		
<i>Baltics</i>		√ 03/05		
<i>(...)</i>	?	?	?	?
<i>DE</i>				√ 03/05
<i>Italy</i>	√ 01/05			
	2	3	1	2”
A	B	C	D	E

(207) The table reads as follows:

In the top line, the four flat glass manufacturers are identified:

- Column B: SG = Saint-Gobain,
- Column C: Gua = Guardian,
- Column D: Gla = Glaverbel,
- Column E: Pilk = Pilkington.

(208) Column A lists the regions or countries, for which price increases were agreed upon, plus Scandinavia and (...), for which a price increase agreement was still outstanding. As follows from the rest of the eight-page document, the entries in columns B-E next to the regions or countries point to the month in the year 2005 of the announcement or implementation of the price increases (for example, "01/05" refers to January 2005) and the “leadership” for such price increases as agreed upon²⁴³.

(209) The Commission will present in detail the cartel arrangements as they can be deduced from the document.

(210) As regards Ireland, the text reads as follows:

“①. Ireland – January 1st -=>2.75 minimum

price ./ 2.5 % cash

²⁴³ Only in case of the Baltics, the entry in the table does not match the information found later in the notes: according to the table, Guardian should be the first to announce price increases in the Baltics, as of March 2005, while the notes later refer to January 2005.

SG · SG to lead

·Immediate fix on status quo

·GL no clear float sales in Ireland”

- (211) This extract indicates that agreement was reached to increase prices in Ireland, as of 1 January 2005, with a minimum price of EUR 2,75 (possibly minus a cash bonus of at maximum 2,5%) for clear float of 4 mm thickness and that Saint-Gobain (“SG”) would be the first to announce that price increase, the other flat glass manufacturers following. Furthermore, the reference to the "fix on status quo" indicates an agreement that in the meantime prices would be kept on their actual level.
- (212) The inference that the agreement concerned clear float glass of 4mm can be made by reference to sub-section 4.1.2 on price setting in the flat glass sector. The inference that ‘January 1st’ refers to a price increase can be made by looking at the rest of the notes, where the expression ‘to lead’ relates to the leadership by one of the companies concerned (for example, "SG" as reference to Saint-Gobain) with regard to one or several price increase(s) meaning that that manufacturer would be the first to announce the agreed price increase. This is made clear by the initials ‘SG’ appearing in the margin and by the entry "01/05" in column B next to "Ireland" in the table entitled "Price increase concept for next year" (Table 3, recital (206)).
- (213) As regards Italy, the text reads as follows:

“ @ Italy –acknowledged as work in progress

-SG to lead price increase

-Announcement 9th December

implementation 10th January

SG

-Float +5%. 3.15

-MIRROR + 4% 3.35

-Lami +3%

·Minimum prices have been agreed”

- (214) This extract indicates that there was an agreement to increase prices in Italy, as of early January 2005 as indicated in Table 3. Saint-Gobain would lead the price increase for three different glass types by announcement on 9 December 2004 for implementation as of 10 January 2005, again made clear by the initials ‘SG’ appearing in the margin. The other manufacturers were to follow. The level of price increase agreed upon is expressed as a percentage value, which is different for each product category. Furthermore, minimum prices for clear float and for

unprocessed mirrors were agreed upon (which is, from the context, what the numbers 3.15 and 3.35 refer to).

- (215) As regards “*work in progress*” mentioned in relation to the price increase in Italy, the Commission has evidence of implementation of the same identical price increase at least for Saint-Gobain and Pilkington and partly for Glaverbel. Page 78 of a notebook belonging to Mr (...) ²⁴⁴, found in the course of the inspections on 22 February 2005 at the premises of Pilkington in Essen, includes the following:

“*Agenda Italy*” “*Action below*
agreed needs
follow up”

After this comes the following entry:

“1...

2. *Price increase next steps*

5. *Message during next week[']s presentation...*

7...

2. ⇒ *Step 1* = *Letter middle of December (10th)*

WHEN = *10th of January 2005*

= *Agreement* *of 1st level of customers!*

= *Payment TERMS is a mega challenge*

60 days! = 30 days net

Agreed we go ahead!

Presence of Guardian very positive contribution !

8... ”

- (216) The entry referred to in recital (215) is not dated by the writer. The last dated entry before this one in the notebook of nearly 200 pages is dated 26 November 2004 – page 75– ²⁴⁵, the next dated entry is that of 6 December 2004 –page 79–²⁴⁶. Pilkington dates the notes “*prior to 10 December given the contents of the notes*”.²⁴⁷

²⁴⁴ (...)

²⁴⁵ (...)

²⁴⁶ (...)

²⁴⁷ (...)

(217) Pilkington stated, that “*these notes were made by Mr (...) at an internal meeting at which Mr (...) and Mr. (...)*”²⁴⁸ were both present. The particular notes refer to the possibility of a price increase in Italy”. Except for the last line under the heading “2. ⇒ Step 1”, “*These notes record the internal agreement reached between Mr (...) and (...) to proceed with making this proposal to Pilkington's first level customers.*”²⁴⁹

(218) Another undated entry in the same notebook belonging to Mr (...), at the bottom of page 76²⁵⁰ reads:

“Italy price increase

- | |
|--|
| <ul style="list-style-type: none">● (...) % Float● (...) %Laminated● (...) % Mirror |
|--|

⇓

30 days net

⇓

...”

(219) These notes can be dated from around the same period as the ones on p. 78 of the notebook quoted in recital (215): between 26 November and 6 December 2004. As regards the contents, the percentage price increases for each of the three flat glass product categories referred to in recital (218) correspond exactly with the ones mentioned in Mr (...)’s notes of the meeting on 2 December 2004 and with the price increase announcement letter of Saint-Gobain for the Italian market, dated 9 December 2004, which foresees 3 January 2005 as the date of implementation.²⁵¹

(220) On 16 December 2004, Glaverbel announced a price increase for the same three flat glass product categories on the Italian market, to be implemented as of 5 January 2005; for “*Float*” and “*Mirror*” the percentage value of the price increase is the same as written by Mr (...) in his notebook; for “*Laminated*” the percentage increase is (...)%.²⁵²

(221) On 20 December 2004, Pilkington announced a price increase for each of the three flat glass product categories on the Italian market, to be implemented as of 10

²⁴⁸ (...)

²⁴⁹ (...)

²⁵⁰ (...)

²⁵¹ (...)

²⁵² (...)

January 2005.²⁵³ Although the announcement only mentions the nominal prices as of that date, when comparing those prices with the nominal prices mentioned in Pilkington's most recent price increase announcement before that, which is dated 30 September 2004²⁵⁴, the increase in percentage can be deduced. It is concluded that Pilkington's price increases in the Italian market in January 2005 match the price increases in percentages, as found on page 76 of Mr (...)’s notebook and in his notes of the meeting on 2 December.

(222) As stated in recital (130) Guardian has not provided any price increase announcements, despite having been asked to do so twice by the Commission.

(223) Mr (...)’s notes confirm that at the time of the 2 December 2004 meeting a price increase had already been agreed for Italy and was in the process of being implemented.

(224) As regards the United Kingdom, the text reads as follows:

“③. UK prices are seen as low!

•Target price must be 2£

•This requires almost a price increase in 2 steps for the competition

Pilk

•No acquisition – need to fix the status quo

•Timing – agreement

•Procedure – „ –”

(225) This extract indicates that for the United Kingdom there was an agreement that the prices should be increased and that the target price should be GBP 2 for clear float of 4 mm thickness. The notes do not indicate an agreement on the concrete level of any increase, or minimum prices, but timing and procedure as regards the upcoming price increase(s) are agreed upon, as referred to in Table 3, which indicates March 2005. As with the other countries where the "leading" company is noted in the margin, the word ‘Pilk’ appears in the margin, highlighting that Pilkington is the agreed upon manufacturer to lead any such price increase in the United Kingdom.

(226) As regards the Baltic States, the text reads as follows:

“④ Baltic States

²⁵³ (...)

²⁵⁴ (...)

•Despite the agreement to increase prices (GL and P did) G has not increased and furthermore prices are now on the same level (Ø [= average] 2.60)

G

•Price increase in January let (sic) by G.

Estonia: 3.00€

Latvia: 2.90€

Lithu: 2.80€”

(227) This extract indicates that agreement was reached to increase prices in the Baltic countries as of January 2005 and that Guardian – who in the past had failed to increase its prices – would be the first to announce that price increase (as also made clear by the initial "G" appearing in the margin), the other manufacturers following. Table 3 indicates the date of March 2005. Given the context, it must be assumed that the nominal prices in the quote in recital (226) are the new minimum prices for clear float, as agreed upon.

(228) Furthermore, reference is made to an earlier similar price-agreement between the manufacturers, to increase prices in those countries. “GL” (Glaverbel) and “P” (Pilkington) did stick to that agreement, but “G” (Guardian) did not.

(229) As regards Poland, the text reads as follows:

” © Poland

G •Price increase let (sic) by G in March of 10% - min price upstream 12 Zloties

•Prices for the next months should be kept absolutely stable”

(230) This extract indicates that there was an agreement to increase prices in the Polish market by 10% for some or all product categories, as of March 2005, which is also the indication provided in Table 3, and that Guardian (“G”) would be the first to announce that increase (as also made clear by the initial "G" appearing in the margin), the other manufacturers following. Furthermore, a minimum price of PLZ 12 for clear float, as of March 2005, was agreed upon. Finally, it was agreed that up to the implementation of the price increase in March 2005, actual levels of prices should be kept; in other words, manufacturers should not offer lower net prices than those applied to each customer at the time of the agreement.

(231) As regards France, the text reads as follows:

” © France

•Prices are almost the lowest in Europe now !

G •Price increase of 10% for Float + Low E agreed. G to lead.”

(232) This extract indicates that there was an agreement to increase prices for clear float and for low-emissivity glass in the French market by 10% and that Guardian (“G”) would be the first manufacturer to announce that price increase (again the initial “G” appearing in the margin), the other manufacturers following. There is no mention of any date, indicating the start of this price increase exercise, but Table 3 indicates March 2005 as a date for a forthcoming price increase.

(233) As regards the Benelux, the text reads as follows:

At the top of the seventh page of the document, numbered “③” it is stated:

“Benelux

· Prices to be increased in March in line with DE increase

GL”

(234) This extract indicates that agreement was reached to increase prices in Belgium, the Netherlands and Luxemburg, as of March 2005, for some or all of the flat glass product categories. The report does not mention the level (nominal amount or percentage) of the upcoming increase. However, the agreement also provided for the price increase to be directly related, in timing and in amount, to the upcoming price increase in Germany. Table 3 also indicates March 2005 for the price increases in the Benelux and in Germany and an arrow links those two dates. Furthermore, on the eighth page of the document, at point④, under “*General Agreements*” emphasis is again put on the fact that “*Increases in DE + Benelux are totally linked*”. On this basis it is concluded that the price increase agreed for Belgium, the Netherlands and Luxemburg was 10% (see recital (236)).

(235) The initials “GL” appear in the margin, indicating that Glaverbel was the agreed manufacturer to lead any such price increase in Belgium, the Netherlands and Luxemburg.

(236) As regards Germany, the text reads as follows:

”DE · Prices need to be stabilised on current levels immediately → MAUT ?!

Pilk · Price increase to be lead [sic] by Pilk – 10% increase ⇒ or 50 cts?’

(237) This extract indicates that agreement was reached to increase prices for some or all flat glass product categories in the German market by 10% or EUR 0,5 and that Pilkington should be the first to announce that price increase, the other manufacturers following, as indicated also by the initials ‘Pilk’ appearing in the margin. Table 3 indicates March 2005 as the date for the price increase as regards Germany.

(238) The notes also report the agreement to keep prices in the German market at actual levels, meaning that the flat glass manufacturers, up to the March 2005 price increase, should not offer lower net prices than those applied to each customer at the time of the agreement.

(239) The introduction in Germany, as of 1 January 2005, of the so-called “Mautgebühr” (or 'MAUT') –a toll road tax, to be levied on transport per lorry of over 12 tonnes– led to discussions between the flat glass manufacturers on whether and, if so, how, to pass that cost on to customers: as a separate surcharge which would be related exclusively to that cost component, to be listed separately from the normal commercial product prices in the invoice²⁵⁵, or just as part of the usual product pricing. The latter alternative was apparently perceived as risking to erode prices, which was to be avoided (see document referred to in recital (240)).

(240) A one page note written by Mr (...), dated “2/12/04”²⁵⁶, on the same Pilkington paper as the notes referred to in recitals (210), (213), (224), (226), (229), (231), (233), (241) and (236), with a cover page entitled “MAUT DE”²⁵⁷ found during the inspections in Essen, is believed to summarise the different views of Pilkington (column on the right) and of the other glass manufacturers (column on the left).

(241) As regards Spain, the text reads as follows:

“Spain

•Prices in Free fall since 2 months

•Guardian still very satisfied with Spanish prices.”

(242) This extract indicates that the flat glass manufacturers discussed the actual prices of the flat glass product categories concerned in the Spanish market and noted a significant price erosion since October 2004. Apparently, Guardian expressed its view that it did not see any reason to increase prices at that moment, in that market.

(243) The last, unnumbered page of the eight-page document is headed “General Agreements” and lists the following items:

“① Prices all across Europe to be frozen for the next months

② No acquisition!

③ Prices to go down/up in 2 ct increments

④ Increases in DE + BENELUX are totally linked

⑤ As principle only 8% should go of (sic) the invoice price. How to split between Cash and Bonus is free”

(244) It is concluded that this extract partly summarises the agreements reached and reported on in the other parts of the document, and partly covers other agreements.

²⁵⁵ (...)

²⁵⁶ (...)

²⁵⁷ (...)

- (245) “*Ø*” refers to the agreement not to offer lower net prices than those applied to each customer at the time of the agreement, not only for the countries or regions where price increases and/or minimum prices had been agreed but also for the rest of Europe.
- (246) Under “*③*” the agreement refers to the fact that the manufacturers should not offer price reductions of more than 2 cents at a time in negotiation with customers.
- (247) Under “*④*” the agreement to increase prices in Belgium, the Netherlands and Luxemburg and in Germany in parallel is repeated. (See recital (233))
- (248) Under “*⑤*” an agreement between the manufacturers is reported, according to which the total of any rebates granted to any customer, anywhere, should in principle not be higher than 8% of the invoice price, leaving the manufacturers discretion in dividing that total between sales discounts and cash discounts. It is considered that this agreement was meant to support the agreement under “*Ø*”. (See recital (245))
- (249) On the third and fourth page of the document²⁵⁸, the author further reports on additional information exchanged by the participants:

"Market prices in Spain over the last 2 month have collapsed

SG Ø (= “average”) selling price 3.15 → 2.80”.

" Letters for the Maut announcement will be send (sic) out by G+GL in the next few days”

"SG 1€ct price decline in DE = 1 M€ profit”.

"(...) said...”

"Greece is seen highly profitable by everyone”

- (250) In addition to the discussion on prices in Spain and on the implementation of the 'MAUT' (see in this regard recitals (239) to (240)) by Guardian and Glaverbel, Mr (...)’s notes on the information exchanged during the meeting also indicate that Mr (...), representative of Guardian, was present at the meeting on 2 December 2004.

4.2.7.3. Conclusion on the meeting of 2 December 2004

- (251) It is concluded that, on 2 December 2004, the four major flat glass producers in Europe, Pilkington, Glaverbel, Guardian and Saint-Gobain, met in Luxembourg in the context or on the fringe of a scheduled meeting of one of the GEPVP bodies and agreed on the following:
- price increases (including the amount of the increase), to be implemented in specific Contracting Parties to the EEA Agreement by each producer, each time for all or for specific flat glass product

²⁵⁸ (...)

categories, and each time according to an agreed timing in respect of the undertaking to announce the price increase first;

- minimum prices, to be applied in specific Contracting Parties to the EEA Agreement by each producer, as of the date the price increases were to be implemented, each time for all or for specific flat glass product categories;
- the target price to be achieved in the United Kingdom;
- a single maximum total rebate to be granted by any of the four producers to any customer in at least all Contracting Parties to the EEA Agreement;
- the fact that the manufacturers should not offer price reductions by more than 2 cents at a time in negotiation with customers;
- an immediate price freeze – meaning an agreement not to decrease prices – to be applied by each producer in at least all Contracting Parties to the EEA Agreement and for all flat glass product categories, up until the moment of the effective implementation of any agreed upon price increase in the near future.

4.2.7.4. The parties' arguments in response to the SO as regards the 2 December 2004 meeting and the Commission's findings

- (252) Pilkington did not dispute that Mr (...)’s notes of the meeting on 2 December 2004 constitute a record of the discussions during that meeting. It alleged, however, that the discussions should be characterised as an exchange of information about the future pricing intentions of the glass manufacturers against which Mr (...) later assessed the actual pricing conduct of Pilkington’s competitors.
- (253) This reasoning cannot be accepted. Mr (...)’s notes of 2 December 2004 are quite precise and use expressions such as 'price increase', 'agreed', 'agreement' and 'to lead' which are explicit enough to conclude that anticompetitive agreements were made during the said meeting. Furthermore the meeting was also followed by another anticompetitive meeting on 11 February 2005, which was not a GEPVP meeting and which, as mentioned at recitals (274) to (280), confirms some of the agreements made by the glass manufacturers at the meeting on 2 December 2004, removing any potential doubt on the anticompetitive agreements concluded at the meeting on 2 December 2004.
- (254) Moreover, as stated in recital (100), the Court of First Instance has already held that price announcements normally have an impact on the final outcome even if the final price is negotiated with the customer.²⁵⁹

²⁵⁹ Judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, paragraphs 450-453.

- (255) Pilkington also argued that Mr (...)’s note entitled "*MAUT DE*" was a note he wrote to brief the Pilkington force in Germany summarising the arguments for and against the passing on of the MAUT as a surcharge. Pilkington argued that it declined to apply the MAUT surcharge, notwithstanding the decision by its competitors to do so. Pilkington therefore concludes that the references to the MAUT in Mr (...)’s manuscript notes of the meeting on 2 December 2004 reflect discussions among the other three glass manufacturers only, since Pilkington had decided unilaterally not to pass on the MAUT through a surcharge.²⁶⁰ The Commission’s allegation in the SO as regards discussions between the four flat glass manufacturers on this issue, is therefore incorrect as far as Pilkington is concerned.
- (256) In its reply to the SO, Pilkington did not provide any contemporaneous document in relation to its unilateral decision not to apply the MAUT surcharge. A document in the file entitled "*Maut in Germany – A Saga becomes Reality*" refers to the glass industry's intention, already as early as the beginning of 2003, to apply a surcharge once the MAUT was introduced.²⁶¹ Furthermore, an email exchange between Mr (...) and Mr (...), as late as 30 November 2004, only two days before the meeting on 2 December 2004 in Luxembourg, shows Pilkington had not yet made the decision not to apply the MAUT surcharge.²⁶²
- (257) Incidentally, an undated document in the file, entitled "*Maut in Germany – A Saga becomes Reality*" which obviously is an internal Pilkington presentation on that company's decision not to apply the MAUT surcharge, refers to Pilkington's competitors' MAUT surcharge announcements to their customers, which are dated after the 2 December meeting.²⁶³
- (258) It is therefore concluded that the discussion among the participants of the meeting on 2 December 2004 on the issue of whether and how to pass on the German “MAUT” road toll charge to customers was part of the information exchange on the future behaviour of the parties' (including Pilkington), well before customers were informed about the decision each producer had taken in that respect.
- (259) Even assuming that Pilkington had unilaterally decided, just before the meeting on 2 December 2004, not to apply the MAUT surcharge, the fact that it provided information about its decision in that meeting provides proof of Pilkington’s active participation in the MAUT discussion.
- (260) Guardian stressed that the notes are not reliable and may just contain Mr (...)’s own reflections and ideas. It also stated that the dinner was not organized or held in a clandestine fashion as it only became clear to Mr (...) at 7PM the very same evening who, out of all the people invited, would attend the dinner. Guardian submitted that the Commission had not proven that Mr (...) expressed or indicated

²⁶⁰ (...)

²⁶¹ (...)

²⁶² (...)

²⁶³ Announcements by Guardian and Saint-Gobain are dated 8 and 10 December respectively (...)

his willingness to participate in any agreements on prices or business conditions. Furthermore it is irrational and unlikely that the glass manufacturers would have agreed on a price increase in December to be implemented in March the following year. Mr (...) was, in any case, a passive participant and did not communicate any sensitive information to the other participants and Guardian did not implement any alleged agreement whatsoever.²⁶⁴

- (261) None of Guardian's arguments affect the Commission's findings as regards the meeting. Guardian acknowledges that Mr (...) took part in the dinner. As regards the notes, Pilkington does not contest that they constitute a record of the discussions at the meeting. Guardian accepts that the notes were written in the aftermath of the meeting.²⁶⁵ The notes can therefore not be considered to contain reflections and ideas of the author or the author's proposals of which undertaking would lead a price increase, but are indeed a record of the discussions at the meeting. It is also rather surprising that Mr (...) claims not to have had any idea who was going to attend the dinner until 7PM when he met Mr (...), (...) and (...) at the hotel, as he had extended the invitation to 12 people and booked a gastronomic restaurant²⁶⁶ for dinner. In any event, such ignorance or the alleged public nature of the meeting does not affect the anti-competitive object of the participants' discussions. Furthermore, the fact that the same participants at the December meeting met again in February, as described in sub-section 4.2.8, to reiterate their agreements regarding a price increase to be implemented in March in Germany, Belgium, the Netherlands and Luxemburg contradicts Guardian's claim that it would be irrational for the glass manufacturers to agree in December on a price increase to be implemented in March the following year.
- (262) Mr (...) cannot be considered a passive participant. It is clear from the notes that he provided information that was specific and relevant and that this was noted down by Pilkington's representative, see for instance recital (241). The notes clearly reflect that Guardian would lead a price increase in Estonia, Latvia, Lithuania, Poland and France (see table 3 and recitals (226), (229) and (231)). Such information could only be an outcome of the discussions.
- (263) As to the lack of implementation, for certain countries the price was a target (see recital (224)), which gives the participants room for manoeuvre to have different price increases. The fact that in the United Kingdom the price for some clients was below the target does not prove that Guardian was not a party to the agreement. Indeed, the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives.²⁶⁷

²⁶⁴ (...)

²⁶⁵ (...)

²⁶⁶ www.legastronome.lu

²⁶⁷ Case T-64/02, *Dr. Hans Heubach GmbH & Co. KG v Commission*, [2005] ECR p.II-05137, paragraph 111.

(264) Furthermore, the argument that prices declined or did not significantly change in Poland, France, Germany, Belgium, the Netherlands and Luxemburg cannot be used as evidence of non-implementation of agreements or non-participation in the cartel. In fact, those price increases were to have taken place in March 2005, that is to say after the inspections. It is possible that the price increases for March 2005 were never applied, but that does not prove that Guardian was not a party to the cartel.

4.2.8. Meeting of 11 February 2005

4.2.8.1. Introduction and context

(265) On 11 February 2005, Glaverbel, Saint-Gobain, Pilkington and Guardian met at the Hotel du Louvre in Paris and agreed, amongst other things, on price increases and other commercial conditions for the sale of flat glass products in Germany, Austria, (...), Belgium, the Netherlands and Luxemburg countries and exchanged sensitive commercial information. This meeting was in part a follow-up to their previous meeting of 2 December 2004 with earlier agreements concretized and with additional agreements and information exchange.

(266) Evidence of the meeting can be found in a four-page handwritten document²⁶⁸ which was copied during the inspections carried out on 22 February 2005 at the premises of Pilkington in Essen.

(267) Pilkington stated that Mr (...) wrote those notes and that they constituted contemporaneous notes of a meeting held at the Hotel du Louvre on 11 February 2005 in Paris. Pilkington also confirms the participation of Messrs. (...), (...), (...) and (...) in the meeting.²⁶⁹ Further confirmation of the participation of those four persons in the meeting is provided by Guardian²⁷⁰. In response to the Commission's request for information of (...), Saint-Gobain did not provide any information regarding the meeting on 11 February 2005.

(268) During the inspection at the premises of Glaverbel in Brussels, the Commission found a document showing the following entry in Mr. (...)’s (Glaverbel’s representative in the meeting on 2 December 2004) agenda for 11 February 2005:

“12:30 – 15:30 Réunion La Défense”.²⁷¹

(269) (...) that a meeting took place between Messrs (...), (...), (...) and (...) at the Hotel du Louvre in Paris on that date.²⁷² With reference to Mr (...)’s agenda, (...) in order to maintain the secrecy of the meeting, Mr (...) noted in his agenda that on that day

²⁶⁸ (...)

²⁶⁹ (...)

²⁷⁰ (...)

²⁷¹ (...)

²⁷² (...)

he would meet with Mr (...), who is a colleague of Mr (...) in France, at La Défense in Paris but that this was not correct.²⁷³

- (270) As to the subject matter(s) of the meeting, Guardian replied that Mr (...) accepted a lunch invitation made by Mr (...) in relation to the Marcomm matters of the GEPVP, without further details.²⁷⁴
- (271) The four pages of the document referred to in recital (266), presented in the order in which they were found, are written on the same Pilkington paper. They are not numbered. The heading of the first page, in a kind of cloud-icon, reads “11.2.05”. Although Mr (...)’s handwriting in the notes permits easy reading, the Commission asked Pilkington to provide a typed transcript thereof, together with an explanation of abbreviations, figures, etc.²⁷⁵
- (272) As in the handwritten notes of the meeting on 2 December 2004, the words ‘float’, ‘mirrors’ and ‘low-e’ are used. The abbreviation “VSG” (Verbundsicherheitsglas)²⁷⁶ stands for the same (processed) flat glass product category named “lami” in the description of the notes on the meeting of 2 December 2004. Again, those words clearly point to the product categories which were the subject of the meeting: raw float glass, unprocessed mirror glass, low-emissivity glass and laminated glass, which are the subject of this Decision.
- (273) From the content of those notes and based on other information collected during the inspections of 22 and 23 February 2005, it can be concluded that they report on the outcome of a meeting between representatives of the same undertakings which participated in the dinner meeting on 2 December 2004, summarising the agreements reached and the information exchanged during the meeting of 11 February 2005.

4.2.8.2. Details of the agreements and discussions

- (274) The first page of the four-page document reads as follows:

“AU + (...)”

Price increase in DE

ANNOUNCEMENT WITH Glasbrief 18th February 2005

Letter to be send (sic) to customers 25th - ,, - 2005

– Mirrors Min Net price 3.50 € 3mm

²⁷³ (...)

²⁷⁴ (...) As mentioned at recital (253) there was no Marcomm meeting on that date.

²⁷⁵ (...)

²⁷⁶ See also recital (10).

4.50 € 4 mm

- *Float Min Net price 2.75*
Price increase 10 %
- *Low-E Min Net price 3.63 – 3.65*
Price increase 10 %
- *VSG Min Net price 6.70 – 6.80*
Price increase 10 %”

- (275) This extract indicates that on 11 February 2005, during a meeting of the four major flat glass producers, agreement was reached between the participants on price increases for float, low-e glass and laminated glass or 'VSG' to be implemented in Germany ("DE"), Austria ("AU") and (...), but also on minimum prices for the same product categories plus unprocessed mirrors in the same countries. Pilkington was to announce this increase to its clients in its brochure 'Glasbrief'.²⁷⁷
- (276) This interpretation is consistent with the notes relating to the meeting on 2 December 2004 in Luxembourg whereby Pilkington should be the first to announce a price increase of 10% in Germany as from March 2005, the other manufacturers following, as mentioned at recital (237).
- (277) (...) during the meeting on 11 February 2005, the participants agreed that Pilkington would implement a price increase in Germany and that all the others would follow. Discussions about Germany also covered Austria and (...)²⁷⁸. In advance, in February 2005, Pilkington was to circulate a brochure expressing its intention to customers to increase its prices within the following weeks. The participants also agreed not to decrease their prices until the Pilkington price increase.²⁷⁹ At the time of the oral submissions of 8 March 2005, the price increase had not yet been announced on the market.
- (278) The next entry on the first page of the document reads as follows (as far as relevant):

“• *Benelux Price increase 10 % on the*
price whatever it is.
Glaverbel to lead ...”

²⁷⁷ See recital (90).

²⁷⁸ See recital (85).

²⁷⁹ (...)

- (279) This extract indicates that, during the same meeting, agreement was reached between the participants as to a 10% price increase to be implemented in Belgium, the Netherlands and Luxemburg for some or all four flat glass product categories. This interpretation is consistent with the notes relating to the meeting on 2 December 2004 in Luxembourg²⁸⁰ described in sub-section 4.2.7 whereby Glaverbel should be the first to announce the price increase in Belgium, the Netherlands and Luxemburg in March 2005.²⁸¹
- (280) The price increase exercise in Belgium, the Netherlands and Luxemburg was to be closely linked to the price increase exercise in Germany, also of 10%, led by Pilkington (see recitals (236) and (237)).
- (281) (...) that agreement was reached during the meeting on 11 February 2005 that Glaverbel would initiate a price increase in Belgium, the Netherlands and Luxemburg but subject to the prior announcement of the price increase agreed for Germany. As regards France, the United Kingdom and Ireland the participants did not agree on any specific price increases. However, (...) the general understanding was that none of the participating companies would decrease its prices and that if any of them would raise prices, the others would follow such increase. As regards the Italian market, (...) that no actions were agreed as the participants were satisfied with the existing market situation.²⁸²
- (282) The following extract indicates that the participants in the meeting exchanged information as regards EUR-prices (on a net/net basis ('N/N') that is to say, after deduction of all rebates) they were charging to certain customers in Germany at the time.²⁸³ As regards two of those customers, (...) and (...), information was also exchanged as regards the volumes sold and/or to be sold, by Glaverbel.²⁸⁴

“• *Price levels in DE*

(...) *Pilkington: 2.68 NET/NET*

Guardian: 2.56 – ,, – (incl. 4.25 ...)

20 loads 10 loads Glaverbel: 2.56 –,,– (–,,–)

JAN FEB

(...): *Pilkington: 2.43 net/net*

²⁸⁰ See recitals (233) and (234).

²⁸¹ (...)

²⁸² (...)

²⁸³ In case the flat glass product category is not specified, the Commission understands the price concerns clear float of 4 mm thickness. (...).

²⁸⁴ (...)

*Guardian: H. 2.76 –,– + Maut
T. 2.54*

Glaverbel: 2.72 –,– + Maut

SG: 2.45 –,– + Maut

(...) Glaverbel: 2.34 N/N + MAUT

Guardian: 2.44 N/N + MAUT

Pilkington: 2.58 N/N

(...): Glaverbel Float 2.47 N/N

Low-E 3.30 N/N

Max 4 Guardian Float 2.44 NO SALE

Loads Low-E 3.20

per month²⁸⁵

Pilkingt. Float 2.64

LOW-E

(...): Glaverbel 2.59 N/N + MAUT”

- (283) As regards the rest of the four-page document, the information exchange between the participants at the meeting seems to have concerned several subjects. First, the application of the "MAUT" and whether this road tax was passed on to customers:

“– MAUT is widely accepted in Germany

– Every Austrian customer is paying to Guardian.

– Even (...) is paying the German MAUT”

- (284) Unlike the other suppliers' prices, none of Pilkington prices quoted at recital (282) is followed by the expression “+ MAUT”, indicating that Pilkington did not pass on the tax, at least to those specified customers. This is also confirmed by the other inspection document referred to in recital (240), which highlights Pilkington's point of view on the introduction of the MAUT road tax.

- (285) (...) the representative of Pilkington explained that Pilkington was not planning to pass on the new roads tax, effective in Germany since January 2005, to its customers.²⁸⁶

²⁸⁵ This statement is linked to the word "Guardian" by an arrow.

²⁸⁶ (...)

(286) Second, the participants at the meeting reaffirmed their agreement of 2 December 2004 to set a maximum of 8% for the total of all rebates to be granted to any customer in the German, Austrian and (...) market (and on the maximum for each of the two elements of these rebates – sales discounts and cash discounts respectively – : 3 % for the former and 5% for the latter):

“• *Maximum price reduction $\cdot/ \cdot 3 \cdot/ \cdot 5 = \cdot/ \cdot 8\%$* ”

(287) Third, the participants at the meeting reached agreement on the price level to be achieved in Spain (where some price increases had already been announced) and Portugal (where price increases were to be announced shortly):

“• *Price increases have been announced in Spain + Portugal shortly*

⇒ 2.85 net is target price.”

(288) Fourth, the participants to the meeting reaffirmed their earlier agreement of 2 December 2004 (see recital (246)) that, in negotiations with individual customers, they would not offer greater price reductions than EUR 0,02 at a time: “*Price decreases will happen in 2 ct steps.*”

(289) Finally, under the heading “*New Float Activities and other things*”, the participants at the meeting exchanged information as regards the progress of setting up new float lines by Saint-Gobain, actual commercial relations with specified customers – that is to say (...) – and actual commercial relations in the framework of a flat glass supply agreement between Saint-Gobain and (...) – more in particular regarding agreed upon price and agreed upon volume²⁸⁷.

4.2.8.3. Conclusion on the meeting of 11 February 2005

(290) It is therefore concluded that, on 11 February 2005, the four major flat glass producers in Europe, Pilkington, Glaverbel, Guardian and Saint-Gobain, met and exchanged commercially sensitive information regarding volumes supplied or to be supplied and prices charged to specific customers. They also agreed on the following:

- price increases (expressed in percentage), to be implemented in Germany, Austria, (...) Belgium, the Netherlands and Luxemburg by each producer, each time for some or all flat glass product categories²⁸⁸, and each time according to an agreed timing in respect of the undertaking to announce the price increase first;
- minimum prices, to be applied in Germany, Austria and (...) by each producer for all four flat glass product categories, as of the date the price increase was to be implemented;
- the target price to be achieved in Spain and Portugal;

²⁸⁷ (...)

²⁸⁸ Except for unprocessed mirrors in Germany.

- a single maximum total rebate to be granted by any of the four producers to any customer anywhere in the EEA, including the maximum for each of the two composing elements of those rebates, that is to say, sales and cash discounts.
- the fact that the manufacturers should not offer price reductions by more than 2 cents at a time in negotiation with customers.

4.2.8.4. The parties' arguments in response to the SO as regards the meeting on 11 February 2005 and the Commission's findings

- (291) Guardian again challenged the credibility of Mr. (...)’s notes. Guardian submitted that it did not agree on price increases in any country and that it did give incorrect information. Mr. (...) was a purely passive listener and Guardian continued its competitive behaviour after the meeting.²⁸⁹ In respect of the February meeting, Pilkington again contested that the participants agreed on anything but claimed that they merely expressed their future pricing intentions (see recital (252)) and that in any event there was no implementation of those stated pricing intentions on the market.
- (292) Those arguments cannot be accepted. Both Guardian and Pilkington acknowledge that their representatives participated in the meeting. As regards the notes, Pilkington does not dispute that Mr (...)’s notes taken on the 11 February 2005 constitute a record of the discussions during the meeting. Furthermore, as already mentioned at recital (253), the fact that the meeting on 11 February 2005, which was not a GEPVP meeting, dealt with partly the same agreements as the meeting on 2 December 2004, albeit in more detail, corroborates in itself the claim that these were meetings where anti-competitive agreements were made.
- (293) The claim that Mr. (...) was a passive participant and only provided incorrect information must also be rejected. It is clear from the notes that Mr. (...) did provide information that was specific and relevant and that this was noted down by Pilkington’s representative (see for instance recitals (282) and (283)). It is obvious that Mr. (...) contributed to that meeting as well as to the other meetings where he participated. The representatives of Pilkington, Glaverbel and Saint-Gobain would have found no interest in inviting Mr (...) to those meetings, had he only been passive and contributed incorrect information, particularly if he had done this on several past occasions, as argued by Guardian.
- (294) As for the meeting on 2 December 2004, Pilkington again argued that the MAUT reference in the notes reflected discussions among the other three glass manufacturers only.
- (295) As regards that argument, it is sufficient to refer to the Commission’s reasoning in recitals (256) to (259) and to the fact (...) that the Pilkington representative at the meeting explained Pilkington’s plans regarding the MAUT surcharge, see recital (285).

²⁸⁹ (...)

(296) The argument that there was no implementation of agreements and/or that an undertaking continued its competitive behaviour after the meeting cannot be used as evidence of non-implementation of or non-participation in the cartel. In fact, the meeting was held only a week and a half before the inspections. Apart from the announcement in the Glasbrief on 18 February 2005 and letters to customers on 25 February 2005, there is no date mentioned for the implementation of the agreements and it is likely that such implementation would have taken place after the inspection.

5. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

5.1. Relationship between the Treaty and the EEA Agreement

(297) The arrangements described in Chapter 4 applied to the entire territory of the EEA for which a demand for float glass, laminated glass, low-e glass and unprocessed mirrors existed. The cartel members had sales of the flat glass products concerned by this Decision in practically all the Member States and in the EFTA States party to the EEA Agreement.

(298) The restrictive arrangements set out in Chapter 4 therefore applied to all Contracting Parties to the EEA Agreement, that is to say, all the Member States together with Norway, Liechtenstein and Iceland.

(299) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994. The infringement to which this Decision relates is deemed to have started on 9 January 2004 (see chapter 7 for the duration of the infringement by each undertaking). The EEA Agreement (primarily Article 53 thereof) therefore applies to the arrangements concerned by this Decision.

(300) Insofar as the arrangements affected competition in the common market and trade between Member States, Article 81 of the Treaty is applicable. As regards the operation of the cartel in EFTA States which are part of the EEA (“EFTA/EEA States”) and its effect upon trade between the Member States and EFTA/EEA States or among EFTA/EEA States, this falls under Article 53 of the EEA Agreement.

5.2. Jurisdiction

(301) In this case the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the cartel had an appreciable effect on trade between Member States and between contracting parties of the EEA Agreement, as described in sub-section 5.3.5 of this Decision.

5.3. Application of Article 81 of the Treaty and Article 53 of the EEA Agreement

5.3.1. Article 81 of the Treaty and Article 53 of the EEA Agreement

- (302) Article 81 of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.
- (303) Article 53 of the EEA Agreement (which is modelled on Article 81 of the Treaty) contains a similar prohibition. However the reference in Article 81 to trade "between Member States" is replaced by a reference to trade "between contracting parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the ... [EEA] Agreement".

5.3.2. *The nature of the infringement*

5.3.2.1. Agreements and concerted practices

Principles

- (304) Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements between undertakings, decisions of associations of undertakings and concerted practices.
- (305) An *agreement* can be said to exist when the 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 in the market. It 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. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.²⁹⁰
- (306) In its judgement in the PVC II case²⁹¹, the Court of First Instance stated that "*it is well established in the case law that for there to be an agreement within the meaning of Article [81(1) EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way*"²⁹².

²⁹⁰ Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG a.o. v Commission*, [2002] ECR II-1487

²⁹¹ Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II), [1999] ECR II-931, paragraph 715.

²⁹² The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.1994, recitals 32-35. References in this Decision to Article 81 therefore apply also to Article 53.

- (307) Also, if an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed.²⁹³ It is, indeed, well established case law that “*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*”.²⁹⁴ This should take the form of an announcement by the company that it would distance itself from the cartel objectives and the methods to be used for implementing those objectives.²⁹⁵
- (308) Although Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of “*concerted practices*” and “*agreements between undertakings*”, the object is to bring within the prohibition of those Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition²⁹⁶.
- (309) The criteria of co-ordination and co-operation laid down by the case law of the Court of Justice of the European Communities, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof 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 which they themselves have decided to adopt or contemplate adopting on the market²⁹⁷.
- (310) Thus, conduct may fall under Article 81 of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour²⁹⁸. Furthermore, the

²⁹³ Case T-334/94 *Sarrió v Commission* [1998] ECR II-01439, paragraph 118.

²⁹⁴ *Ibidem*. See also Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 232; and Case T-25/95 *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1389.

²⁹⁵ Case T-329/01, *Archer Daniels v Commission*, judgement of 27 September 2006 (not yet published), paragraph 247.

²⁹⁶ Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

²⁹⁷ Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663.

²⁹⁸ See also Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, paragraph 256.

process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

- (311) Although in terms of Article 81 of the Treaty 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 in 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. Such a concerted practice is caught by Article 81 of the Treaty even in the absence of anti-competitive effects on the market²⁹⁹.
- (312) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article³⁰⁰.
- (313) It is not necessary, particularly in the case of a complex infringement, for the Commission to characterise the conduct as exclusively one or other of those forms of illegal behaviour. The concepts of *agreement* and *concerted practice* are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 81 of the Treaty lays down no specific category for a complex infringement involving different forms of anti-competitive behaviour.³⁰¹
- (314) In a situation where there are several cartel members and their anti-competitive behaviour over time can be characterised as either agreements or concerted practices (complex infringement), the Commission does not need to assess precisely for each time of behaviour in which group it falls.³⁰²

²⁹⁹ See also Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, paragraphs 158-166.

³⁰⁰ See, in this sense, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission*, *Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, paragraph 72.[1995] ECR II- 1057, 1063, 1191

³⁰¹ See again Case T-7/89 *Hercules v Commission*, paragraph 264.

³⁰² See paragraph 696 of *PVC II* judgement referred to in footnote 291; “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each

- (315) An agreement for the purposes of Article 81 of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, 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 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, upholding the judgement of the Court of First Instance, pointed out in *Commission v Anic Partecipazioni SpA*³⁰³ it follows from the express terms of Article 81 of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.
- (316) According to the case law the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 81 of the Treaty. It is, however, 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. It is in fact normal that agreements and practices prohibited by Article 81 of the Treaty assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, 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.³⁰⁴

Application in this case

- (317) It is demonstrated by the facts described in Chapter 4 this Decision (see in particular recitals (141), (154), (171), (251) and (290)) that Glaverbel, Guardian, Pilkington and Saint-Gobain entered into the following arrangements for the identified product categories within the flat glass sector:
- price increases, to be implemented in specific Contracting Parties to the EEA Agreement by each producer,
 - minimum prices, to be applied in specific Contracting Parties to the EEA Agreement by each producer,
 - target prices, to be achieved in specific Contracting Parties to the EEA Agreement,
 - a price freeze in at least the EEA,

undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty”.

³⁰³ Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I - 4125, at paragraph 81.

³⁰⁴ Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v Commission*, [2004] ECR p. I-123, paragraphs 53-57 and joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, *Dresdner Bank AG and Others v Commission*, judgement of 27 September 2006 (not yet published) paragraphs 59-67.

- additional arrangements for commercial conditions applied to customers such as the level of total rebates to be granted and price reductions to be applied in steps of 2 cents at a time and
 - exchange of sensitive commercial information.
- (318) The cartel activities from 9 January 2004 until 22 February 2005 form part of an overall plan to restrict competition among the four participants which determined the lines of their actions in the flat glass sector and limited the commercial autonomy of each participant. In accordance with the case law, this overall scheme qualifies as an agreement and/or concerted practice between undertakings within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement in the sense that the flat glass producers concerned expressed their joint intention to conduct themselves on the market in a specific way. That behaviour consisted mainly in price coordination between the main flat glass producers on the EEA market.
- (319) It is demonstrated by the facts in Chapter 4 that representatives of the undertakings concerned arranged cartel meetings on several occasions. The meetings and the practices and agreements they entailed were arranged in a clandestine fashion and the participants made efforts to protect the secrecy of the meetings by normally not keeping any notes and using false agenda entries and travel records (see recitals (81), (144), (146), (192), (269)). Documentation associated to the meetings and the practices and agreements was found by the Commission during the inspections and illustrates the existence of the cartel. The documentation contains repeated references to what was "agreed" and to the (an) "agreement(s)" (recitals (159), (163), (213), (215), (224), (226), (231) and (243)) and also reports on exchange of information (see for instance recitals (162), (165), (249), (282) and (283)). (...).
- (320) As stated in Chapter 4, the flat glass producers also implemented agreed price increases (see recitals (129), (148), (159), (163) and (219) to (221)). As regards implementation by Guardian, it has already been pointed out (see recital (130)), that Guardian failed to comply with the Commission's request to provide price increase announcements. The sharing of information between the participants made it possible for them to review the implementation of the price arrangements and to work out new ones. The cartel members were able to coordinate their commercial conduct and to monitor each others' pricing and sometimes deliveries to common customers in order to ensure adequate effectiveness of the arrangements and their joint control of the market. By way of example, this is shown by the exchange of information mentioned in recitals (84) and (282) and the reference to "work in progress" in Italy (recitals (213) to (223)) and the follow-up on an earlier agreement to increase prices in Estonia, Latvia and Lithuania (recitals (226) to (228)).
- (321) Based on the foregoing, the different elements of behaviour of the addressees of this Decision can be considered to form part of an overall scheme to coordinate prices of the identified flat glass products in the EEA. The behaviour of the undertakings concerned can be characterised as a complex infringement consisting of various actions which can be either classified as an agreement or concerted practice, within which the competitors knowingly substituted practical co-operation between them for the risks of competition. Furthermore, given that the

concertation among the participating undertakings occurred on a continuous and regular basis and that there is evidence for the actual implementation of agreed price increases, those undertakings must have taken account of the information exchanged with competitors in determining their own conduct on the market. The complex of infringements in this case as described in Chapter 4 therefore presents all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty.

5.3.2.2. Single and continuous infringement

Principles

- (322) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The Court of First Instance points out, *inter alia*, in the *Cement* cartel case that the concept of ‘single agreement’ or ‘single infringement’ presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.³⁰⁵ The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty.
- (323) 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 was a single infringement which progressively would manifest itself in agreements and/or concerted practices.
- (324) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81 of the Treaty where there is a single common and continuing objective.
- (325) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and/or the same anti-competitive effect. An undertaking which takes part in the 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. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk³⁰⁶.

³⁰⁵ Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraph 3699.

³⁰⁶ See Case *Commission v Anic Partecipazioni* (referred to in footnote 303), at paragraph 83.

(326) In fact, as the Court of Justice stated in its judgment in *Commission v Anic Partecipazioni*³⁰⁷, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as recently reiterated by the Court in the *Cement* cases, that an infringement of Article 81 of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 81 of the Treaty. When the different actions form part of an ‘overall plan’, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.³⁰⁸

Application in this case

(327) In this case, the conduct in question constitutes a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(328) For the period from 9 January 2004 to at least 22 February 2005 the evidence referred to in this Decision shows the existence of a single and continuous collusion in the flat glass sector in the EEA for float glass, laminated glass, low-e glass and unprocessed mirrors between Glaverbel, Guardian, Pilkington and Saint-Gobain (see chapter 7 for the duration of the infringement for each undertaking). Indeed, the parties expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct in the price setting regarding these products. The collusion was in pursuit of a single anti-competitive economic aim of distorting competition in the flat glass sector in the EEA by agreeing on price increases, minimum prices, target prices, price freezing and other commercial conditions as well as exchanging commercially sensitive information.

(329) It would be artificial to split up such continuous inter-related conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single complex and continuous infringement for the products concerned which progressively would manifest itself in agreements and/or concerted practices.

(330) It should in this regard also be noted that it is natural that arrangements over a period of time involve organisational changes, a variation in the participant undertakings, their respective importance in the cartel or changes in the intensity and regularity of the meetings. However, in this case there is actually a clear

³⁰⁷ See Case C-49/92P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125.

³⁰⁸ See Joint cases C-204/00 and others, *Aalborg Portland et al.*, paragraph 258 (not yet published). See also Case C-49/92, *Commission v Anic Partecipazioni*, paragraphs 78-81, 83-85 and 203.

continuity of meetings, of the individuals attending them and of the modalities of the cartel behaviour. Indeed, throughout the duration of the infringement, the arrangements focused on price coordination with the exchange of commercially sensitive information and the participants were all representatives of the undertakings at the level of (...). During the meetings the participants dealt with float glass, laminated glass, low-e glass and unprocessed mirrors. The Commission has proven that the original participants in this continuous conduct were Glaverbel, Pilkington and Saint-Gobain. Guardian was made aware of the arrangements and expressed its intention to cooperate with the others as from at least 20 April 2004 (see sub-section 4.2.5). After the involvement of Guardian, the infringement continued with the same individuals representing the other undertakings and with the same cartel modalities.

5.3.3. *Restriction of competition*

- (331) The anti-competitive behaviour in this case had the object of restricting competition in the Community and the EEA.
- (332) Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which directly or indirectly fix selling prices or any other trading conditions³⁰⁹
- (333) Price being the main instrument of competition, arrangements between competitors directed at coordination of prices will by their very nature restrict competition within the meaning of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement.
- (334) The cartel has to be considered as a whole and in the light of the overall circumstances. The principal aspects of the complex of agreements and practices considered in this case which can be characterised as restrictions of competition are agreeing on price increases, minimum prices, target prices, price freezing and other commercial conditions as well as exchanging commercially sensitive information.
- (335) These kinds of arrangements have as their object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA agreement.
- (336) It is settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-

³⁰⁹ The list is not exhaustive.

competitive object of the conduct in question is proven³¹⁰. The same applies to concerted practices.³¹¹

- (337) In Chapter 4 it is shown that on various occasions the flat glass producers announced price increases, which were previously agreed upon, in a parallel and coordinated manner, see recitals (129), (148), (159), (163) and (219) to (221). As already pointed out in recital (130), Guardian has failed to comply with the Commission's requests to provide price increase announcements. As explained in recital (320) the parties also made efforts to monitor each other's pricing and deliveries. Even if it is not necessary to show actual anti-competitive effects where the anti-competitive object of a conduct is proven, the latter behaviour indicates that cartel agreements were at least partly implemented, which implies that actual anti-competitive effects of the cartel arrangements are likely to have taken place even if the precise magnitude of such effects does not appear to be measurable.
- (338) For the cartel agreements to be considered as implemented, it is not necessary that all the participants always respect the arrangements. As the Court of First Instance stated in the *Cascades* judgement, "*an undertaking which, despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit*".³¹²
- (339) The competition-restricting object of the arrangements is sufficient to support the conclusion that Article 81 of the Treaty and Article 53 of the EEA Agreement apply. The likelihood of those arrangements having the effect of restricting competition leads to the same conclusion.

5.3.4. *Application of Article 81(3) of the Treaty*

- (340) The provisions of Article 81(1) of the Treaty may be declared inapplicable pursuant to Article 81(3) where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- (341) Restriction of competition being the sole object of the price arrangements which are the subject of this Decision, there is no indication that the agreements and concerted practices between the flat glass manufacturers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this Decision, are, by definition, the most

³¹⁰ Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178 and case T-38/02, *Danone v Commission*, [2005] ECR II-4407, paragraph 150.

³¹¹ See recital (311).

³¹² Case T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 230. See also Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of 15 June 2005 (not yet published) at paragraph 297.

detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.

(342) The parties have not raised any arguments to suggest that the conditions of Article 81(3) of the Treaty are fulfilled in this case, and the Commission considers that this is not the case.

5.3.5. *Effect upon trade between Member States and between EEA Contracting Parties*

(343) The continuing agreement between the flat glass manufacturers had an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement.

(344) Article 81 of the Treaty is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(345) The Court of Justice and Court of First Instance have consistently held that, "*in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective 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*".³¹³ In any event, whilst Article 81 of the Treaty "*does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect*"³¹⁴.

(346) As demonstrated in recitals (56) – (59), the market for float glass, low-e glass, laminated glass and unprocessed mirrors is characterised by a substantial volume of trade between Member States. There is also trade between the Community and EFTA countries belonging to the EEA.

(347) The application of Articles 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for those provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States³¹⁵.

³¹³ See Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others* [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR* [2002] ECR II-491.

³¹⁴ Case C-306/96 *Javico*, [1998] ECR I-1983, paragraphs 16 and 17; see also Case T-374/94, *European Night Services*, [1998] ECR II-3141, paragraph 136 and Case C-238/05, *Asnef-Equifax*, judgement of 23 November 2006 (not yet published), paragraph 43.

³¹⁵ See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

- (348) In this case, the cartel arrangements of the four major flat glass manufacturers in the Community/EEA covered the whole of the EEA. The collusion on fixed price increases, minimum prices and other commercial conditions and the exchange of sensitive commercial information was capable of resulting in the automatic diversion of trade patterns from the course they would otherwise have followed³¹⁶.
- (349) Insofar as the activities of the cartel related to sales in countries that are not members of the Community or the EEA, they lie outside the scope of this Decision.

5.4. The parties' arguments in response to the SO as regards the legal assessment of the facts and the Commission's appraisal

5.4.1. The parties' arguments as regards proof of the infringement and the Commission's legal assessment of the facts

- (350) The Commission has already addressed the parties' arguments in relation to specific evidence and parts of the facts when presenting the cartel in chronological order in Chapter 4. This section will assess the parties' arguments of a general nature relating to the proof of the infringement and assessment of the facts.
- (351) Guardian and Pilkington argued that the evidence of which the Commission is in possession would not be sufficient to establish their participation in the cartel as described by the Commission.³¹⁷
- (352) Reference should first of all be made to recital (316). The overall participation of these undertakings in the cartel is established on the basis of the contemporaneous evidence gathered during the investigation (...).
- (353) More specifically, Guardian and Pilkington questioned (...) statements and referred to inconsistencies, a tendency to increasingly incriminate other parties and pressure to provide evidence of significant added value.³¹⁸
- (354) That reasoning cannot be accepted. There is no provision or any general principle of Community law that prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings.³¹⁹ Admittedly, (...) gave their statements after the material events and for the purpose of application of the Leniency Notice. They cannot however be regarded as devoid of probative value. Statements which run counter to the interests of the declarant

³¹⁶ See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

³¹⁷ (...).

³¹⁸ See in particular point 213 in Guardian's reply to the SO and points 2.8 – 2.13 in Pilkington's reply to the SO.

³¹⁹ Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp a.o v Commission*, [2004] ECR p. II-02501, paragraph 192.

must in principle be regarded as particularly reliable evidence.³²⁰ The fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not, as such, create an incentive to submit distorted evidence. Indeed, any attempt to mislead the Commission could call into question the sincerity and completeness of cooperation of the person seeking to benefit, thereby jeopardising his chances of benefiting from the Leniency Notice.³²¹ Where statements containing inaccuracies are corrected in a later statement this merely means that the probative value of such statements must be carefully analysed, but does not in itself render the testimony worthless. In fact, recollection of facts does not need to be perfect in order to be credible. Moreover, (...) do not tend to exculpate (...) or tone down its role in the cartel. The statements are corroborated by other evidence contemporaneous with the facts at issue which was gathered independently of (...). Thus, the existence of the collusive meetings referred to by (...) is confirmed by other items of evidence dating from the time of the infringement (...).

- (355) Furthermore, evidence of the infringement is also found in the parties' replies to the requests for information, see for instance recitals (129), (148) and (190). It is clear from the case law that answers given on behalf on an undertaking are normally of high probative value.³²²
- (356) As to the handwritten notes of Mr. (...), Guardian argued that they are of a private character and do not reflect the true content of the discussions but rather scenarios envisaged by Mr. (...).³²³ Pilkington referred to the general pricing transparency in the flat glass sector and argued that it cannot be assumed that information in Mr. (...)’s notes is sensitive commercial information exchanged by competitors as such information might already have been known to Pilkington from its customers. Similarly, Guardian emphasised that the information Mr. (...) provided was either incorrect or publicly known.
- (357) Those arguments cannot be accepted. The notes of Mr. (...) are contemporaneous documents found during the inspections. For the most part, they constitute minutes of meetings he attended himself and/or a record of the discussions during such meetings, see recitals (157), (177), (198), (199) and (267). The notes are detailed, structured (sometimes with tables, bullets or numbered items) with a relatively high level of precision. In particular, the notes of the meeting on 2 December 2004 and the meeting on 11 February 2005 are evidently connected and coherent. The argument that the very precise figures, recorded in documents such as minutes or records of discussions with cartel members, were already known to Pilkington – or to the other participants – and did not constitute sensitive commercial information

³²⁰ Joined Cases T-67/00, T 68/00, T-71/00 and T-78/00, *JFE Engineering v Commission*, [2004] ECR II-2501, paragraph 211.

³²¹ Judgement of 16 November 2006 in Case T-120/04, *Peróxidos Orgánicos, SA v Commission*, not yet reported, paragraph 70.

³²² Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, *JFE Engineering Corp a.o. v Commission*, [2004] ECR p. II-02501, paragraph 205.

³²³ (...)

cannot be accepted. The figures were discussed within the cartel arrangements and were written down so that the author would remember the agreements and discussions. Guardian's argument that it only provided incorrect or publicly known information has already been dismissed (see recitals (178), (262) and (293)). Such argument already concedes that Mr. (...) was present and took part in the discussions on price increase and other agreements and for those reasons was repeatedly invited to meetings or called on the phone.

- (358) The Court of First Instance has also disregarded as irrelevant similar arguments that information revealed to competitors could already have been gathered by those competitors on the market. First, even if a price leader first notified its customers, individually and on a regular basis, of the prices it intended to charge, that fact does not imply that at the time, those prices constituted objective market data that were readily accessible. Second, through direct information exchanges the participants became aware of that information more simply, rapidly and directly than they would have done via the market. Third, the systematic participation of undertakings in competitor meetings allows them to create a climate of mutual certainty as to their future pricing policies.³²⁴
- (359) As regards the exchange of information that is not publicly known, "*the fact that an exchange of information involves information which an independent operator scrupulously preserves as business secrets is sufficient to demonstrate the existence of an anti-competitive intention*".³²⁵
- (360) Thus, on the basis of inspection documents, (...) and the parties' replies to the Commission's request for information it has been established that the undertakings in question have participated in an anti-competitive practice. In such circumstances it is for Pilkington and Guardian to produce evidence that explains their conduct in a way that is consistent with competitive behaviour.³²⁶ In the Commission's view no such proof has been provided. Pilkington and Guardian have not produced a different, coherent explanation of the circumstances and indications that the Commission relies on.³²⁷ In particular, they have not given any convincing explanation or justification as to another purpose (and content) of the meetings and discussions. For instance, as regards the meeting on 20 April 2004 there is no explanation of how the discussions were either relevant for their commercial relationships or otherwise consistent with competitive behaviour. Furthermore, as regards the meetings on 2 March 2004 and 15 June 2004,

³²⁴ Joined cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle and Others v Commission*, [2001] ECR II-2035, paragraphs 60-61

³²⁵ Joined cases T-202/98, T-204/98 and T-207/98, *Tate & Lyle and Others v Commission*, [2001] ECR II-2035, paragraph 66. See also judgement of the Court of First Instance on 12 September 2007 in case T-36/05, *Coats Holdings Ltd and J & P Coats Ltd, v Commission*, not yet reported, paragraph 113.

³²⁶ Joined cases C-204/00 P etc *Aalborg Portland and others v Commission* [2004] ECR I-123, paragraph 132.

³²⁷ See Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and others v Commission*, [2004] ECR I-123, paragraph 132.

Pilkington has not given any explanation as to why the travel expenses of Mr. (...) indicate other destinations and/or purposes of the travel than the real ones.

- (361) Guardian argued that since this case is not very complex and concerns a short time period and Guardian's involvement is unclear, the Commission should assess whether each type of alleged conduct in itself constitutes an agreement or a concerted practice. It argued that for the three meetings and one phone call that concern Guardian, the Commission has not proven that Guardian entered into any agreement or concerted practice as it did not communicate any confidential information to the others and did not implement any of the alleged arrangements. Furthermore, Guardian argued that it distanced itself from the cartel and, in particular, that it provided incorrect information at the meeting on 20 April 2004. According to Guardian, the case law which requires distancing by clear opposition is not applicable to bilateral meetings and phone calls. In such situations, disagreement can be demonstrated by conclusive behaviour and it is not necessary to voice opposition.³²⁸ In any event Guardian played a passive role.
- (362) Those arguments cannot be accepted. Reference should first of all be made to recitals (313) and (314). Considering that there are several undertakings involved, that the cartel concerns several product categories, that in the handwritten notes relating to the meetings there are expressions such as "agreed", "agreement" or "to lead" and also reports of exchanges of information, that the discussions relate to a range of countries and that the participants have made an effort to prevent detection, the Commission cannot be required to define precisely for each single occasion whether the conduct of each undertaking constitutes an agreement or a concerted practice. As regards the argument that Guardian did not enter any agreement or concerted practice, it is sufficient to state that it is established that it participated in the cartel meetings and it can therefore be assumed that it complied with the overall objective of the cartel. In addition, the case law states that the condition of reciprocity of a concerted practice is met where one competitor discloses its future intentions or conduct on the market to another and the latter requests it or, at the very least accepts it.³²⁹ Therefore, in particular as regards the meeting on 20 April 2004, even if there was no agreement on that meeting, it can still be assessed as at least a concerted practice. Furthermore, Guardian cannot be considered to have distanced itself from the cartel. Indeed, it is established case law that the undertaking must distance itself from the cartel openly and unequivocally, in such a way that the other participants are aware that it does not subscribe to the conclusions of meetings and will not act in conformity with them or is participating in the meetings in a spirit which is different from theirs.³³⁰ That

³²⁸ (...).

³²⁹ Joined cases T-25/95 etc, *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 1849

³³⁰ Case T-7/89, *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, paragraph 232, Case 12-89, *Solvay et Compagnie SA v Commission* [1992] ECR II-907, paragraph 98, Case T-141/89, *Tréfileurope Sales SARL v Commission* [1995] ECR II-791, paragraphs 85 and 86, Case T-15/89, *Chemie Linz AG v Commission* [1992] ECR II-1275, paragraph 135, Case T-61/99, *Adriatica di Navigazione SpA v Commission* [2003] ECR II-5349, paragraph 135, joined cases T-25/95 etc, *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 3199. See also case C-199/92, P *Hüls AG v Commission*

case law is also applicable as regards the bilateral meeting on 20 April 2004 and the phone call in June 2004.³³¹ Finally, Guardian cannot be considered passive as it is established that Mr. (...) actively contributed to the discussions.³³²

- (363) Referring to evidence regarding pricing with customers, Guardian and Pilkington also emphasise that their actions on the market were competitive. They provided the effective prices charged to their final customers in several countries in order to prove that the agreements and/or concerted practices alleged in the Commission's objections were not implemented, that on the contrary they behaved competitively on the market and that the alleged agreements did not have any effect on the actual invoiced prices.
- (364) As already noted in recital (99), it is in the nature of the market that general price increases are first announced by the different suppliers and that final prices are thereafter negotiated between the suppliers and the individual customers. The cartel mainly concerned the general price increase announcements. It is irrelevant that final prices are eventually negotiated with individual customers as what is important for the cartel is that the announcements give the general direction that prices will be increased on the market. As regards Guardian, it has already been pointed out that Guardian failed to comply with the Commission's requests to provide its price increase announcements.
- (365) The Court of First Instance has already stated that price announcements normally have an impact on the final outcome even if the final price is negotiated with the customer. Indeed, "*[t]he fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition*".³³³
- (366) It is also clear from the case law that the implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives.³³⁴

[1999] ECR I-4287, paragraph 155 and case C-49/92 P, *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 96, C-204/00 *Aalborg Portland A/S and others v Commission* [2004] ECR I-123, paragraphs 81-86 and joined cases T-259/02 etc *Raiffeissen Zentralbank Österreich and others v Commission* (Lombard Club), judgement of 14 December 2006, not yet reported, paragraph 486.

³³¹ See case T-56/99 *Marlines SA v Commission* [2003] ECR II-2003, paragraph 56, confirmed on appeal, case C-112/04 P *Marlines SA v Commission*, order of 15 September 2005, not yet reported, where one undertaking was considered participating in agreements by the mere fact that it had received telefaxes from other companies.

³³² See for instance recitals (178), (226), (229), (231), (241) and (249).

³³³ Judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, paragraphs 450-453.

³³⁴ Case T-64/02, *Dr. Hans Heubach GmbH & Co. KG v Commission*, [2005] ECR p. II-05137, paragraph 111.

- (367) Guardian and Pilkington finally claimed that the cartel cannot be considered to be EEA-wide. They argued that at the very most it can be considered to cover specific countries or groups of countries at specific times. Guardian added that, in any event, it is inappropriate to consider that Guardian knew or should have known about an overall single and continuous EEA-wide collusion, at least prior to 2 December 2004.
- (368) That reasoning cannot be accepted. To the contrary, the infringement must be considered to be EEA-wide, for the reasons set out in recitals (369) and (370).
- (369) The participants, Glaverbel, Guardian, Pilkington and Saint-Gobain, compete with one another in selling the product categories concerned to independent customers and they are all members of the GEPVP³³⁵. They all sell the product categories concerned within at least the EEA and their combined share of the sales in the EEA amounts to at least 80% (see Table 1). They supply the EEA customers from their production facilities and warehouses dispersed throughout the EEA (see recital (56)) and through the commercial relationships between them (see recital (39)). (...).³³⁶. (...) (see recital (55)). (...)
- (370) Such functioning of the flat glass sector underlies the general functioning of the cartel: the participants in the meetings and contacts were all (...) (see recital (105)). (...).³³⁷ The object of the cartel was European wide: to limit competition on the entire European flat glass market (see recital (80)) and reverse the general downward trend for prices (recital (81)). (...) discussed general commercial conditions such as bonuses and rebates (see for instance recital (243)) and exchanged information, notably on their main European customers and the prices they charged to them (see for instance recitals (165) and (282)). They discussed and agreed on price increases and the timing thereof, including which undertaking was to lead the increase, and on minimum prices or target prices. Such discussions differed between different countries or groups of countries in at least the EEA due to the specificities in each country or group of countries, but they all had the same anti-competitive object. Thus, on 9 January 2004 the participants discussed Germany (recital (141)); on 2 March 2004 they discussed Belgium, the Netherlands and Luxemburg (recital (154)); on 20 April the United Kingdom, Ireland, Germany and Italy (recitals (159), (162), (163), (165) and (167)); on 15 June 2004, Italy (recitals (189) and (196)); on 2 December 2004 at least the following countries: Ireland (recital (210)), Italy (recital (213)), the United Kingdom (recital (224)), Estonia, Latvia and Lithuania (recital (226)), Poland (recital (229)), France (recital (231)), Belgium, the Netherlands and Luxemburg (recital (233)), Germany (recital (236)), Spain (recital (241)) and Greece (recital (249)). They also referred to earlier agreements, such as an earlier agreement on Estonia, Latvia and Lithuania (recital (226)). Furthermore, there were also more general agreements such as "Prices all across Europe to be frozen for the next months" (recital (243)). On 11 February 2005 the parties discussed Germany

³³⁵ Guardian is member since mid-2004.

³³⁶ (...)

³³⁷ (...) The first attendance of Guardian in these meetings was on 16 November 2004 (...).

(recitals (274), (282) and (283)), Belgium, the Netherlands and Luxemburg (recital (278)), Austria (recitals (274) and (283)) and Spain and Portugal (recital (287)). In such circumstances the infringement must be considered to have covered the entire EEA.

(371) Guardian's argument that it could not have known about an overall single and continuous EEA-wide collusion prior to 2 December 2004 cannot be accepted. To the contrary, several indicia point to the fact that Guardian must already have known that the cartel had a wider scope on 20 April 2004 and was prepared to accept that risk. In addition to the common features of the undertakings participating in the cartel, the synergies in the flat glass sector and the general functioning of the cartel described in recitals (369) and (370), on 20 April 2004 Guardian was in the process of formally joining the GEPVP (see recital (160) and footnote 195). On that date, its (...), Mr. (...) ³³⁸, met with Pilkington's (...) ³³⁹ and (...), Mr. (...). During their meeting they discussed several Member States: the United Kingdom, Ireland, Germany and Italy. Guardian was then called on 15 June 2004 and it participated in the meetings on 2 December 2004 and 11 February 2005. (...) Guardian was informed of the discussions between Glaverbel, Pilkington and Saint-Gobain by Mr (...), as from at least March 2004. On the basis of these indicia it must be held that, on 20 April 2004, Guardian already knew or should have known, that it was participating in an EEA-wide cartel or at least in a cartel of a wider scope than what was discussed on 20 April 2004. Therefore, Guardian must be considered to have participated in an EEA-wide cartel as from 20 April 2004, constituting a single and continuous infringement.

5.4.2. *Guardian's arguments as to its distinctive character and lack of commercial interest*

(372) Guardian argued at some length that the Commission has not considered that it would be irrational for it to collude on a pricing strategy with its competitors. It stressed that it is not vertically integrated as the others and that general price increases would squeeze out its individual customer base. (...) ³⁴⁰

(373) The characteristics of Guardian are not such as to cast doubt on the series of indicia proving its participation in the cartel. For the purposes of the cartel, it is not different from its competitors as they compete with one another in selling the product categories concerned to independent customers.

(374) Documents in the file establish that the cartel members are competitors. In the first place, the turnover figures communicated by the undertakings in response to the Commission's request for information show that they all sell the product categories concerned within at least the Community/EEA. ³⁴¹

³³⁸ (...)

³³⁹ Mr. (...) see recital (105).

³⁴⁰ (...).

³⁴¹ (...).

- (375) From Guardian's own sales reviews and reports it can be seen that it analyses the competition on, for instance, float, low-e and laminated glass.³⁴² In the "*Year end report UK and Ireland*" (2004), Guardian discusses the competition experienced from Saint-Gobain, Pilkington and Glaverbel³⁴³. In the "*Guardian Glass Spain Sales report 2004*" it was noted that "...the continuous fight between St Gobain affiliates and Vitro kept on decreasing the I.G. prices, putting additional pressure in the independent customers" and on the next page, "Pilkington tried to get long terms deals at any price in Portugal and in Spanish customers, and Glaverbel continued his usual aggressive price policy".³⁴⁴ These findings establish that from Guardian's perspective, competition with, in particular, Glaverbel, Saint-Gobain and Pilkington for independent customers necessarily existed, without which the analyses in those documents cannot be explained.
- (376) Moreover, internal e-mails also contain exchanges of such information.³⁴⁵ In an e-mail from the Marketing Manager for the Northern Part of Italy to, amongst others, Mr (...) the following is noted³⁴⁶: "Price increase announcements went from S. Gobain [...] and Glaverbel [...] and Pilkington [...], I hope other competitors are going to realize we all needs (sic) to increase some and it'll do asap ad (sic) without dirty games."
- (377) The flat glass sector is dominated by the four competitors Glaverbel, Guardian, Pilkington and Saint-Gobain – having together approximately at least 80% of the market (see Table 1). The cartel arrangements related to prices applicable to independent customers, which – in the light of Guardian's status as supplier to such customers – suffices to explain that undertaking's participation in meetings and contacts.
- (378) In any event, as far as the existence of the infringement is concerned, it would not matter whether or not the conclusion of cartel agreements was in Guardian's commercial interest. As the Court of Justice held in *Sumitomo Metal Industries and Nippon Steel v Commission*: "*where the Commission has succeeded in gathering documentary evidence in support of the alleged infringement and where that evidence appears to be sufficient to demonstrate the existence of an agreement of an anti-competitive nature, there is no need to examine the question whether the undertaking had a commercial interest in the agreement.*"³⁴⁷

342 (...)

343 (...).

344 (...).

345 (...).

346 (...).

347 See judgement of 25 January 2007 in joined cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v. Commission*, not yet reported, paragraph 46. See also joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and others v Commission*, [2004] ECR I-123, paragraph 335.

- (379) The Court goes on to state that "*As regards, in particular, agreements of an anti-competitive nature reached, as in the present case, at meetings of competing undertakings, the Court has already held that an infringement of Article 81(1) EC is constituted when those meetings have as their object the restriction, prevention or distortion of competition and are thus intended to organise artificially the operation of the market [...]. In such a case, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded in order to prove that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward indicia to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs [...].*"³⁴⁸
- (380) As already observed in recital (362) Guardian has not distanced itself from the cartel.
- (381) Notwithstanding the above, Guardian itself stated, at the Oral Hearing on 7 June 2007, that Mr. (...) attended the meetings probably aiming to obtain useful information about the other participants but not to reveal anything about Guardian. Guardian also stated that Mr. (...) deliberately gave information that was made up or embellished.³⁴⁹ Those statements show that, in his mind, the contacts were of commercial interest for Guardian.
- (382) Guardian also emphasised that Mr. (...) was not authorized to make – and in fact does not make – any price setting decisions.³⁵⁰ At the Oral Hearing on 7 June 2007 Guardian also stated that he did not report to anyone about the alleged contacts with competitors.
- (383) The Court of Justice has already disregarded the argument that the Commission is required to show that the partners or managers of a company committed the infringement intentionally or negligently. In order to attribute liability, it is not necessary "*for there to have been action by, or even knowledge on the part of the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices*".³⁵¹
- (384) Guardian's arguments as to its distinctive character and lack of commercial interest do not establish that its participation in the meetings was without any anti-competitive intention. It is therefore concluded that the body of the evidence as a

³⁴⁸ Judgement of 25 January 2007 in joined cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v. Commission*, not yet reported, paragraph 47.

³⁴⁹ (...)

³⁵⁰ (...).

³⁵¹ Cases 100-103/80, *SA Musique Diffusion Française v. Commission* of 7 June 1983, ECR 1983 p. 01825, paragraph 97. See also Case T-9/99, *HFB and others v Commission*, [2002] ECR II-1487, paragraph 275, Case T-15/99, *Brugg Rohrsysteme v Commission*, [2002] ECR II-1613, paragraph 58, Case T-236/01 *Tokai Carbon v Commission*, [2004] ECR II-1181, paragraph 277.

whole allows the Commission to find that Guardian has committed an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

6. ADDRESSEES OF THIS DECISION

6.1. Principles

- (385) The subjects of Community competition rules are undertakings, a concept which is not identical with that of corporate legal personality for the purposes of commercial or fiscal national law. The undertaking that participated in the infringement is therefore not necessarily identical with the precise legal entity within the group of companies whose representatives actually took part in the cartel meetings. The term “undertaking” is not defined in the Treaty. It may refer to any entity engaged in commercial activities. The case law has confirmed that Article 81 of the Treaty is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision.³⁵²
- (386) Despite the fact that Article 81 of the Treaty is applicable to undertakings and that the concept of undertaking has an economic scope, only entities with legal personality can be held liable for its infringement.³⁵³ Measures enforcing Community competition rules must thus be addressed to a legal entity.
- (387) It is accordingly necessary to define the undertaking that will be held accountable for the infringement of Article 81 of the Treaty by identifying one or more legal persons to represent the undertaking. According to case law, “*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*”.³⁵⁴ If a subsidiary does not determine its own conduct on the market independently, the company which directed its commercial policy forms a single economic entity with the subsidiary and may thus be held liable for an infringement on the ground that it forms part of the same undertaking.
- (388) According to the settled case-law of the Court of Justice and the Court of First Instance, the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without

³⁵² See the judgement of the Court of First Instance in case T-11/89, *Shell International Chemical Company v. Commission* [1992] ECR II-757, paragraph 311. See also Case T-352/94, *Mo och Domsjö AB v. Commission*, [1998] ECR II-1989, paragraphs 87-96.

³⁵³ Although an ‘undertaking’ within the meaning of Article 81 of the Treaty is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. Case T-305/94, *PVC* [1999] ECR, p. II-0931, paragraph 978.

³⁵⁴ See the judgement of the Court of First Instance in Case T-203/01 *Michelin v Commission* [2003] ECR II-4371, at paragraph 290.

needing to check whether the parent company has in fact exercised that power.³⁵⁵ However, the parent company and/or subsidiary can rebut this presumption by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company*".³⁵⁶

- (389) Where an infringement of Article 81 of the Treaty is found to have been committed, it is necessary to identify a natural or a legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.
- (390) In response to the SO and referring to case law³⁵⁷, Asahi, Compagnie de Saint-Gobain and Guardian Industries Corp. argued that 100% ownership does not on its own create any presumption, but that additional elements are required. This argument cannot be accepted. As already stated in recital (388), the attribution of liability to the parent company can indeed be sufficiently based on a presumption following from near 100% ownership.³⁵⁸ Additional indicia can be used to corroborate the presumption. The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

6.2. Application to this case

- (391) In application of the principles set out in sub-section 6.1, this Decision should be addressed to the legal entities that represent and are part of the undertakings involved in the cartel as presented in Chapter 4. Those addressees are companies that participated directly in the cartel or parent companies that participated by exercising decisive influence over the general commercial policies of their subsidiaries. Together those companies form part of the undertaking that committed the infringement of Article 81 of the Treaty.

6.2.1. *Asahi/Glaverbel*

6.2.1.1. The Commission's findings

- (392) Throughout the infringement period, Glaverbel SA/NV (now named AGC Flat Glass SA, see recital (17)) participated in the collusion via one of its employees

³⁵⁵ Court of First Instance in Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 60; Case T-354/94, *Stora Kopparbergs Bergslags v Commission*, [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in case C-286/98P *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27, 28 and 29; and Court of Justice in Case 107/82, *AEG v Commission*, [1983] ECR 3151, paragraph 50.

³⁵⁶ Court of First Instance in Joined cases T-71/03 etc. *Tokai Carbon and Others v Commission*, 15 June 2005, paragraph 61.

³⁵⁷ In particular judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported.

³⁵⁸ See judgement of 12 September 2007 in case T- 30/05, *William Prym GmbH & Co. KG and Prym Consumer GmbH & Co. KG, v Commission*, not yet reported, paragraphs 146 and 147.

and Glaverbel SA/NV should be held liable for its direct participation in the cartel. Throughout the infringement period Asahi Glass Company Limited owned 100 per cent of the voting rights in Glaverbel SA/NV (see sub-section 2.2.1). In line with the case-law there is therefore a presumption that Asahi Glass Company Limited exercised decisive influence over Glaverbel SA/NV. Consequently, Glaverbel SA/NV and Asahi Glass Company Limited together form part of the undertaking that committed the infringement.

- (393) In addition, there are further indicia which confirm (and thus corroborate the presumption in recital (392)) that Asahi Glass Company Limited exercised decisive influence over Glaverbel SA/NV's conduct on the market.
- (394) Firstly, a majority of the voting members in Glaverbel's Board of Directors simultaneously hold positions such as (...) and (...) in Asahi Glass Company Limited.³⁵⁹ The management functions of Glaverbel's Board of Directors (...)I³⁶⁰ (...).³⁶¹
- (395) Asahi Glass Company Limited – as the 100% parent company – has restructured and unified the flat glass activities of the group in a single in-house company: the Flat Glass Company (FGC) (which has been renamed AGC Flat Glass, see recital (15)). In such circumstances it must be assumed that Glaverbel SA/NV cannot independently determine its commercial policy. The FGC comprises the flat glass subsidiaries of Asahi Glass Company Limited and as such constitutes a part of the group business structure. (...) ³⁶²(...)
- (396) In accordance with the business organisation of the Group, notably the FGC, there are reporting lines (...).³⁶³ It must be assumed that reporting functions as a means to allow intervention where this is considered appropriate or necessary.
- (397) Furthermore, Glaverbel SA/NV provides Asahi Glass Company Limited with business information on a regular basis, as can be derived from e-mail exchanges.³⁶⁴
- (398) (...) ³⁶⁵(...).

6.2.1.2. Asahi's arguments prior to and in response to the SO

³⁵⁹ (...).

³⁶⁰ (...)

³⁶¹ (...).

³⁶² (...).

³⁶³ (...).

³⁶⁴ (...)

³⁶⁵ (...).

- (399) Asahi submitted that it should not be held liable for Glaverbel's infringement. It submitted a number of arguments before³⁶⁶ and after the notification of the Commission's objections³⁶⁷ pertaining to its liability for the infringement. Asahi's main arguments are compiled and presented in this sub-section.
- (400) Asahi was only a financial investor, not involved in the illegal arrangements nor in the management of Glaverbel and it did not exercise any influence over the commercial conduct of Glaverbel. As explained in recital (390), it argued that 100% ownership is not enough to trigger a presumption of decisive influence of the parent company over the commercial conduct of its subsidiary. In line with this it argued that the additional indicia are irrelevant and/or lack probative value as they do not show actual exercise of decisive influence over Glaverbel's commercial policy, including the day-to-day management. The Commission must show that the subsidiary carried out in all material respects, the instructions given by the parent. Finally, it claimed to rebut any established presumption of decisive influence by showing that it did not issue instructions concerning Glaverbel's day-to-day management and/or strategic commercial decisions but granted its subsidiary a high level of independence. Asahi's main arguments are further presented in recitals (401) to (406).
- (401) Asahi claims that the e-mails referred to in recital (397) only show that Glaverbel reported to Asahi, ex post, limited information concerning (...). The intra-group reporting does not denote the actual exercise of decisive influence.
- (402) As regards Asahi's flat glass activities and conglomerate model it has granted a high level of independence to Glaverbel as it (...). Asahi gives a number of examples to illustrate Glaverbel's independence. (...)
- (403) Mr (...) never received any instructions from Asahi regarding Glaverbel's day-to-day management and/or strategic commercial conduct.
- (404) Asahi also issued specific instructions not to engage in illegal conduct but those instructions were ignored by Glaverbel which shows, if anything, that Asahi did not actually exercise any decisive influence over Glaverbel.
- (405) (...).
- (406) Finally, under the legal doctrine "piercing the corporate veil", in several jurisdictions, Asahi would not be found liable for Glaverbel's actions. Under this doctrine a parent company is only held liable in extreme circumstances.

6.2.1.3. The Commission's appraisal and conclusion

- (407) The arguments put forward by Asahi do not prove that it did not exercise decisive influence over Glaverbel.

³⁶⁶ (...).

³⁶⁷ (...).

- (408) Asahi's view on the reporting lines and e-mails cannot be accepted. The existence of such reporting lines and e-mails shows that the parent company had put in place a mechanism which allowed it to supervise its subsidiary's activities with a view to ensuring that they were in accordance with the commercial objectives and strategies set by the parent. The e-mails do indeed contain commercial information. (...) ³⁶⁸(...)
- (409) Asahi's arguments relating to its flat glass activities and conglomerate model (see recital (402)) can be used to highlight that Asahi and Glaverbel are part of one single undertaking. The fact that the parent company has decentralized decision-making functions is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units in the group. The division of tasks is a normal phenomenon within a group of companies. As regards the FGC, as stated in recital (395), it comprises the flat glass subsidiaries of Asahi Glass Company Limited and, as such, constitutes a part of the group business structure. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business sectors that are dependent on a corporate centre for their investments and finances and for their leadership cannot be considered to constitute an economic unit in their own right.
- (410) In addition, Asahi's reasoning as regards (...) cannot be accepted. First of all, Asahi's decision not to change any remaining management system cannot prove the absence of decisive influence. The exercise of decisive influence is not a question of the ability to successfully manage the business in question, but of the exercise of influence upon it. It is a fact that during the infringement period a majority of the voting members in the Glaverbel Board of Directors simultaneously held positions at management level in Asahi. This composition of the Board shows the extent of the parent company's involvement in the subsidiary and put it in a position to exercise decisive influence over the subsidiary's commercial policy on the market.³⁶⁹ Even if the (day-to-day) management functions of Glaverbel's Board of Directors (...), this does not mean that the Board of Directors did not exercise decisive influence on the subsidiary's commercial policy, as is the normal role of the directors in a company. Through the involvement of Asahi management personnel on the board there was thus a direct influence by the mother company itself. (...). It is practically a universal feature of a well-run business needing specialised knowledge that powers are given to the local management of a wholly owned subsidiary. In line with this, it is only natural that the European subsidiary decides issues relating to the specificities of the European market.
- (411) As stated in recital (408), the existence of reporting lines shows a supervising mechanism for the parent company. The argument that Mr. (...) did not receive

³⁶⁸ (...)

³⁶⁹ See Judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, paragraph 138.

instructions does not change that conclusion, nor does it prove that Glaverbel was autonomous on the market.

(412) (...).³⁷⁰

(413) As regards Asahi's instructions not to engage in illegal conduct, the existence of an antitrust compliance programme is irrelevant in this context as it is not capable as such of distancing the parent company from the wrongdoings of its subsidiary. Asahi has not provided any evidence showing those instructions and in any event, they proved ineffective. If at all, they show the attempt by the mother company to exercise influence over its subsidiary's commercial conduct.

(414) As to "piercing the corporate veil", reference to different areas of law where such a doctrine may be used is not appropriate in the context of an infringement of Article 81 of the Treaty.

(415) To conclude, Asahi's assertions do not support its claim that Glaverbel behaved autonomously on the market as regards key aspects of its commercial conduct and it has not rebutted the presumption that it exercised decisive influence over Glaverbel.

(416) For those reasons, Asahi Glass Company Limited should be held jointly and severally liable with Glaverbel SA/NV as they form part of the undertaking that committed the infringement.

6.2.2. *Guardian*

6.2.2.1. The Commission's findings

(417) Throughout the infringement period, participation in the collusion took place via an employee of Guardian Europe S.à.r.l. and that company should be held liable for its direct involvement in the cartel. Throughout the infringement period Guardian Industries Corp. owned 100% of Guardian Europe S.à.r.l. (see subsection 2.2.2). In line with the case-law there is therefore a presumption that Guardian Industries Corp. exercised decisive influence over Guardian Europe S.à.r.l. Consequently, Guardian Industries Corp. and Guardian Europe S.à.r.l. together form part of the undertaking that committed the infringement.

(418) In addition, there are further indicia which confirm (and thus corroborate the presumption in recital (417)) that Guardian Industries Corp. exercised decisive influence over the market conduct of Guardian Europe S.à.r.l. These indicia concern the functioning and organisation of the Guardian group, reporting lines, multiple responsibilities of officials, the actual implementation of general business principles throughout the group, the exchange of business information within the group and an overlapping management.

(419) According to the Guardian web-site the Guardian Group is one of the world's largest manufacturers of float glass and fabricated glass products. The Group is privately held under the control of (...). All important strategic decisions are taken

³⁷⁰ (...).

by (...) and *de facto* all employees report directly or indirectly to (...) with respect to strategic matters.³⁷¹ In Europe, the activities of the Group are summarily divided into a Flat Glass Division and an Automotive Division.³⁷² (...) .³⁷³ Accordingly, the reporting lines involving Mr (...) ultimately lead to the owner of the parent company (...).³⁷⁴ Furthermore, certain Guardian officials have multiple responsibilities, such as the (...)³⁷⁵ which indicate that they not only work for the legal entity employing them but are involved in implementation of group policies and strategic decisions for the group.

(420) Guardian has described certain policy approaches that are generally applied within the Guardian Group:³⁷⁶ (...) According to the web-site, there is a Group environmental policy, quality pledge and statement of Ethics³⁷⁷.

(421) Furthermore, e-mail exchanges show that business information is shared within the group, including Guardian Industries Corp.³⁷⁸ There are also overlapping positions at management level as a number of management members simultaneously hold positions in the Statutory Boards of several Guardian companies.³⁷⁹

6.2.2.2. Arguments by Guardian Industries Corp. in response to the SO and the Commission's appraisal

(422) As mentioned in recital (390) Guardian Industries Corp. claimed that 100% ownership does not, on its own, create any presumption, but that additional elements are required. In line with this, it submitted that the Commission has not shown to the requisite legal standard that such relevant additional circumstances are present which would allow the conclusion that Guardian Europe carried out, in all material respects, the instructions given to it by Guardian Industries Corp. In addition, referring to the decentralized structure of Guardian's activities in Europe, it emphasised that Guardian Industries Corp. was neither involved in, nor aware of, the infringement and it did not give instructions to carry out any infringement.

(423) These arguments cannot be accepted. As a result of the presumption of decisive influence of the parent company over the commercial policy of its subsidiary – and in order to avoid parental liability – it is for Guardian Industries Corp. to submit

³⁷¹ (...)

³⁷² (...)

³⁷³ (...).

³⁷⁴ (...).

³⁷⁵ (...).

³⁷⁶ (...).

³⁷⁷ <http://www.guardian.com/en/about.html>

³⁷⁸ (...).

³⁷⁹ (...)

sufficient evidence of the autonomous behaviour of Guardian Europe. It is not necessary that the parent company was involved in, aware of or gave instructions regarding the infringing behaviour. Attribution of liability to a parent company flows from the fact that the parent company and the subsidiary constitute a single undertaking for the purposes of the Community rules on competition, not from proof of its participation in or awareness of the infringement. Guardian Industries' general statement that the elements the Commission mentioned in the SO are "not sufficient" to conclude that it "exerted control over Guardian Europe with respect to the alleged infringements" cannot be considered sufficient to rebut the presumption. Likewise, the presumption cannot be rebutted by a general statement that the parent company was not involved in or even aware of the cartel or that it did not give any instructions to its subsidiary in this respect.

- (424) Moreover, referring to previous Commission decisions, Guardian Industries Corp. stated that it would not be inconsistent with Commission practice to not to impute liability to it.
- (425) The Commission enjoys a margin of discretion in deciding which entities of an undertaking it holds liable for an infringement and its assessment is done on a case-by-case basis. The fact that, in previous decisions, based on the facts in those particular cases, the Commission chose not to hold the parent companies liable does not mean that the Commission is prevented from holding the parent company liable in this case.
- (426) Guardian Industries Corp finally argued that an automatic imputation of liability to a foreign parent company would harm and impede international business and be inconsistent with the principle of proportionality.
- (427) This argument cannot be accepted. The imputation of liability is not "automatic". It is based on a presumption which the parent company and/or subsidiary can reverse by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an undertaking*".³⁸⁰ The general statements of Guardian Industries Corp. do not constitute such evidence.

6.2.2.3. Conclusion

- (428) For the reasons stated in recitals (417) to (427), Guardian Industries Corp. should be held jointly and severally liable with Guardian Europe S.à.r.l. as they form part of the undertaking that committed the infringement.
- (429) As described in recital (20) Guardian Industries Corp. owns Guardian Europe S.à.r.l. via two intermediate companies. (...) ³⁸¹ In this case the ultimate parent company and the operating subsidiary involved in the infringement are, in principle, the proper representatives of the undertaking which is responsible for

³⁸⁰ Joined Cases T-71/03 etc *Tokai Carbon and Others v Commission*, paragraph 61.

³⁸¹ See recital (20).

the purposes of Community law, and it is not necessary for any intermediate holding company to also be held liable. This Decision should therefore not be addressed to the intermediate holding companies.

6.2.3. *Saint-Gobain*

6.2.3.1. The Commission's findings

(430) Throughout the infringement period, participation in the collusion took place via an employee of Saint-Gobain Glass France SA and that company should be held liable for its direct involvement in the cartel. Throughout the infringement period Compagnie de Saint-Gobain SA (here after "La Compagnie") owned 100% of Saint-Gobain Glass France SA (see sub-section 2.2.4). In line with the case-law there is therefore a presumption that La Compagnie exercised decisive influence over Saint-Gobain Glass France SA. Consequently, La Compagnie and Saint-Gobain Glass France SA together form part of the undertaking that committed the infringement.

(431) In addition, there are further indicia which confirm (and thus corroborate the presumption in recital (430)) that La Compagnie exercised decisive influence over the market conduct of Saint-Gobain Glass France SA. These indicia concern the functioning and organisation of the Saint-Gobain Group, in particular the Flat Glass Sector, the President of the Flat Glass Sector holding overlapping positions within the group, reporting lines within the Group, board members in Saint-Gobain Glass France holding positions in La Compagnie plus further indicia.

(432) Firstly, as regards the indicia, the Group is presented on the Saint-Gobain website as a world leader in each of its fields of competence and there exist common principles which apply to all companies of the Group as well as a Group Strategy.³⁸² The business structure of the Group, as described in recital (33), which encompasses all of the Group's competences, was set up by decision of the Group's ultimate parent company, La Compagnie. The business sectors form a basic operational management framework for the implementation of the Group's business model. Initiatives undertaken and results achieved are in line with priorities and objectives set for all Group businesses.³⁸³

(433) As regards the Flat Glass Sector of the Group, the day-to-day management is carried out by each relevant business unit. The business orientations (for example, business plans and budgets) and important operational business decisions are also prepared at business unit level and are ultimately adopted by the Director of the flat glass sector, Mr. (...) see recital (434).³⁸⁴

382 See <http://www.saint-gobain.com/en/html/groupe/panorama.asp>,
http://www.saint-gobain.com/en/html/groupe/rh_principes.asp and
<http://www.saint-gobain.com/en/html/groupe/strategie.asp>

<http://www.saint-gobain.com/en/html/groupe/panorama.asp>
<http://www.saint-gobain.com/en/html/groupe/strategie.asp>

383 (...).

384 (...).

- (434) Mr. (...) – who is employed by Saint-Gobain Glass France SA – fulfils a number of functions within the Saint-Gobain Group³⁸⁵: At the level of La Compagnie he is Senior Vice-President (Directeur Général Adjoint) and answers to and reports to the Chief Operating Officer (Directeur Général Délégué) of the Group. He participates in the meetings of the "Comité opérationnel" and of the "Comité de direction générale" and is responsible for the innovation of the Group. Furthermore, from the Saint-Gobain website it can be seen that Mr. (...) is a member of the Group's Management Team³⁸⁶ and also in the Annual reports³⁸⁷ he is presented as a member of the Executive Management of the Group. As Director of the Flat Glass Sector, while not intervening on an everyday basis in the commercial policy, he does intervene regarding important decisions. Moreover, he is the Chairman and CEO (Président) of two subsidiaries, namely Saint-Gobain Glass France and Saint-Gobain Sekurit.
- (435) In accordance with the Group's business structure there are reporting lines which include Mr (...) and which ultimately lead to the Chief Operating Officer of La Compagnie.³⁸⁸ As can be seen from e-mail exchanges, business information is exchanged within the Group.³⁸⁹
- (436) During the infringement period, three of the six members of the Board of Directors in Saint-Gobain Glass France SA also held positions within La Compagnie.³⁹⁰
- (437) Finally La Compagnie (and the holding company Vertec SAS) and Saint-Gobain Glass France SA are registered at the same address.

6.2.3.2. Arguments by La Compagnie in response to the SO

- (438) La Compagnie contested being held liable for the behaviour of Saint-Gobain Glass France SA. It emphasised that the principle of the personal nature of criminal responsibility must be observed. As stated in recital (390) it argued that 100% ownership is not enough to trigger a presumption of decisive influence of the parent company over the commercial conduct of its subsidiary. In line with this, it argued that the additional indicia presented by the Commission are irrelevant.
- (439) As to the indicia, La Compagnie firstly argued that the Commission has only described the existence of a group of companies, which in itself cannot indicate that it exercised decisive influence over its very large number of subsidiaries. La Compagnie is only a holding company that does not intervene in the businesses of

³⁸⁵ (...).

³⁸⁶ <http://www.saint-gobain.com/en/html/investisseurs/equipe.asp>

³⁸⁷ Annual report 2005, (...) and annual report 2004, see <http://www.saint-gobain.com/en/html/investisseurs/rapport/ra2004en.pdf>

³⁸⁸ (...).

³⁸⁹ (...).

³⁹⁰ (...).

its subsidiaries. It clarified that it defines the overall strategy of the Group, but that it does not give any instructions as regards the operations of the subsidiaries and that the different sectors are autonomous.

- (440) As to the role of Mr. (...), La Compagnie emphasised that he does not work at the executive level of that company nor is he a representative thereof. It clarified that the two committees are purely internal units for the exchange of information. It also argued that the title Senior Vice-President (Directeur Général Adjoint) is an honorary title with no particular responsibilities or executive powers. It finally submitted that, as Director of the Flat Glass Sector, it is only logical that Mr. (...) is president of the two subsidiaries.
- (441) As regards the reporting lines, La Compagnie emphasised that they only follow from the legal structure of the Group. It clarified that the information given by Saint-Gobain to the Commission only concerned the Flat Glass Sector of the Group, with the reporting lines ending at the Director level of that sector. As regards the e-mails referred to in recital (435), La Compagnie argued that they were mostly sent within the Flat Glass Sector and that none of them contain any instructions from the parent company.
- (442) La Compagnie also emphasises that none of the Board members of Saint-Gobain Glass France SA were members of the Board of La Compagnie. The only link between the Board members of Saint-Gobain Glass France SA and La Compagnie is that certain Board members perform duties within La Compagnie. It also argued that the physical location of the companies is irrelevant.
- (443) Finally, La Compagnie argued that by applying an irrebuttable presumption, the Commission misuses its powers.

6.2.3.3. The Commission's appraisal and conclusion

- (444) La Compagnie's arguments cannot be accepted. Firstly, as regards the principle of the personal nature of criminal responsibility, in holding certain legal entities responsible as representatives of the undertaking that committed the infringement, this principle is indeed respected.³⁹¹ Article 81 of the Treaty is addressed to "undertakings" which may comprise several legal entities. The principle is not breached as long as the legal entities are held liable on the basis of circumstances which pertain to their own role and conduct within the undertaking. In the case of a parent company, liability is established on the basis of the exercise of effective control on the commercial policy of the subsidiary.
- (445) As regards the arguments relating to La Compagnie's role as a holding company referred to in recital (439), they rather indicate that La Compagnie and Saint-Gobain Glass France SA are indeed part of one single undertaking. The fact that the parent company itself is not involved in production and sale of flat glass is not decisive as regards the question whether it should be considered to constitute a single economic unit with the operational units of the group. The division of tasks

³⁹¹ See, in a different context, the reasoning in Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I - 4125, paragraphs 83 - 84.

is a normal phenomenon within a group of companies. An economic unit by definition performs all of the main functions of an economic operator within the legal entities of which it is composed. Group companies and business sectors that are dependent on a corporate centre for the basic orientation of the commercial strategy and operations, for their investments and finances, for their legal affairs and for their leadership cannot be considered to constitute an economic unit in their own right. Saint-Gobain must be considered to constitute such a single economic unit. La Compagnie defines the overall strategy of the Saint-Gobain group and runs functional departments such as Human Resources, Finance, Research and Development, Legal and Fiscal Affairs, Corporate Planning and Communications.³⁹²

- (446) The reasoning regarding the Director of the Flat Glass sector and the reporting referred to in recitals (440) and (441) cannot be accepted. During the inspections (...) replied to the inspectors' questions as to his functions in i.a. la Compagnie.³⁹³ (...) explained that as Senior Vice-President (Directeur Général Adjoint) he reported to the Chief Operating Officer (Directeur Général Délégué) of the Group, (...),³⁹⁴ and that he was also responsible for the innovation of the group. As to the committees in which he participates, he explained that the "Comité Opérationnel", which deals with the general organisation of the Group (such as working capital requirement, purchases, informatics and aspects of human resources), meets every 15 days and that reports of the decisions of that committee are established. The "Comité de direction générale" is a forum for information for the principal officers of the group. Both committees are cross sectional, dealing with subjects of common interest for the different sectors.³⁹⁵ Such committees again indicate the existence of one single undertaking as they deal with subjects of common interest for the undertaking. Even though la Compagnie claimed that the title Senior Vice-President (Directeur Général Adjoint) is honorific, it is noted that according to Saint-Gobain's website, Mr. (...) is a member of the Group's Management Team³⁹⁶ and also in the Annual Reports³⁹⁷ he is presented as a member of the Executive Management of the Group. According to the Saint-Gobain website, the group's COO is also part of the Group's Management Team, while at the same time being part of La Compagnie's Executive Committee. It is thus not credible that members of the Management Team leading a business sector (like Mr. (...) for the Flat Glass

³⁹² (...) The Commission notes that according to the web-site <http://www.saint-gobain.com/en/html/groupe/organisation.asp> the function of "Internal Audit and Business Control" is also performed by La Compagnie.

³⁹³ (...).

³⁹⁴ (...) The Commission notes that according to annual report 2004, p. 31 at <http://www.saint-gobain.com/en/html/investisseurs/rapport/ra2004en.pdf> Mr. Streiff was replaced by Mr. de Chalendar as COO.

³⁹⁵ (...).

³⁹⁶ <http://www.saint-gobain.com/en/html/investisseurs/equipe.asp>

³⁹⁷ Annual report 2005, (...) and annual report 2004, see <http://www.saint-gobain.com/en/html/investisseurs/rapport/ra2004en.pdf>

Sector) would only communicate among themselves – and thereby run the management of the group as a whole – with no involvement of the executive committee of La Compagnie as the group's ultimate parent company. Moreover, it appears that Mr(...)has multiple functions within the Group and his work is not limited to only the Flat Glass Sector, notably he is responsible for the innovation of the Group. It is obvious that the information and knowledge that one individual obtains from one function, he or she uses and considers also in the other functions for the benefit of the undertaking. As to the e-mails and notes the Commission observes that they show that Mr. (...) is informed about the commercial operations of the entire Flat Glass Sector and that Mr. (...) and other members of the Executive Committee are provided by him with relevant information, in line with the ultimate parent company's involvement in the Group's Management, as demonstrated by the inclusion of the COO in the Executive Management of the group. Two e-mails³⁹⁸, one with the subject matter "prix" (price), the other one regarding a joint venture, are sent from Mr. (...) directly to members of the Executive Committee. Both e-mails suggest that Mr. (...) has meetings with those members. Such information and such meetings would result in the Executive Committee's full knowledge of the subsidiaries' commercial policy, which would allow it to exercise regular control and direction.

(447) As regards the Board of Directors of Saint-Gobain Glass France SA, in addition to Mr. (...), who holds the positions "Directeur Général Adjoint" and "Directeur de la Branche Vitrage" within la Compagnie, two other the members also hold positions within that company: Messrs (...) and (...), were employed by La Compagnie and held the titles "Directeur de la Recherche and "Directeur Financier Adjoint", respectively³⁹⁹. Mr. (...) is also part of the Group Management⁴⁰⁰. Such composition of the Board of Saint-Gobain Glass France SA shows the extent of the parent company's involvement in the subsidiary's commercial policy and indeed put it in a position to exercise decisive influence over the subsidiary's commercial policy on the market.⁴⁰¹ The fact that the parent company and the subsidiary are located at the same address facilitates a unified approach in pursuance of a specific economic aim, and thus supports the good functioning of the undertaking.

(448) Lastly, the argument that the Commission would employ an un rebuttable presumption cannot be accepted. The parent company and/or subsidiary can reverse the presumption by producing sufficient evidence that the subsidiary "*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an undertaking*".⁴⁰² However, since a presumption builds on the

³⁹⁸ (...)

³⁹⁹ (...).

⁴⁰⁰ See annual report 2004, at <http://www.saint-gobain.com/en/html/investisseurs/rapport/ra2004en.pdf>

⁴⁰¹ See Judgement of 26 April 2007 in joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission*, not yet reported, paragraph 138.

⁴⁰² Joined Cases T-71/03 etc *Tokai Carbon and Others v Commission*, paragraph 61.

fact that what is presumed *typically* occurs where the conditions on which the presumption is built apply (here: exercise of decisive influence over a subsidiary in case of 100%, or near 100%, ownership) it is normal that the rebuttal of the presumption will not easily be achieved.

- (449) As a result of the presumption – and in order to avoid parental liability – it is for la Compagnie (and/or its subsidiary) to submit sufficient evidence of the autonomous behaviour of Saint-Gobain Glass France. However, La Compagnie has not provided any evidence that would support its arguments advanced to reverse the presumption. La Compagnie should therefore be held jointly and severally responsible with its subsidiary as they form part of the undertaking that committed the infringement.
- (450) La Compagnie owns Saint-Gobain Glass France SA via the intermediate holding company Vertec SAS. In line with the reasoning in recital (429), the ultimate parent company and the operating subsidiary involved in the infringement are the proper representatives of the undertaking which is responsible for the purposes of Community law. In this case it is not necessary for the intermediate holding company to also be held liable. This Decision should therefore not be addressed to Vertec SAS.

6.2.4. *Pilkington*

- (451) Throughout the infringement period, participation in the collusion took place via an employee of Pilkington Deutschland AG and that company should be held liable for its direct involvement in the cartel. Throughout the infringement period Pilkington Holding GmbH owned approximately 96% of Pilkington Deutschland AG (36% directly and 60,5% indirectly via its 99% subsidiary Dahlbusch AG) and was in turn 100 % owned by Pilkington Group Limited (see sub-section 2.2.3). In line with the case-law there is therefore a presumption that Pilkington Group Limited exercised decisive influence over Pilkington Holding AG and that Pilkington Holding AG exercised decisive influence over Pilkington Deutschland AG. Consequently, those companies together form part of the undertaking that committed the infringement.
- (452) In addition, there are further indicia which confirm (and thus corroborate the presumption in recital (451)) that Pilkington Group Limited exercised decisive influence over the market conduct of Pilkington Holding GmbH and Pilkington Deutschland AG. Those indicia concern the organisation of the Group, reporting lines within the Group, instructions given by the parent company, the existence of "Ordinary resolutions" passed at the annual General Meeting of Pilkington Group Limited and covering other group companies and an inter-company agreement between Pilkington Holding GmbH and Pilkington Deutschland AG.

6.2.4.1. Pilkington's response to the SO as regards liability and the Commission's conclusion

- (453) In its reply to the SO, Pilkington did not challenge the Commission's findings concerning liability. Thus, for the reasons stated in recitals (451) – (452), it is concluded that Pilkington Group Limited, Pilkington Holding GmbH and Pilkington Deutschland AG constituted one undertaking throughout the period of

the infringement. They should therefore be held jointly and severally liable for the infringement.

(454) Pilkington Group Limited is the owner of Pilkington Holding GmbH/Pilkington Deutschland AG via several intermediate holding companies.⁴⁰³ Pilkington Holding GmbH owns Pilkington Deutschland AG partly via another company. In line with the reasoning in recital (429), the ultimate parent company and the operating subsidiary involved in the infringement (including Pilkington Holding GmbH which controls and governs Pilkington Deutschland AG, see recital (24)) are the proper representatives of the undertaking which is responsible for the purposes of Community law. In this case it is not necessary for the intermediate holding companies to also be held liable. This Decision should therefore not be addressed to those intermediate holding companies.

7. DURATION OF THE INFRINGEMENT

(455) As stated in Chapter 4 the Commission's assessment under the competition rules and the application of any fines relates to the period from 9 January 2004 to 22 February 2005. 9 January 2004 is the date of the first documented collusive meeting between employees of Glaverbel, Pilkington and Saint-Gobain. That date should therefore be considered to be the starting point of the infringement of the competition rules by Glaverbel, Pilkington and Saint-Gobain. The starting point of the infringement by Guardian should be considered to be 20 April 2004, as this is the date of its first documented participation in the cartel.

(456) 22 February 2005 should be considered as the end date for determining the duration of the infringement. It is clear from the case law that when prices are discussed for the next month/year after a meeting, the Commission is entitled to take the view that the infringement continued until a later point in time after that meeting.⁴⁰⁴ Indeed, the meeting on 2 December 2004 concerned, amongst other things, price increases for the following year, in particular price increases in March 2005 (see Table 3) for at least France (recital (231)), Belgium, the Netherlands and Luxemburg (recital (233)) and Poland (recital (229)) and a general agreement to freeze prices across Europe for the next months (recital (243)). The meeting on 11 February 2005 concerned, amongst other things, future price increases in Belgium, the Netherlands and Luxemburg (recitals (278) and (279)) and Portugal (recital (287)). Under such circumstances the Commission is entitled to conclude that the infringement continued until the date of the first set of inspections, namely 22 February 2005.

(457) The duration of the infringement taken into account for each addressee should therefore be as follows:

⁴⁰³ The activities of the companies are presented in Directors' report and accounts 2005, p. 55, see also Directors' report and accounts 2004 on http://www.pilkington.com/resources/pilkington_report2004.pdf

⁴⁰⁴ Case T-14/89, *Montedipe v Commission*, [1992] ECR II-1155, paragraph 231. See also case 243/83, *Binon v Agence et Messagerie de la Presse* [1985] ECR 2015, paragraph 17 and Case T-59/99, *Ventouris Group Enterprises SA v Commission*, [2003] ECR II-5257, paragraphs 182-183 and 190 - 193.

(a) Asahi Glass Company Limited and Glaverbel SA/NV, from 9 January 2004 to 22 February 2005;

(b) Guardian Industries Corp. and Guardian Europe S.à.r.l., from 20 April 2004 to 22 February 2005;

(c) Pilkington Group Limited, Pilkington Holding GmbH and Pilkington Deutschland AG, from 9 January 2004 to 22 February 2005;

(d) Compagnie de Saint-Gobain SA and Saint-Gobain Glass France SA, from 9 January 2004 to 22 February 2005.

8. REMEDIES

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

(458) Where the Commission finds that there is an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(459) Given the secrecy in which the cartel arrangements were carried out, it is not possible to determine with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

8.2. Article 23(2) of Regulation (EC) No 1/2003

(460) Under Article 23(2) of Regulation (EC) No 1/2003⁴⁰⁵, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. Under Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁴⁰⁶, which was applicable during part of the infringement, the fine for each undertaking participating in the infringement could not exceed 10 % of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(461) Pursuant to Article 23(3) of Regulation (EC) No 1/2003 and Regulation No 17 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 Regulation (EC) No 1/2003

⁴⁰⁵ Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305, 30.11.1994, p.6.).

⁴⁰⁶ OJ 13, 21.2.1962, p.204/62. Regulation repealed by Regulation (EC) No 1/2003.

- (462) 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. In particular, the Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003⁴⁰⁷ (hereafter, "the 2006 Guidelines on fines"). Finally, the Commission will apply, as appropriate, the provisions of the Leniency Notice.
- (463) In their response to the SO Glaverbel and Asahi claimed that any fine imposed on them should be determined according to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty⁴⁰⁸ (hereafter, "the 1998 Guidelines on fines") not the 2006 Guidelines on fines as when they applied for leniency and were contemplating making the decision to apply, the 1998 Guidelines on fines were still in force. They argued that applying the 2006 Guidelines on fines to them, which would certainly increase the amount of the fines imposed, would not only run counter to the Community law principles of non-retroactivity, legal certainty and legitimate expectations but would also jeopardise the very purpose of the leniency policy.
- (464) As regards the principle of non-retroactivity and legal certainty they argued that Article 7 of the Convention for Protection of Human Rights and Fundamental Freedoms ⁴⁰⁹ prohibits the imposition of heavier penalties than those applicable when the offence in question was committed and stated that both legal rules and the consequences for violations thereof must be clear, precise and predictable. As regards legitimate expectations, Asahi and Glaverbel referred to point 29 of the Leniency Notice and to the fact that when applying for immunity/leniency they acquired a legitimate expectation that any fine would be calculated under the set of rules in force at the time of the application, namely the 1998 Guidelines on fines, which were binding on the Commission. They argued that the previous case law recognising the Commission's discretion to change its policy as regards the level of the fines at any time was developed in a situation where there were no prior guidelines on fines. Furthermore, it is the time at which the SO was notified, which was the decisive factor for the application of the 2006 Guidelines on fines, and that timing was exclusively in the hands of the Commission. Lastly, leaving an immunity/leniency applicant in uncertainty as to the method to be applied to set fines would jeopardise the leniency policy and undertakings' incentives to cooperate with the Commission.
- (465) Those arguments cannot be accepted. It is settled case law that in determining the amount of the fines, the Commission has a wide discretion. It is also settled case law that the fact that the Commission imposed fines of a certain level for certain

⁴⁰⁷ OJ C 210, 1.9.2006, p. 2

⁴⁰⁸ OJ C9, 14.1.1998, p. 3.

⁴⁰⁹, Signed in Rome on 4 November 1950 ('the ECHR').

types of infringement in the past does not mean that it cannot increase that level to ensure the implementation of Community competition policy.⁴¹⁰

- (466) The Court of Justice has previously established that undertakings involved in an administrative procedure in which fines may be imposed cannot claim a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed, so that a legitimate expectation cannot be based on a method of calculating fines. This was also found to be the case for undertakings which had decided to cooperate with the Commission under the Leniency Notice before a new method of calculating fines was adopted, method which was subsequently applied to calculate the fines imposed on the said undertakings.⁴¹¹ The Court also held in the same circumstances that the Commission had not breached the principle of non-retroactivity.⁴¹²
- (467) The argument that that case law does not apply in this case because prior guidelines already existed cannot be accepted. The fact that the Commission cannot depart from its own guidelines in cases where they apply without providing any justification⁴¹³, does not mean that it cannot use its discretion and adopt new guidelines, within the limits of Regulation (EC) No 1/2003. As regards Asahi and Glaverbel's argument on the legitimate expectations under point 29 of the Leniency Notice, these legitimate expectations apply to the treatment of the applicants under the leniency regime not to the level of fines they will receive.
- (468) As regards the Commission's responsibility for the timing of the notification of the SO, the application of the 2006 Guidelines on fines is not due to the length of the proceedings since they became applicable only a year and a half after the inspections. (...).
- (469) Lastly, at recital (345) of the SO, the Commission already anticipated the application of the 2006 Guidelines on fines to the case concerned by this decision.

8.3. The basic amount of the fines

8.3.1. Calculation of the value of sales

⁴¹⁰ Joined cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 109 and Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and others v Commission* [2005] ECR I-5428, paragraphs 169 and 172.

⁴¹¹ Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v Commission*, cited above, in particular paragraphs 159, 162, 163 and 173.

⁴¹² Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and others v Commission*, cited above, in particular paragraphs 213 to 232.

⁴¹³ See for instance T-224/00, *Archer Daniels Midland v Commission*, [2003] ECR II-02597, paragraph 182 and judgement of the Court of 8 February 2007 in Case C-3/06 P *Groupe Danone v Commission*, not yet reported, paragraph 80.

- (470) Pursuant to the 2006 Guidelines on fines, in determining the basic amount of the fine to be imposed, the Commission will take the value of each undertaking's sales of goods to which the infringement directly or indirectly relates in the geographic area concerned within the EEA for the last full business year of the undertaking's participation in the infringement. In this case, the sales for float glass, low-e glass, laminated glass and unprocessed mirrors made by each undertaking in the EEA in 2004 will be considered, see Table 1.
- (471) Pilkington argued that tinted float should be excluded from the value of sales as it is not priced by reference to clear float but is rather negotiated on a customer specific basis.
- (472) That argument cannot be accepted. Documents in the file suggest that tinted float is priced by reference to clear float. Over the years, Pilkington's own announcements of price increases for float glass present such increases in relation to both clear float and tinted float. As an example, its announcement for the United Kingdom on 29 April 2004 presents the following price increase "Pilkington Optifloat™ (Clear, Bronze, Grey & Green), + 12%".⁴¹⁴ Furthermore, none of the other undertakings have claimed that tinted float should be excluded from the category float glass.

8.3.2. *Determination of the basic amount of the fine*

- (473) As provided in the 2006 Guidelines on fines, the basic amount of the fine to be imposed should be related to a proportion of the value of sales, depending on the degree of gravity of the infringement multiplied by the number of years of infringement.

Gravity

- (474) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales. In order to decide whether the proportion of the value of sales should be at the lower or at the higher end of the scale, the Commission has regard to a number of factors, such as 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.

(a) Nature

- (475) Horizontal price-fixing is by its very nature among the most harmful restrictions of competition. In this case there is no indication of the existence of market-sharing or output-limitation agreements.

(b) Combined market share

- (476) The estimated combined market share of the four undertakings participating in this infringement in 2004 was at least 80 % in the EEA (see table 1).

⁴¹⁴ (...). See also other Pilkington price increase announcements in 2004 in different countries, (...).

(c) Geographic scope

(477) The geographic scope of the infringement was the EEA (see recitals (2), (297), (298), (348) and (368) to (371)).

(d) Implementation

(478) As indicated at recitals (337) and (338), it has been established that the infringement was generally implemented.

(479) In their replies to the SO, Guardian and Pilkington have raised various arguments aiming at attenuating the gravity of the infringement.

(480) Pilkington argued that there is no evidence as regards any agreement but rather of discussion on market conditions and then, if at all, concerning only a number of countries and not the entire EEA. In addition, Pilkington provided data which show that if there were such agreements, Pilkington did not implement any of them, as shown by the negotiated prices with its customers, which should be taken into account when assessing gravity. Guardian emphasised that it did not participate in any EEA wide price-fixing agreement nor in any EEA-wide collusive behaviour and that it did not implement the alleged infringement.

(481) Those arguments are not capable of attenuating the gravity of the infringement. On the basis of the evidence available to the Commission, it has been concluded that there were agreements, that the cartel arrangements were EEA wide (see recitals (2), (297), (298), (348), (368) to (371)) and that Pilkington on several occasions implemented the said agreements (see recitals (129), (148), (159), (163) and (219) to (221)). Furthermore, as has already been stated at recitals (99) and (364) the fact that the negotiated prices with customers were different from the agreed price increases between competitors does not have any bearing on the Commission's conclusions. Guardian has also failed to comply with the Commission's requests to provide price increase announcements. Furthermore, as stated in recital (366), implementation of an agreement on price objectives, rather than on fixed prices, does not mean that prices corresponding to the agreed price objective are to be applied, but rather that the parties endeavour to get close to their price objectives.

(482) In conclusion and taking into account the factors discussed above relating to the nature of the infringement, the combined market share of the parties and the geographic scope, the proportion of the value of sales of each undertaking involved to be used to establish the basic amount of the fines to be imposed should be 18 %.⁴¹⁵

Duration

(483) In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value

⁴¹⁵ As new Member States joined on 1 May 2004, the Commission has divided the value of sales for each undertaking into sales effected in the 'old' EEA and sales effected in the new Member States in order not to take into account sales in those countries which took place before they were part of the EEA, see recital (485).and table 1.

of sales, as described at recitals (474) to (482), should be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half year; periods longer than six months but shorter than one year will be counted as a full year.

- (484) As set out in Chapter 7, the undertakings were involved in the infringement at least during the following periods:
- Asahi/Glaverbel: from 9 January 2004 to 22 February 2005, namely a period of one year and one month⁴¹⁶;
 - Guardian: from 20 April 2004 to 22 February 2005, namely a period of 10 months;
 - Pilkington: from 9 January 2004 to 22 February 2005, namely a period of one year and one month; and
 - Saint-Gobain: from 9 January 2004 to 22 February 2005, namely a period of one year and one month.

- (485) As a result, the multiplying factors to be applied to the amount determined in recital (482) should therefore be 1.5 for Pilkington and Saint-Gobain and 1 for Asahi/Glaverbel and Guardian. As regards the value of sales of these companies in the countries which became Member States on 1 May 2004, the multiplying factor applied should be 1 for all four undertakings as the sales taken into account cover only a period of 10 months.⁴¹⁷

Additional amount

- (486) In order to deter undertakings from entering into horizontal price fixing agreements such as the one currently at issue, the basic amount of the fines to be imposed should be increased by an additional amount, as indicated in point 25 of the 2006 Guidelines on fines. For this purpose, having considered the circumstances of the case and, in particular, the factors discussed in recitals (475) to (478) it is concluded that an additional amount of 17% of the value of sales would be appropriate.

8.3.3. Conclusion on the basic amounts

- (487) The basic amount of the fine to be imposed on each undertaking should therefore be as follows:

All amounts are in EUR

⁴¹⁶ As the evidence Asahi/Glaverbel submitted enabled the Commission to find an infringement of longer duration than prior to the submission of evidence (see sub-section 8.6.3) and to start the infringement from 9 January 2004 instead of 20 April 2004 (which is the first contemporaneous proof of the cartel found by the Commission), in accordance with point 23 of the Leniency Notice, these elements will not be taken into account when setting the fine. As a result, the amount determined under recital (482) shall as far as Asahi/Glaverbel is concerned only be multiplied by 1 (and not by 1,5).

⁴¹⁷ See footnote 415.

Asahi/Glaverbel	(...)
Guardian	(...)
Pilkington	(...)
Saint-Gobain	(...)

8.4. Adjustments to the basic amount

8.4.1. *Aggravating circumstance*

8.4.1.1. Asahi/Glaverbel

(488) (...).

8.4.1.2. Guardian

(489) (...)

8.4.1.3. Pilkington

(490) (...)

8.4.1.4. Saint-Gobain

(491) (...).

8.4.2. *Mitigating circumstances*

8.4.2.1. Asahi/Glaverbel

(492) (...).

(493) (...)⁴¹⁸.

(494) (...).

(495) (...).

(496) (...)

(497) (...)⁴¹⁹,(...)⁴²⁰

⁴¹⁸ (...)

⁴¹⁹ (...).

⁴²⁰ (...).

(498) (...).

8.4.2.2. Guardian

(499) (...).

(500) (...).

(501) (...).⁴²¹

(502) (...).

(503) (...).⁴²²

(504) (...).⁴²³

(505) (...).⁴²⁴

(506) (...).

(507) (...).

8.4.2.3. Pilkington

(508) (...).

(509) (...).⁴²⁵

(510) (...).

(511) (...).⁴²⁶

(512) (...).

8.4.2.4. Saint-Gobain

(513) (...).

8.4.3. *Sufficient deterrence*

⁴²¹ (...).

⁴²² (...).

⁴²³ (...).

⁴²⁴ (...).

⁴²⁵ (...).

⁴²⁶ (...).

(514) In determining the amount of the fine, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates (point 30 of the 2006 Guidelines on fines), even if it is not possible to estimate the amount of gains improperly made as a result of the infringement (point 31 of the 2006 Guidelines on fines), as the fine imposed must fulfil its objective of disciplining the infringing undertaking having taken into account its overall size.

(515) In this case the world wide turnover in 2006 of the undertakings concerned are the following: Asahi: EUR 9 985 million, Guardian: EUR (...), Pilkington: EUR (...) and Saint-Gobain: EUR 41 596 million.⁴²⁷

(516) As to Asahi/Glaverbel (...).

(517) As to Guardian (...).

(518) As to Pilkington (...).

(519) As to Saint-Gobain (...).

8.5. Application of the 10% of turnover limit

(520) Article 23(2) of Regulation (EC) No 1/2003 stipulates that the fine for each undertaking shall not exceed 10% of the undertaking's total turnover in the preceding business year.

(521) In this case, such ceiling is not attained in respect of the fine to be imposed on any of the undertakings to which this Decision is addressed.

(522) The amounts of the fine to be imposed on each undertaking before application of the 2002 Leniency Notice are therefore the following:

All amounts are in EUR

Asahi/Glaverbel	130 000 000
Guardian	148 000 000
Pilkington	140 000 000
Saint-Gobain	133 900 000

8.6. Application of the Leniency Notice

(523) As indicated in Chapter 3 this investigation was initiated further to information brought to the attention of the Commission by a number of National Competition

⁴²⁷ (...).

Authorities. Following the first inspection, Glaverbel and its mother company Asahi submitted an application for immunity under point 8 of the Leniency Notice and, in the alternative, for a reduction of fines.

8.6.1. *Immunity under point 8 of the Leniency Notice*

- (524) First, Glaverbel and Asahi claim that they would be entitled to immunity under point 8 (a) of the Leniency Notice as the first *ex officio* inspection carried out by the Commission on 22/23 February 2005 did not result in any material evidence and that when they made their first submissions on 2 and 8 March 2005 they provided evidence which would have allowed the Commission to address an inspection decision to the trade association GEPVP and to carry out a more targeted raid than would otherwise have been possible⁴²⁸.
- (525) Those arguments are unfounded. It follows from point 9 of the Leniency Notice that immunity under point 8 (a) is no longer available when the Commission, at the time of the applicant's submission, already had sufficient information to adopt a decision to carry out an investigation in connection with the alleged cartel. Glaverbel and Asahi did not question that the adoption of the first inspection decision was justified and legally correct nor have they argued that the Commission's investigation concerns a different cartel than the one in respect of which the first inspection was carried out. It is therefore concluded that, at the time Glaverbel and Asahi first made their application under the Leniency Notice, immunity under point 8 (a) was no longer available.
- (526) Second, Glaverbel and Asahi claim that, at the time of their application, the Commission did not have sufficient evidence to find an infringement of Article 81 of the Treaty and that they were the first and sole undertaking to provide evidence that enabled the Commission to find such an infringement, therefore entitling them to be granted immunity pursuant to point 8 (b) of the Leniency Notice⁴²⁹. The Commission had allegedly not seized evidence during the inspections which was capable of demonstrating to the requisite legal standard an infringement of Article 81 of the Treaty, as Glaverbel and Asahi's contribution was necessary to supplement that evidence. Glaverbel and Asahi are also of the view that the assessment whether they should be granted immunity under point 8 (b) of the Leniency Notice is an assessment which has to be made at the time of their application and that their submissions throughout the procedure, considering that they are the only applicant, must be taken into account to assess Asahi's and Glaverbel's overall contribution to the Commission's ability to find an infringement.
- (527) This argument cannot be accepted. Points 8 (b) and 10 of the Leniency Notice specify amongst other things that immunity will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 of the Treaty in connection with the alleged cartel and that the evidence submitted may, in the

428 (...)

429 (...).

Commission's view, enable it to make such a finding. Whether the applicant satisfies the latter standard depends on the value of the evidence it submits to the Commission. Evidence which merely strengthens the Commission's ability to prove the facts by complementing what was already in the Commission's possession at the time of its application would not satisfy the condition of point 8 (b) as it would be tantamount to providing significant added value to the Commission under points 21 and 22 of the Leniency Notice.

- (528) For the period 20 April 2004 to 22 February 2005, as set out in Chapter 4, the evidence relied on by the Commission in order to find the infringement concerned by this decision comprises mainly contemporaneous notes of cartel meetings copied during the inspections. Glaverbel and Asahi contributed few elements with evidentiary value which the Commission did not yet have for that period, except for corroborating statements⁴³⁰. At the time Glaverbel and Asahi applied for immunity/leniency the Commission already had contemporaneous evidence copied during the inspections which was sufficient to find an infringement of Article 81 of the Treaty⁴³¹.
- (529) On that basis, as stated in recital (70), the Commission rejected Glaverbel and Asahi's application for immunity under point 8 of the Leniency Notice on 2 February 2007.

8.6.2. *Significant Added Value*

- (530) Glaverbel and Asahi applied for leniency on 2 March 2005, a few days after the Commission undertook its first set of inspections.
- (531) For the most part Glaverbel and Asahi provided evidence which strengthened the Commission's ability to prove the facts for the period 20 April 2004 to 22 February 2005. (...) ⁴³² (...) ⁴³³ (...) ⁴³⁴
- (532) It appears that Glaverbel terminated its involvement in the infringement no later than the time at which Glaverbel and Asahi made their submission. Glaverbel and Asahi have provided the Commission with full and effective cooperation from that date and throughout the proceeding.
- (533) For these reasons, Glaverbel and Asahi met the requirements of point 21 of the Leniency Notice.

⁴³⁰ See recitals (160), (187), (204), (269), (277), (281) and (285).

⁴³¹ See recital (203) for the notes of 2 December 2004 as further described under sub-section 4.2.7.2, recital (201) for Mr (...)’s agenda and recital (202) for Mr (...)’s agenda.

⁴³² See recital (160).

⁴³³ See recitals (204), (269), (277), (281) and (285).

⁴³⁴ See for example recitals (80) to (82), (84) to (87) and (94) to (96).

- (534) Furthermore, as Asahi and Glaverbel were the first and only undertaking to have fulfilled the requirements of point 21 of the Leniency Notice, the Commission informed those companies by letter of 28 February 2007 of its intention to grant them a 30-50% reduction of the fine that would normally be imposed.
- (535) Considering the value of their contribution to this case, the early stage at which they provided this contribution and the extent of their cooperation following their submissions, Glaverbel and Asahi are entitled to a reduction of 50% of the fine that would otherwise have been imposed on them.

8.6.3. Application of point 23 of the Leniency Notice

- (536) As noted at recital (484), although the Commission had evidence of the infringement, from the inspection, in respect of the meetings of 20 April 2004, 2 December 2004 and 11 February 2005, Glaverbel and Asahi's submissions enabled the Commission to extend the duration of the cartel back to 9 January 2004.
- (537) Glaverbel and Asahi's evidence relating to the period of the infringement before 20 April 2004, which consisted of oral statements as well as circumstantial evidence⁴³⁵ related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel. In accordance with point 23 of the Leniency Notice, the period from 9 January 2004 to 19 April 2004 will not be taken into account for the purposes of the calculation of the fine to be imposed on Glaverbel and Asahi.
- (538) In their reply to the SO, Glaverbel and Asahi claim that Glaverbel should be granted partial immunity under point 23 of the Leniency Notice for the period 9 January 2004 to 1 December 2004 because, without Glaverbel's contribution, the Commission would not have been in a position to prove the existence of the infringement prior to 2 December 2004.(...).
- (539) As stated in Chapter 4, as a result of the inspections it carried out at the premises of the companies concerned, the Commission had a contemporaneous document relating to a meeting on 20 April 2004 between Pilkington and Guardian which refers to some of the previously agreed price increases between Glaverbel, Pilkington and Saint-Gobain, as communicated by Pilkington to Guardian. It is therefore clear that it is only Glaverbel's evidence concerning the period prior to 20 April 2004 which relates to facts previously unknown to the Commission.

8.6.4. Conclusion on the application of the Leniency Notice

- (540) In conclusion, Glaverbel and Asahi should be granted a 50% reduction of the fine that would otherwise have been imposed, as well as immunity under point 23 of the Leniency Notice for the period 9 January 2004 to 19 April 2004.

8.7. Final amounts of the fines to be imposed in this proceeding

- (541) In conclusion, the fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should be as follows:

⁴³⁵ For example see recitals (127), (143) and (146).

- Asahi Glass Company Limited and AGC Flat Glass Europe SA/NV, jointly and severally liable: EUR 65 000 000
- Guardian Industries Corp. and Guardian Europe S.à.r.l, jointly and severally liable: EUR 148 000 000
- Pilkington Group Limited , Pilkington Holding GmbH and Pilkington Deutschland AG jointly and severally liable: EUR 140 000 000
- Compagnie de Saint-Gobain SA and Saint-Gobain Glass France SA, jointly and severally liable: EUR 133 900 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated in a complex of agreements and/or concerted practices which covered the whole EEA and which consisted of fixing price increases, minimum prices and other commercial conditions for four categories of flat glass products as well as exchanging sensitive commercial information:

- (a) Asahi Glass Company Limited and AGC Flat Glass Europe SA/NV, from 9 January 2004 to 22 February 2005;
- (b) Guardian Industries Corp. and Guardian Europe S.à.r.l., from 20 April 2004 to 22 February 2005;
- (c) Pilkington Group Limited, Pilkington Holding GmbH and Pilkington Deutschland AG from 9 January 2004 to 22 February 2005;
- (d) Compagnie de Saint-Gobain SA and Saint-Gobain Glass France SA from 9 January 2004 to 22 February 2005.

Article 2

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

- (a) Asahi Glass Company Limited and AGC Flat Glass Europe SA/NV, jointly and severally: EUR 65 000 000
- (b) Guardian Industries Corp. and Guardian Europe S.à.r.l, jointly and severally: EUR 148 000 000
- (c) Pilkington Group Limited, Pilkington Holding GmbH and Pilkington Deutschland AG, jointly and severally: EUR 140 000 000
- (d) Compagnie de Saint-Gobain SA and Saint-Gobain Glass France SA, jointly and severally: EUR 133 900 000

The fines shall be paid in Euros, within three months of the date of the notification of this Decision to the following account held in the name of the European Commission with:

Citibank, N.A.
Citigroup Centre
Canada Square
Canary Wharf
UK - LONDON E14 5LB
Code IBAN : GB43CITI18500811850415
Code SWIFT : CITIGB2L

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.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct referred to in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

Asahi Glass Company Limited
1-12-1, Yurakucho
Chiyoda-ku,
Tokyo 100-8405
Japan

AGC Flat Glass Europe SA/NV
Chaussée de la Hulpe 166
B – 1170 Bruxelles
Belgium

Guardian Industries Corp.
2300 Harmon Road
Auburn Hills, MI 48326-1714,
United States

Guardian Europe S.à.r.l.
Zone Industrielle Wolser
L- 3452 Dudelange
Grand Duchy of Luxembourg

Pilkington Group Limited
Prescot road, St Helens
UK-Merseyside WA10 3TT,
United Kingdom

Pilkington Holding GmbH
Haydnstr. 19
45884 Gelsenkirchen
Nordrhein-Westfalen
Germany

Pilkington Deutschland AG
Haydnstr. 19
45884 Gelsenkirchen

Nordrhein-Westfalen
Germany

Compagnie de Saint-Gobain SA
Les Miroirs
Avenue d'Alsace, 18
F-92400 Courbevoie
France

Saint-Gobain Glass France SA
Les Miroirs
Avenue d'Alsace, 18
F-92400 Courbevoie
France

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 28 XI 2007

For the Commission

Neelie KROES
Member of the Commission