



EUROPEAN COMMISSION  
Competition DG

## ***CASE AT.39792-Steel Abrasives***

(Only the English text is authentic)

### **CARTEL PROCEDURE**

### **Council Regulation (EC) 1/2003 and**

### **Commission Regulation (EC) 773/2004**

---

Article 7 Regulation (EC) 1/2003

Date: 25/05/2016

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...]. Other information is replaced by respectively [non-addressee] or [third party].



Brussels, 25.5.2016  
C(2016) 3121 final

**COMMISSION DECISION**

**of 25.5.2016**

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the  
European Union and Article 53 of the EEA Agreement**

**(AT.39792 – Steel Abrasives)**

(Only the English text is authentic)

## TABLE OF CONTENTS

1.	Introduction .....	5
1.1.	The other undertakings subject to the proceedings but not addressees of this Decision .....	5
2.	The Industry Subject to the Proceedings.....	5
2.1.	The products concerned .....	5
2.2.	The undertaking subject to the proceedings in this case .....	6
2.3.	Trade between Member States and between Contracting Parties to the EEA Agreement.....	8
3.	Procedure.....	8
4.	Description of the events.....	11
4.1.	Basic principles of organisation of the coordination.....	11
4.2.	Description of Pometon’s collusive contacts .....	12
4.2.1.	Scrap surcharge .....	12
4.2.1.1.	Description of the uniform scrap surcharge formula .....	12
4.2.1.2.	Amendment of the uniform scrap surcharge formula .....	14
4.2.1.3.	Application of the agreement on the uniform scrap surcharge formula.....	14
4.2.2.	Coordination of the participants' behaviour with respect to individual customers ....	17
4.3.	Discussion and findings regarding the evidence concerning Pometon.....	23
5.	Application of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement .....	24
5.1.	Jurisdiction .....	24
5.2.	Application of the competition rules in this case .....	24
5.2.1.	Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.....	24
5.2.2.	Agreements and concerted practices.....	24
5.2.2.1.	Principles.....	24
5.2.2.2.	Application in this case .....	27
5.2.3.	Single and continuous infringement.....	27
5.2.3.1.	Principles.....	27
5.2.3.2.	Application in this case .....	29
5.2.3.3.	Discussion and findings .....	31
5.2.4.	Restriction of competition.....	37
5.2.4.1.	Principles.....	37
5.2.4.2.	Application to this case .....	38
5.2.4.3.	Pometon's arguments.....	38
5.2.4.4.	Discussion and findings .....	39

5.2.5.	Effect upon trade between Members States and between Contracting Parties to the EEA Agreement .....	40
5.2.5.1.	Principles.....	40
5.2.5.2.	Application in this case .....	40
5.2.6.	Appreciable effects on competition and trade.....	41
5.3.	Application of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement .....	41
5.3.1.1.	Principles.....	41
5.3.1.2.	Application in this case .....	42
6.	Duration of the Infringement .....	42
7.	The Addressee of this Decision.....	44
7.1.	Principles.....	44
7.2.	Application in this case .....	46
8.	Remedies .....	50
8.1.	Article 7 of Regulation (EC) No 1/2003 .....	50
8.2.	Applicability of limitation periods .....	51
8.3.	Article 23(2) of Regulation (EC) No 1/2003 .....	51
8.4.	Calculation of the fine .....	52
8.4.1.	Value of sales .....	52
8.4.2.	Determination of the basic amount of the fine.....	53
8.4.2.1.	Gravity.....	53
8.4.2.2.	Duration.....	55
8.4.2.3.	Additional amount.....	55
8.4.2.4.	Calculation of the basic amount of the fine .....	56
8.4.3.	Adjustment of the basic amount of the fine: aggravating and mitigating circumstances .....	56
8.4.4.	Adaptation of the adjusted basic amount .....	56
8.4.5.	Application of the 10% of turnover limit.....	57
8.4.6.	Final amount of the fine .....	58

## COMMISSION DECISION

of 25.5.2016

**relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement**

**(AT.39792 – Steel Abrasives)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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 Treaty<sup>1</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 16 January 2013 to initiate proceedings in this case,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty<sup>2</sup>,

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

Having regard to the final report of the hearing officer in this case<sup>3</sup>,

Whereas:

---

<sup>1</sup> OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market".

<sup>2</sup> OJ L 123, 27.4.2004, p. 18.

<sup>3</sup> Final report of the Hearing Officer of 24 May 2016

## 1. INTRODUCTION

- (1) This Decision concerns the participation of the undertaking headed by Pometon S.p.A. (see section 2.2 for more details), in a single and continuous infringement of Article 101 of the Treaty and Article 53 of the the EEA Agreement. The infringement consisted of an agreement and/or concerted practice to coordinate the pricing of steel abrasives, with four other undertakings, which covered the whole EEA from 3 October 2003 to 16 May 2007.
- (2) This Decision is addressed to Pometon S.p.A. in respect of its participation in meetings and other anticompetitive contacts as described in this Decision through its own executives as well as through certain executives of its subsidiaries Pometon España S.A. (Pometon España) and Pometon Deutschland GmbH (Pometon Deutschland).

### 1.1. The other undertakings subject to the proceedings but not addressees of this Decision

- (3) Four other undertakings – [non-addressee]<sup>4</sup>, [non-addressee]<sup>5</sup>, [non-addressee]<sup>6</sup> and [non-addressee]<sup>7</sup> - were subject to the proceedings in respect of the infringement to which this Decision relates. They submitted to the Commission formal requests to settle pursuant to Article 10a (2) of Regulation (EC) No 773/2004 and were addressees of the Commission Decision of 2 April 2014 (the "Settlement Decision").<sup>8</sup> They will be collectively referred to in this Decision as "the settling parties" or "the other participants in the infringement". The five undertakings subject to the proceedings will be also collectively referred to as "the parties" or "the participants in the infringement".
- (4) This Decision will not be addressed to the settling parties. The conduct referred to in this Decision involving the settling parties is exclusively used to establish the liability of Pometon S.p.A. for an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement.

## 2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

### 2.1. The products concerned

- (5) The products subject to the anticompetitive conduct are steel abrasives. Steel abrasives are loose steel particles for multiple usages, either in round (steel shot) or angular (steel grit) form. Steel shots and grits are most generally used in cleaning applications for removal of loose material on metal surfaces, in preparing surfaces

---

<sup>4</sup> [non-addressee][non-addressee] [...] and its subsidiary [non-addressee][non-addressee] [...] ([non-addressee]).

<sup>5</sup> [non-addressee][non-addressee] and its subsidiary [non-addressee][non-addressee] [...] ([non-addressee]). Until July 2011, [non-addressee][non-addressee] was named "[non-addressee][non-addressee]". The name [non-addressee] is generally used in this Decision and any references to "[non-addressee][...]" or "[...]" prior to July 2011 are therefore meant to refer to [non-addressee].

<sup>6</sup> [non-addressee] ([non-addressee]).

<sup>7</sup> [non-addressee] ([non-addressee]).

<sup>8</sup> Decision C(2014)2074 final. See the non-confidential version of the Settlement Decision available on the DG Competition website and the press release of the Commission at [http://europa.eu/rapid/press-release\\_IP-14-359\\_en.htm](http://europa.eu/rapid/press-release_IP-14-359_en.htm).

before painting or coating, in cutting hard stones such as granite and in other technical operations to improve the durability of the metal. In many industries steel abrasives are used as part of their construction, renovation or repair processes. The main sectors using steel abrasives are the automotive industry, the construction industry, in particular stone cutting, the metallurgy industry and the petrochemical industry. Steel abrasives are produced by the atomisation of molten steel from steel scrap, followed by a series of thermal and mechanical treatments in order to give them final characteristics. The anticompetitive conduct identified in this case covers both steel shot and steel grit in all their grades.<sup>9</sup>

- (6) The cost of metal scrap constitutes 25-45% of the total manufacturing costs of steel abrasives. The metal scrap market is characterised by sharp price fluctuations as well as significant price differences across the EEA.<sup>10</sup>
- (7) The Eurofer Scrap Price Index was released each month on the Internet<sup>11</sup> by Eurofer (the European Iron and Steel Association) until 2 March 2016. It provided referential price information on three categories of steel scrap (demolition, new arisings and shredded scrap<sup>12</sup>) based on bid and ask prices collected from major traders in Germany, France, Italy, Spain and the United Kingdom. The Eurofer index (average in 2001= 100) was calculated on the basis of the average price in EUR per tonne for those Member States.

## **2.2. The undertaking subject to the proceedings in this case**

- (8) The origins of the undertaking date back to 1940 when Polveri e Metalli S.p.A., whose main activity was the production of powder for military applications, was founded. In 1990, Polveri e Metalli S.p.A. was merged with Metallurgica Toniolo S.p.A. which already produced steel and grit shots and Metal Powders S.p.A. which was specialised in steel desulphuring technologies. The resulting entity was renamed Pometon S.p.A.. Its registered offices are currently located in Via Circonvallazione 62, Maerne di Martellago, Venice, Italy.
- (9) Pometon S.p.A. is currently 99.99% owned by Sefin Investiments SA (Sefin), which is based in Luxembourg. At the time of the infringement, 99.9% of the shares in Pometon S.p.A. were owned by Ferruginoso Holding & Finance BV (Ferruginoso), which was based in the Netherlands, and which, on 7 November 2008, transferred its Pometon S.p.A. shares to Sefin. Subsequently, Ferruginoso was liquidated and dissolved.
- (10) Pometon's relevant subsidiaries for the purposes of these proceedings are:
  - (1) Pometon España S.A., previously named Metapol S.A., acquired by Pometon S.p.A. on 16 July 1996 and 99.96% owned by this latter until 13 June 2008, when Pometon S.p.A. acquired the totality of its shares<sup>13</sup>;

---

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

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

<sup>11</sup> See the website: <http://www.eurofer.org/eurofer/Statistics/scrap.htm>.

<sup>12</sup> According to the European Steel Scrap Specification published by Eurofer, these three categories correspond to grade E3 for demolition scrap (old thick steel scrap), to grade E2 for new arisings (thick new production steel scrap) and to grade E40 for shredded scrap (old steel scrap fragmented into pieces not exceeding 200mm).

<sup>13</sup> ID [...].

- (2) Pometon Deutschland GmbH, established in Germany in 2001, 74% owned by the Austrian company Finmetal Holding GmbH, which was in turn wholly owned by Pometon S.p.A.. On 27 November 2007, Pometon S.p.A. acquired 100% of Pometon Deutschland GmbH, which was subsequently liquidated, together with Finmetal Holding GmbH, ceased its activities on 31 December 2010 and was dissolved.<sup>14</sup>
- (11) On 16 May 2007, the sale of Pometon S.p.A.'s steel abrasives business to [non-addressee] took place. More particularly, the business including the production and sale of high, medium and low carbon steel shot for mechanical, chemical and granite cutting applications was transferred to [third party], a legal entity belonging to the [non-addressee] group. Pometon stated that from that date Pometon S.p.A. discontinued selling steel abrasives independently on the market.<sup>15</sup> [Business secret].<sup>16</sup> [ Business secret].<sup>17</sup> [Business secret].<sup>18</sup>
- (12) During the infringement period as defined in Section 6, several executives from Pometon S.p.A., Pometon España S.A. and Pometon Deutschland GmbH took part in the anticompetitive meetings and contacts described in Section 4. Those individuals, as well as the key staff reporting to them, are listed in table 1:

Table 1

NAME	COMPANY	POSITION	PERIOD
[Company representative]	Pometon S.p.A.	[function]	3 March 1994-25 February 2016 <sup>19</sup>
[Company representative]	Pometon S.p.A.	[function]	19 October 1997 – 15 May 2007 <sup>20</sup>
[Company representative]	Pometon S.p.A.	[function]	27 September 1998 – 15 May 2007 <sup>21</sup>

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

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

<sup>16</sup> ID [...], ID [...] and ID [...].

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

<sup>18</sup> ID [...], ID [...] and ID [...].

<sup>19</sup> ID [...] and ID [...]. [company representative] has been employed by Pometon since 1979, in 1992 he was appointed [function][function] and on 3 March 1994 [function][function]. He held both positions until 25 February 2016. See ID [...] and ID [...].

<sup>20</sup> ID [...], ID [...] and ID [...]. In Italian "[role]". He was transferred to [third party] ([non-addressee]) on 16 May 2007 (ID [...]).

<sup>21</sup> ID [...], ID [...] and ID [...]. In Italian "[function]". [...] was transferred to [third party] ([non-addressee]) on 16 May 2007 (ID [...], Pometon – reply to RFI).



<b>[Company representative]</b>	Pometon S.p.A.	[function]	1 May 2000 – 31 December 2007 <sup>22</sup>
<b>[Company representative]</b>	Pometon España S.A.	[function]	Since 29 February 2000 <sup>23</sup>
<b>[Company representative]</b>	Pometon España S.A.	[function]	17 July 1974 – 6 April 2006 <sup>24</sup>
<b>[Company representative]</b>	Pometon Deutschland	[function]	20 April 2001 – 27 November 2007 <sup>25</sup>

- (13) Pometon S.p.A. as well as the subsidiaries referred to in recital 2 directly or indirectly controlled by it constitute the undertaking referred to as "Pometon" in this Decision, unless differently specified.
- (14) Pometon S.p.A. currently produces iron and copper powders (and related alloys) predominantly for the automotive sector. It also produces stainless steel shot and grit for specific blasting surface treatments where a high degree of corrosion resistance is needed but only to a very limited extent (less than 5% of its current turnover).<sup>26</sup> In 2015, Pometon's consolidated worldwide turnover amounted to EUR 89 172 000.<sup>27</sup>

### **2.3. Trade between Member States and between Contracting Parties to the EEA Agreement**

- (15) The participants in the infringement sold steel abrasives in the whole territory of the EEA. Their production sites were mostly situated in the Member States of their domicile, but could also be found in some other Contracting Parties to the EEA Agreement. Therefore, during the infringement period, there were substantial trade flows of steel abrasives between the Contracting Parties to the EEA Agreement.

## **3. PROCEDURE**

- (16) On 13 April 2010, [non-addressee] applied for immunity under the Leniency Notice.<sup>28</sup> [non-addressee]'s immunity application was followed by a number of submissions consisting of oral statements and documentary evidence. On 31 May 2010, the Commission granted [non-addressee] conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.
- (17) On 15, 16 and 17 June 2010, the Commission carried out unannounced inspections at the premises of various producers of steel abrasives, including Pometon.

<sup>22</sup> ID [...]. He moved to [third party] ([non-addressee]) on 1 January 2008 (ID [...]).

<sup>23</sup> ID [...].

<sup>24</sup> ID [...].

<sup>25</sup> ID [...].

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

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

<sup>28</sup> Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

- (18) The Commission subsequently sent several requests for information pursuant to Article 18 of Regulation (EC) No 1/2003 to the parties.
- (19) On 16 January 2013, the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against the parties with a view to engaging in settlement discussions with them. After each party, Pometon included, had confirmed its willingness to engage in settlement discussions, the discussions started in the period between 19 and 26 February 2013.
- (20) Settlement meetings between each party and the Commission took place between February 2013 and December 2013. During those meetings, the Commission informed each of the parties of the objections it envisaged raising against them, and disclosed the main pieces of evidence in the Commission file relied on to establish those potential objections. The parties were also given a copy of the relevant pieces of evidence in the file as well as a list of all the documents in the file. Further, the parties were given access to the oral statements at the Commission's premises. The Commission also provided the parties with an estimation of the range of fines likely to be imposed.
- (21) [...], the settling parties submitted their formal requests to settle to the Commission pursuant to Article 10a (2) of Regulation (EC) No 773/2004.
- (22) Pometon did not submit a formal request to settle pursuant to Article 10a (2) of Regulation (EC) No 773/2004. On 10 February 2014, it returned the CD-ROM with evidence that had been handed over to it on 21 February 2013 in the context of the settlement procedure.
- (23) On 2 April 2014, the Commission adopted the Settlement Decision, which was addressed to the settling parties and found them liable for their respective conduct in this case (see recital (3)). The Settlement Decision was based on matters of fact and law accepted by its addressees and did not address the question of the liability of Pometon in respect of any breach of Article 101 of the Treaty (see recital (27)).
- (24) On 3 December 2014, the Commission adopted a Statement of Objections (SO) which was notified to Pometon S.p.A..<sup>29</sup> Subsequently, Pometon S.p.A. was provided with a CD-ROM which contained the accessible parts of the Commission's investigation file. In addition, its legal representatives made use of their rights of access to the parts of the Commission's file that were only available at the Commission's premises. On 27 February 2015, Pometon had access to an additional document that had not been made accessible in the access-to-file CD-ROM and was granted the possibility to submit written comments on it. Pometon did not submit any comments on that document.
- (25) Pometon made known its written observations on the SO to the Commission on 16 February 2015. Further observations were made during the oral hearing that took place on 17 April 2015.
- (26) At the oral hearing, Pometon raised two points that it had not raised in its written reply to the SO. Pometon first argued that the Commission had breached the principle of the presumption of innocence and Pometon's rights of defence because, at the time it adopted the Settlement Decision, it referred to Pometon in the section

---

<sup>29</sup> Under reference C(2014)9347 final.

relating to the description of the events. Pometon claims that this showed that the Commission's view in its respect had already been formed before these proceedings were concluded. Second, Pometon argued that the Commission had breached the principle of professional secrecy because it had published a provisional non-confidential version of the Settlement Decision, without redacting references to Pometon in it. This, in Pometon's view, was not remedied by the removal of the Settlement Decision from the Commission's website and the publication of a new redacted text of the Settlement Decision which occurred a few days later.

- (27) The Commission recalls at this point its position that it was acceptable for it to mention the non-settling party in the Settlement Decision for three reasons: (i) the presumption of innocence does not require that all participants to the same infringement be tried simultaneously, and the Commission could legally apply the settlement procedure in a staggered way; (ii) references to the participation of third parties may be necessary for understanding a case and the assessment of the guilt of those who were subject to the settlement procedure; and (iii) reference to a third party is compatible with the presumption of innocence insofar as overall effective access to a fair trial is ensured for the third party.
- (28) With respect to the first of the two points made by Pometon at the oral hearing, the Commission does not consider that there was any breach of the principle of the presumption of innocence and the rights of defence with regard to Pometon. First, Pometon's legal position is not affected by the Settlement Decision, because the Settlement Decision is not addressed to Pometon and it does not draw any legal conclusion as to Pometon's participation in the conduct which the settling parties accepted was unlawful. While the Settlement Decision contains references to Pometon in the section on the description of events, the Commission did not go beyond what was strictly necessary for describing the events, proving the infringement and demonstrating the participation of the settling parties. The conclusions in the Settlement Decision are based on matters of fact and law as accepted by the settling parties, and accordingly Pometon was only mentioned in order to give an accurate and complete account of such facts. There was also a disclaimer that the conduct referred to involving the non-settling party Pometon was exclusively used to establish the liability of the settling parties and that the proceedings against the non-settling party remained pending.
- (29) Moreover, in *Timab*, the General Court confirmed that in a hybrid cartel case, the settlement procedure for the settling parties and the standard procedure for the non-settling parties are two separate procedures.<sup>30</sup> In this context, references to Pometon in the Settlement Decision have to be seen in the light of the subsequent procedural steps that the Commission followed within the standard procedure with regard to Pometon. In particular, Pometon received an SO and had an opportunity to reply to it both in writing and at the oral hearing.
- (30) In any event, the Commission could not establish Pometon's participation in the infringement admitted by the settling parties without granting Pometon the possibility to defend itself against the SO which followed the Settlement Decision. Finally, Pometon may also decide to contest the Commission's findings by

---

<sup>30</sup> Judgment of the General Court of 20 May 2015, *Timab Industries and Cie financière et de participations Roullier (CFPR) v Commission*, T-456/10, ECLI:EU:T:2015:296, paragraphs 71-73.

challenging this Decision before the General Court of the European Union. Therefore, Pometon's rights of defence have not been breached as a consequence of references made in the Settlement Decision to circumstances or facts concerning Pometon, since the Commission did not draw any conclusion from them as regards Pometon. Accordingly, in the Commission's view, Pometon's right to be considered innocent until such time as its participation in the infringement is proven, was not affected by the adoption of the Settlement Decision.

- (31) As regards the second point, namely the publication of the provisional non-confidential version of the Settlement Decision, initially without redacting references to Pometon, the Commission explained to Pometon at the oral hearing that this was a case of unintentional disclosure caused by human error and that it had been promptly remedied. The non-confidential version of the Settlement Decision with Pometon's name visible was published online for the relatively short period of two weeks and went practically unnoticed at the time, since not even Pometon complained about the inadvertent disclosure of information. When the error was noticed by the Commission itself, it was addressed immediately by removing Pometon's name. The Commission concludes that that minor error does not in any way affect the validity of the proceedings in this case because it did not result in any limitation of Pometon's procedural rights, nor did it infringe Pometon's right of defence as shown by Pometon's reply to the SO and further observations made during the oral hearing.

#### **4. DESCRIPTION OF THE EVENTS**

##### **4.1. Basic principles of organisation of the coordination**

- (32) Pometon engaged in both bilateral and multilateral contacts with the other participants in the infringement, in the course of which they discussed a key price component applicable to all their sales of steel abrasives in the EEA, namely the scrap surcharge. Pometon also discussed with the other participants in the infringement (mainly through bilateral contacts) which parameters of competition would be allowed between them as regards individual customers within the EEA.<sup>31</sup>
- (33) Pometon used those contacts with the other participants in the infringement to:
- (a) coordinate the introduction of a uniform calculation model for a common scrap surcharge<sup>32</sup>, that is a variable surcharge that would be applicable to the price of all steel abrasives in the EEA;
  - (b) coordinate behaviour with respect to individual customers within the EEA; in principle price competition was restricted, which limited competition only to quality and services.<sup>33</sup>
- (34) According to the Settlement Decision, the settling parties also coordinated the introduction of an energy surcharge in the summer of 2008.<sup>34</sup> This, however, occurred after Pometon had sold its steel abrasives business to [third party], see recital (11)). The coordination on the energy surcharge therefore falls outside the scope of the proceedings against Pometon.

---

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

<sup>32</sup> For example ID [...] and ID [...].

<sup>33</sup> For example ID [...] and ID [...].

<sup>34</sup> For example ID [...], ID [...], ID [...] and ID [...].

## 4.2. Description of Pometon's collusive contacts

### 4.2.1. Scrap surcharge

- (35) The evidence demonstrates that contacts involving Pometon and the other participants in the infringement evolved into a pattern of behaviour as of October 2003. Following preparatory exchanges between [non-addressee], [non-addressee] and Pometon, the three undertakings met to agree on a common scrap surcharge calculation system (see recital (36)). In the context of those preparations, on 5 September 2003, [company representative], [function], sent two telefaxes to [non-addressee] and [non-addressee] respectively, suggesting that they should discuss moving towards another system for the scrap surcharge index (described in recitals (6) and (7)).<sup>35</sup> On 8 September 2003, [company representative] sent an e-mail to [non-addressee] and [non-addressee] making further proposals and reasoning on how to advance with setting a common scrap surcharge to bring the greatest profit for them with least discussion with customers.<sup>36</sup> On 29 September 2003, [company representative] sent another e-mail to the same addressees with information on the purchase price of scrap for Pometon, which was to be used in devising the new scrap surcharge system ("*please note that E8 cat. is the category that we are now using. CAEF 225 is our new proposal*").<sup>37</sup>
- (36) Following those preparatory contacts, on **3 October 2003**, representatives of [non-addressee], [non-addressee] and Pometon met in a restaurant in Padenghe sul Garda (Italy), a village on the shores of Lake Garda, to discuss and agree on a uniform calculation model for a common scrap surcharge system, to be applied by all of them.<sup>38</sup> On that day [non-addressee], [non-addressee] and Pometon reached an agreement to apply a single formula using as reference the Eurofer index (see recital (7)) for the whole EEA, except for Italy, where they agreed to use a national index as reference<sup>39</sup> (the "uniform scrap surcharge formula").

#### 4.2.1.1. Description of the uniform scrap surcharge formula

- (37) The uniform scrap surcharge formula agreed on 3 October 2003 was "Eurofer index minus the offset 68" applicable to the whole EEA except Italy (see recital (36)), and "CAEF 225 index minus the offset 62" for Italy.<sup>40</sup> The exception for Italy was introduced because scrap metal prices were significantly higher in Italy than in most other European countries.<sup>41</sup> In the evidence, the common scrap surcharge formula is

---

<sup>35</sup> ID [...] is a telefax of 5 September 2003 [company representative] [...].

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

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

<sup>38</sup> ID [...], ID [...], ID [...] and ID [...]. Presence of Pometon at Lago di Garda on 3 October 2003, when the meeting took place, is confirmed also by the VAT receipt ("*ricevuta fiscale*") issued to [company representative] from "Ristorante Aquariva" located in Padenghe sul Garda (ID [...]).

<sup>39</sup> The exception for Italy was introduced because in Italy the metal scrap prices were significantly higher than in most of the rest European countries, see for example ID [...] and ID [...]. The index agreed during the Lago di Garda meeting for Italy (ID [...].t) is exactly the same index that Pometon communicated to the other meeting participants on 29 September 2003 as Pometon's "*new proposal*" (ID [...]). See also ID [...], and ID [...].

<sup>40</sup> ID [...], ID [...], ID [...], ID [...], ID [...] and ID [...].

<sup>41</sup> See for example ID [...] and ID [...].

also referred to as "SCV" (which stands for "Scrap Cost Variance"). The SCV was calculated as follows<sup>42</sup>:

- (a) scrap price index figure published on the Eurofer website in the table concerning the new arisings for the penultimate month<sup>43</sup>;
  - (b) deduction of the agreed base figure of 68 ("*offset*" of 68); for instance 163 (which is the Eurofer price Index figure for January 2004) - 68 = EUR 95;
  - (c) for Italy: the agreed base figure was 62 and was deducted from the national Italian index CAEF 225,<sup>44</sup>
  - (d) addition of the calculated figure (here 95 according to the example in point (b)) to other costs (in particular the actual purchase price of the scrap) in order to construct the base price of abrasives to customers (and part of the invoice to the customers).<sup>45</sup>
- (38) The new system was automatically applicable because it did not require long discussions among the producers.<sup>46</sup> As a result, all that the participants in the infringement had to do was to follow the scrap price indexes and calculate and apply the current scrap surcharge system. It was agreed that [non-addressee] would take the lead in the announcements and that the others would follow.<sup>47</sup>
- (39) [Non-addressee] and [non-addressee] were in parallel also informed about or became aware of the agreement on the uniform calculation model and the specific arrangement for the Italian market.<sup>48</sup> However, they did not participate in the initial stages of the process when the agreement between [non-addressee], [non-addressee] and Pometon was concluded.
- (40) The uniform scrap surcharge formula was applied by all participants in the infringement from February 2004 onwards (see recital (42)).<sup>49</sup> [non-addressee] was in charge of communicating the new surcharge to the other participants in the infringement each month<sup>50</sup> and, as of May 2004, also published the surcharge on its own website and informed the other parties (see recital (49)).<sup>51</sup>

---

<sup>42</sup> For example ID [...];ID [...]. See also an internal memo of 10 November 2003 written by Mr. [company representative] of [non-addressee] (ID [...]) where it summarises the new scrap surcharge system and the expected extra margin for the industry from then on. Regarding the Eurofer Index see also ID [...].

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

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

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

<sup>46</sup> ID [...] "... Besides the change of the index is automatically applicable and it doesn't imply long discussions among the producers...".

<sup>47</sup> ID [...].

<sup>48</sup> For example ID [...], ID [...],ID [...] and ID [...].

<sup>49</sup> For example ID [...], ID [...] and ID [...], ID [...],ID [...].

<sup>50</sup> For example ID [...], ID [...] and ID [...], ID [...] and ID [...]. This also corresponds to the earlier recurrent [non-addressee] communications with Pometon on scrap surcharge covering the whole Europe (ID [...],ID [...],ID [...],ID [...],ID [...] and ID [...])

<sup>51</sup> For example ID [...] and ID [...].

#### 4.2.1.2. Amendment of the uniform scrap surcharge formula

(41) In July 2007, the scheme was amended with effect from 1 October 2007 (see recital (56)). Following that amendment, from October 2007, [non-addressee] published the monthly scrap surcharge on a dedicated website.<sup>52</sup>

#### 4.2.1.3. Application of the agreement on the uniform scrap surcharge formula

(42) Following the agreement reached at the Lake Garda meeting, the participants exchanged several e-mails coordinating in detail the introduction of the new scrap surcharge system<sup>53</sup> and the common starting date, which was set as 1 February 2004.<sup>54</sup>

(43) On **7 October 2003**, [non-addressee] sent Pometon an e-mail containing information on the new way of calculating the agreed scrap surcharge and an assessment of the correlation between the new index and the previous values used in different countries.<sup>55</sup>

(44) In a subsequent e-mail exchange of **14 October 2003** with [non-addressee], Pometon confirmed its agreement on the European and Italian SCV, including also the granite sector customers.<sup>56</sup> In that exchange Pometon argued that the base price could also be increased and, in view of that, informed [non-addressee] that it would put into the letters informing customers "*the message that the modification of the scrap is not covering the other increased costs*". Pometon concluded its message as follows: "*Thanks and I'm prepared to do my best for the conclusion of the total job*".

(45) On **15 and 22 October 2003**, Pometon continued the e-mail exchanges.<sup>57</sup> In those exchanges Pometon again confirmed the application of the agreed scrap surcharge for both "mechanic" and "granite" customers and discussed its active contacts with other parties to ensure adherence to the agreement, as well as the timing of its application and the letters informing customers about the scrap surcharge change. Pometon also told the parent company of [non-addressee] group that it was awaiting formal confirmation from [non-addressee]'s entity on the Spanish market and asked the parent company to "*please push him*". In a subsequent communication on the same date Pometon informed [non-addressee] that it would be sending the letters to the customers and reported about its efforts to ensure that the other participants in the infringement did the same.<sup>58</sup> Those exchanges show that Pometon was active in ensuring that the other participants in the infringement applied the agreement and took measures to apply it itself.

(46) A telefax of **1 December 2003** sent by [company representative] to [company representative]<sup>59</sup> shows that Pometon S.p.A. had asked Pometon Deutschland GmbH to apply the new scrap surcharge as agreed with the other participants in the

---

<sup>52</sup> The website was called [www.scrapsurcharge.com](http://www.scrapsurcharge.com).

<sup>53</sup> For example ID [...].

<sup>54</sup> For example ID [...].

<sup>55</sup> ID [...]. See also an internal memo of 10 November 2003 written by [company representative] of [non-addressee] ID [...] where it summarises the new scrap surcharge system and the expected extra margin for the industry from then on.

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

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

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

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

infringement. In that telefax, [company representative] supported a price increase in general but expressed concerns that Pometon, as a relatively new player on the German market, could be disadvantaged by the price increase compared to the established suppliers on that market. Therefore, Pometon Deutschland GmbH asked Pometon S.p.A.'s opinion on a proposal to *"wait how the new scrap index develops and if the competitors are all applying the new surcharge"* and suggested that *"a general price increase should be discussed again for July 2004 earliest"*. On 4 December 2003, [company representative] sent further information to support his suggestions<sup>60</sup> and noted also the following: *"The very important question is how we can obtain new customers when we are no longer flexible in pricing. If everybody offers the agreed price of e.g. € 475,-- (20-100 tons) who will get the order? Probably the more established, German company [explaining that for the customers this includes also other competitors active in Germany, even though their parent companies are not German]."*

- (47) Further evidence of Pometon having actively taken measures to apply the agreement is provided by an internal e-mail exchange of [non-addressee], dating from **9 December 2003**.<sup>61</sup> In that e-mail [non-addressee] noted that the European-wide scrap surcharge would be applied in the granite sector in Spain starting from the 2<sup>nd</sup> quarter of 2004 at the earliest, as soon as Pometon put it in place which it would do once [non-addressee]'s Spanish subsidiary had done so, and for the "mechanical" segment as of February 2004.
- (48) In an internal e-mail of **24 March 2004**<sup>62</sup> [non-addressee]'s representative reported a conversation with [company representative] of Pometon España S.A., which resulted in an agreement to apply the new scrap surcharge to their customers in Spain without any concessions of any kind.
- (49) On **30 April 2004** [non-addressee] sent an e-mail to the other participants in the infringement announcing that the new scrap surcharge could be found on [non-addressee]'s website.<sup>63</sup> That e-mail, that was found at [non-addressee]'s premises during the inspections, opens with *"dear all"*, which indicates that [non-addressee] was not the only addressee of the e-mail and that the other addressees could not have been anybody else but all other participants in the infringement.
- (50) On **16-18 November 2005** [non-addressee] wrote to Pometon in its capacity as Pometon's customer and initially refused to pay the SCV. That e-mail exchange<sup>64</sup> contains references to the cartel cooperation, including a reference to the cartelised surcharge. Pometon's [company representative] suggested that *"the solution would be to apply the monthly scrap surcharge as currently done in the markets"*.<sup>65</sup> The representative of [non-addressee] responded *"we think, the best way is to fix the scrap surcharge for steel grit on the Eurofer-New-Arisings-index [...], the same index we<sup>66</sup> all take when selling metallic abrasives. So it is very easy to remind, if we also take the same base of 68. So the scrap surcharge will be the same as for all your*

---

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

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

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

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

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

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

<sup>66</sup> The participants.



*other customers*".<sup>67</sup> He also referred to the base of 68, which is exactly what was agreed by the participants in the infringement.

- (51) In its reply to the SO, Pometon provided evidence that it supplied [non-addressee] at a fixed price and argued that that e-mail does not show that Pometon applied the scrap surcharge to its clients.<sup>68</sup> However, the Commission considers that the final outcome of the conversation is not relevant. What is relevant is rather the fact that the e-mail exchange clearly reveals that both Pometon and [non-addressee] were aware of the uniform scrap surcharge formula and applied the SCV as suppliers of steel scrap in the market. In response to Pometon's suggestion that "*the solution would be to apply the monthly scrap surcharge as currently done in the markets*", [non-addressee]'s representative actually confirmed that [non-addressee] also applies the scrap surcharge ("*we all take when selling metallic abrasives*"). In reply to that e-mail Pometon agreed that the "*scrap surcharge system is really a very good system [...]*".<sup>69</sup> That contemporaneous evidence shows that Pometon applied the agreement on the scrap surcharge.
- (52) An internal e-mail exchange of [non-addressee] entitled "*Italian Stone sector surcharge*" and dated **20 March 2007**<sup>70</sup> confirms that in spring 2007 the scrap surcharge system continued to be applied by the participants in the infringement and, notably, that Pometon continued to participate in the agreement: "*for your info our friends at [non-addressee] & Pometon have asked me to attend a meeting to discuss the implementation of the variable scrap s/c in Milan 16<sup>th</sup>/17<sup>th</sup> May*". The occurrence of the meeting of **16-17 May 2007** is confirmed by [...].<sup>71</sup>
- (53) In its reply to the SO, Pometon argued that both of those e-mails were sent at a time when the negotiations regarding the sale of the steel abrasives business by Pometon to [non-addressee] were at an advanced stage and therefore it was illogical that Pometon would have proposed a meeting to discuss the implementation of the scrap surcharge formula.<sup>72</sup> The Commission cannot accept this argument as the sale agreement was signed on and took effect from 16 May 2007. Until then, the negotiations were not public<sup>73</sup> and the other participants in the infringement could not have known that Pometon's business would be sold. The evidence referred to in recital (52) shows that they clearly perceived Pometon as being part of the agreement.
- (54) In fact, it is doubtful whether [non-addressee] knew that Pometon had sold its steel abrasives business to [non-addressee] even at the time of the meeting of 16-17 May 2007 (see recital (52)).
- (55) In its reply to the SO<sup>74</sup>, Pometon referred to [non-addressee]'s internal e-mail in which the [non-addressee]'s representative present reported about the meeting<sup>75</sup> in an

---

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

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

<sup>69</sup> ID [...].

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

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

<sup>72</sup> ID [...].

<sup>73</sup> In its letter of April 2007 to Unione degli Industriali della Provincia di Venezia attached as Annex 1 to its reply to the SO (ID [...]), Pometon itself underlined that the fact Pometon's steel abrasives business was going to be sold to [non-addressee] was to be kept secret.

<sup>74</sup> ID [...].

attempt to demonstrate that at that meeting [company representative] had participated not as representative of Pometon but as the representative of [third party] of the [non-addressee] group (see recital (11)). However, judging from the text of the e-mail, it does not seem that [non-addressee]'s representative knew that [company representative] had participated as a representative of [third party], that is, the acquirer. The text seems to suggest the contrary. According to the e-mail, [company representative], [non-addressee]'s sales manager, suggested that "[t]o reduce suspicion, each supplier is to use a slightly diff figure eg, [non-addressee] 15E – [non-addressee] 16E - pometon 14E", still giving an impression that Pometon is a separate company. [Company name]'s representative's report about the meeting stated that "[t]hroughout the meeting [company representative] took a back seat & let [company representatives] run the show". The fact that [non-addressee]'s representative noticed this means that he must have found it unusual but there is no suggestion that he knew the reason for such a change in [company representative]'s behaviour. Therefore, the Commission considers that the last contact between Pometon and other participants in the infringement regarding the scrap surcharge was the meeting on 16 May 2007 referred to in recital (52). Since, in any event, Pometon continued to apply the scrap surcharge and did not publicly distance itself from the arrangements in place, it can be concluded that Pometon was part of the agreement on scrap surcharge until 16 May 2007.<sup>76</sup>

- (56) In the summer of 2007, after Pometon had sold its steel abrasives business (see recital (11)), [non-addressee], [non-addressee], [non-addressee] and [non-addressee] revised the scrap surcharge (see recital (41)). An adaptation of the scrap surcharge seemed necessary to the other participants in the infringement, as scrap prices had risen in 2007. It was also considered necessary in order to include the losses of about 10% which occur during the production process when melting scrap in a furnace. The other participants in the infringement therefore agreed to revise the surcharge formula accordingly.<sup>77</sup> The revised scrap surcharge formula was introduced in two stages. Firstly, at some time after 1 October 2007, they reduced the offset to EUR 50. Secondly, as of 1 July 2008 ([non-addressee] and [non-addressee]) and 1 August 2008 ([non-addressee] and [non-addressee]), they introduced the new 1.1 multiplier to the Eurofer index. The fact that the other participants in the infringement discussed how to revise the index implies that the cartel agreement was clearly in force, and what was discussed in summer 2007 was only a change in the parameters of the formula.

#### 4.2.2. *Coordination of the participants' behaviour with respect to individual customers*

- (57) The evidence contained in the file, in particular a number of inspection documents as well as other documents submitted by the leniency applicant, show that Pometon also coordinated its behaviour with the other participants in the infringement with respect to individual customers.<sup>78</sup> In parallel with the coordination on the scrap surcharge (see for example recitals (35), (45), (52), (61) and (77)), the participants agreed in

---

<sup>75</sup> ID [...].

<sup>76</sup> Despite its exit from the steel abrasives business, Pometon S.p.A. was still aware of the revised scrap surcharge formula (addition of a multiplier of 1.1) applicable as of 1 July 2008 and communicated it to its subsidiaries (ID [...]).

<sup>77</sup> For example ID [...] and ID [...].

<sup>78</sup> For example ID [...], and ID [...]. See also the reference to basic price by [company representative], in the telefax of 5 September 2003 in ID [...].

principle not to poach each other's established customers, at least not by means of price cuts, to coordinate pricing, including price increases and to implement surcharges in cases where customers were multi-sourcing (see recitals (76), (78) and (79)). While the form and intensity of this behaviour in different Member States varied, the same general principle applied: not to compete on price with regard to individual customers.

- (58) While contacts between [non-addressee] and [non-addressee] to coordinate on individual customers were more frequent than those involving the other participants in the infringement, there is nevertheless evidence of occasional contacts involving Pometon and [non-addressee], while there is far less evidence showing [non-addressee]'s participation in such behaviour.
- (59) As the evidence presented in recitals (61)-(79) shows, contacts between Pometon and the other participants in the infringement took place mainly when one or another participant breached or was believed to have breached the arrangement not to compete on price with regard to individual customers (see for example recitals (76) and (78)).
- (60) The arrangements regarding individual customers covered the whole EEA<sup>79</sup>; their application by Pometon logically extended only as far as Pometon had sales in the Member States concerned. Evidence presented below (recitals (61) ff.) shows that Pometon was clearly involved in contacts regarding the main European steel abrasives markets, that is to say, at least Spain, France, Belgium, Germany and its home country Italy.

#### Spain, France, Belgium and other EEA Contracting Parties

- (61) During the period of coordination on the application of the agreed scrap surcharge (see recital (45)), an e-mail of 22 October 2003<sup>80</sup> from Pometon to [non-addressee] and an e-mail of 21 November 2003 from [non-addressee] to Pometon<sup>81</sup> show that Pometon's headquarters were directly involved in coordination on individual customers in Spain and Belgium. In the e-mail of **22 October 2003**, [Pometon's representative], after speaking about some Spanish customers, stated: *"I deem very strange that Pometon increases the prices (and we will do it in any case!) meanwhile [[non-addressee]] diminishes its quotations."*
- (62) In the e-mail of **21 November 2003** (with subject line *"Spain/Belgium"*)<sup>82</sup> from [non-addressee] to Pometon's [functions and name of representative]<sup>83</sup>, after discussing some Spanish clients in a constructive way (trying to find a solution for splitting or sharing some accounts), the representative of [non-addressee] mentioned a Belgian customer which would normally be supplied by [non-addressee] and warned Pometon not to increase its supplies to the customer: *"You sent 6 trucks [...] It was 4, then 5, now 6. I hope that's the last figure!"*. At the beginning of the same e-mail, [non-addressee] suggested to Pometon *"to speak together about the different possibilities"* regarding customers in *"Scandinavia and East countries"*.

---

<sup>79</sup> See recital 37 of the Settlement Decision.

<sup>80</sup> ID [...].

<sup>81</sup> ID [...].

<sup>82</sup> ID [...].

<sup>83</sup> Referred to as "[first name of company representative]" in the e-mail.

- (63) Furthermore, in an internal e-mail of [non-addressee] of **19 January 2004**<sup>84</sup> reporting on discussions with [non-addressee] on customers on the French and Belgian market, [non-addressee] expressed suspicions that Pometon had undercut its price to a French customer. The e-mail shows that Pometon was also part of the coordination regarding individual customers in France. According to Pometon<sup>85</sup>, that e-mail only demonstrates that [non-addressee] considered Pometon as an aggressive competitor capable of making competitive offers to customers. This argument, however, is not convincing. Looking at the content of the entire e-mail, it is clear that [non-addressee] and [non-addressee] considered Pometon and [non-addressee] to be part of the arrangement not to undercut each other's prices and that what [non-addressee] expressed was a suspicion that Pometon and [non-addressee] had not respected that arrangement.<sup>86</sup>
- (64) In addition, according to the evidence in the case file, Pometon had recurrent meetings and telephone conversations with [non-addressee]'s Spanish subsidiary before and during the period of coordination on the scrap surcharge. Those contacts are very well documented for the period from **20 February 2003 until 5 April 2004** in the form of detailed summaries of meetings and telephone conversations drawn up by the employee of [non-addressee]'s Spanish subsidiary who took part in them.<sup>87</sup> On 20 February 2003 a meeting took place between Pometon and [non-addressee], in which the latter's employee noted down: "*I transmit our intention to increase the selling prices of the mechanics grit, and we would like to know if they [Pometon] are willing to follow suit. The reply [of Pometon] is affirmative.*"<sup>88</sup> The same employee indicates a list of [non-addressee] customers to which an approximate increase of 5% could already be applied.<sup>89</sup> On 21 March 2003, a meeting between Pometon, [non-

<sup>84</sup>

ID [...].

<sup>85</sup>

ID [...].

<sup>86</sup>

ID [...]: "*Points discussed : 1. [Third parties] informed [non-addressee] about our specific offer to the WS 110... According to [third parties], POMETON would have increased its price by 8 €/t.. [...] that [non-addressee] must absolutely change its prices upwards ... 2. [Third parties] ( 58 ) He confirms to me that they do not supply this smeltery. WE therefore need to check with [non-addressee] or POMETON. I will lean towards POMETON.. which are well able to do 200€/t... We agreed to call each other again should new events come up ...*". In the original French: "*Points abordés : 1. [Third parties] a fait part à [non-addressee] de notre offre spécifique à la WS 110... D'après [third parties], POMETON aurait augmenté son prix de 8 €/t.. [...] qu'[non-addressee] doit absolument revoir ses prix à la hausse ... 2. [third parties] ( 58 ) Il me confirme qu'ils ne livrent pas cette fonderie. Il faut par conséquent voir du côté d'[non-addressee] ou POMETON. Je pencherais du côté de POMETON.. qui sont tout à fait capables de faire - 200 €/t...Nous avons convenu de nous rappeler si un événement nouveau se produisait...*".

<sup>87</sup>

Josep Vila of Pometon España was Pometon's representative in a number of contacts. For example, in 2004: 11 and 12 February, contact and meeting in Zaragoza (ID [...].and ID [...].); 15, 16 and 24 March, meeting in Derio (Bilbao) and two telephone contacts ID [...].); 5 April, meeting in Barcelona (ID [...].).

<sup>88</sup>

ID [...]. In Spanish it reads: "*...transmito nuestra intención de subir los precios de venta de la granalla para la mecánica, interesándonos en conocer si ellos estarían dispuestos a seguir esta iniciativa. La respuesta es afirmativa...*". While this document is dated prior to the infringement period, it forms part of the body of evidence showing that contacts that took place during the infringement period were anticompetitive. See in particular ID [...],ID [...],ID [...],ID [...],ID [...],ID [...]. See judgment of 2 February 2012, *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission*, T-83/08, ECLI:EU:T:2012:48, paragraph 188.

<sup>89</sup>

In the minute of the meeting drafted by [non-addressee]'s employee it reads as follows: "*at the outset I provide the [non-addressee] clients that we would be ready to study together, which are [six customer*

addressee] and another competitor that is not subject to the proceedings in this case took place where, amongst others, mutual protection was discussed: "POM[eton] proposes that an agreement is reached between [[non-addressee]'s Spanish subsidiary] and POM[eton] whereby, [[non-addressee]] protects POM[eton] or alternatively POM[eton] protects [[non-addressee]] by offering higher prices than those protected, the successful bidder having to compensate those left outside."<sup>90</sup> Besides prices, quantities supplied, ways of sharing customers<sup>91</sup> as well as compensatory measures<sup>92</sup> were also discussed.

- (65) Moreover, reaching an agreement which would benefit all participants in the meeting was sometimes considered as an obligation. This is clearly shown in [non-addressee]'s internal document reporting on the meeting of **12 February 2004** between [non-addressee] and Pometon's Spanish subsidiary in Zaragoza: "it is our obligation (for those who are present) to try to reach an agreement beneficial to ALL of those who are present".<sup>93</sup>
- (66) In the same context, an internal e-mail of [non-addressee] of **17 March 2004** further shows that an arrangement to coordinate on individual customers was in place as, discussing a Spanish customer, [non-addressee]'s representative stated that "[t]he best would be to know what increase POM[eton] proposed (if really it has proposed it without mentioning it to us before)".<sup>94</sup>
- (67) An internal e-mail of [non-addressee] of **15 July 2005** discussed Pometon's attempt to undercut [non-addressee]'s price at its "exclusive" client in Spain and the fact that during the upcoming meeting a message needed to be passed to Pometon that such behaviour would not be accepted: "POM is trying to come back at any price in Spain: they have made offers to customers they know to be exclusive [third party] with 505 delivered. Whatever happens during your meeting with our friend, they must understand that we cannot accept such an approach".<sup>95</sup>

#### Germany

- (68) Regarding Germany, [...], multilateral meetings took place approximately twice a year from at least mid-2003 until at least 2008.<sup>96</sup> [...] Pometon took part in most of those meetings, naming [company representative] and [company representative] as

---

<sup>90</sup> names]]. In original Spanish it reads: "Por empezar le facilito los clientes [[non-addressee]] que podríamos estar dispuestos a estudiar conjuntamente, que son [six customer names].

ID [...]. In Spanish it reads: "POM propone que entre [non-addressee] y POM se alcance un acuerdo en virtud del cual, [non-addressee] protege a POM o alternativamente POM protege a [non-addressee] mediante la oferta de precios superiores de protección, procediendo a compensar el adjudicatario a quien quede fuera."

<sup>91</sup> ID [...] containing a summary of the meeting of 20 February 2003 with [company representative] of Pometon España.

<sup>92</sup> ID [...]. summary of the meeting of 12 February 2004.

<sup>93</sup> ID [...]. In Spanish it reads: "es nuestra obligación (la de los presentes) intentar alcanzar un acuerdo que beneficie a TODOS los presentes."

<sup>94</sup> ID [...]. Subject: "[...]". In Spanish it reads: "Lo que sería mejor es conocer cual es el aumento que ha propuesto POM (si realmente lo ha propuesto sin antes comentarlo con nosotros)."

<sup>95</sup> ID [...]. (Original in French: "POM essaie de revenir à n'importe quel prix en Espagne: ils ont fait des offres chez des clients qu'ils savent exclusifs [third party] à 505 rendus. Quoi qu'il se passe durant ta rencontre avec notre ami, ils doivent comprendre que nous ne pouvons accepter ce type de démarche").

<sup>96</sup> ID [...]. and ID [...].

participants.<sup>97</sup> While it was not possible to retrieve minutes of the meetings, the fact that they took place is confirmed by e-mail exchanges and other documentation retrieved during the inspections<sup>98</sup> and other documents [...].<sup>99</sup>

- (69) As regards Pometon's participation, [...] is confirmed as regards at least the meetings of **28 September 2004** and **9 June 2005** by various documents.
- (70) An e-mail sent by [ *non-addressee*] to all the other parties, including Pometon, on **13 September 2004**<sup>100</sup> stated the following: "[...] *in the meantime I received the confirmation from all of you that the 28<sup>th</sup> September will be ok for everyone. Also [company representative] confirmed that he will join us.*"
- (71) Similarly, [company representative] sent an e-mail on **16 May 2005** to all the other parties to confirm the date (9 June 2005) and place (Düsseldorf) for "*the next meeting*".<sup>101</sup> That e-mail not only confirms Pometon's participation in the meeting but also, by referring to "the next meeting", shows that Pometon knew that such meetings were habitual and that it must have participated in at least one of the previous ones.
- (72) According to Pometon, however, the fact that it did not participate in 12 meetings concerning individual customers in Germany after 9 June 2005 should be interpreted as meaning that it had distanced itself from the alleged infringement. The argument is addressed in Section 6 (see in particular recital (165)).
- (73) A fax of **16 February 2005**<sup>102</sup> from [company representative] to [company representative] shows that Pometon was also part of the arrangement not to undercut competitors' prices in Germany: "[...] [*non-addressee*] *did not increase pricing as discussed [...] If [non-addressee] would have increased pricing as promised, [non-addressee] would have been thrown out due to their position in the quality comparison. I consider our discussions about protection finished and do not want to wait for more lost quantities (like in UK)! What is your opinion?*"
- (74) According to Pometon<sup>103</sup>, the statement by [company representative] that he considers "*discussions about protection finished*" proves that discussions with [non-addressee] regarding a particular customer had ended. The Commission disagrees. The fact that [company representative] was asking for the opinion of [company representative] means that, first, [company representative] did not have the power to decide on his own (see also recital (46) where again [company representative] asks for instructions from [company representative] on the new scrap surcharge formula) and, second, that the decision to stop discussions on protection had not been made.

#### Italy

- (75) An internal e-mail exchange of [*non-addressee*] of **5 October 2005**<sup>104</sup>, with the subject "*Italian market*", shows that Pometon was also involved in coordination on individual customers in Italy: "[...] *we have to clarify whether we do [lose] market*

---

<sup>97</sup> ID [...].

<sup>98</sup> For example ID [...], ID [...], ID [...], ID [...], ID [...], ID [...] and ID [...].

<sup>99</sup> ID [...], explained in ID [...].

<sup>100</sup> ID [...].

<sup>101</sup> ID [...]. In German it reads: "*das nächste Meeting*".

<sup>102</sup> ID [...].

<sup>103</sup> ID [...].

<sup>104</sup> ID [...].

*shares (real share for the still existing market) or whether we [lose] customers against our competitors. The first matter (lost market shares) is a general problem that cannot be blamed to our "friends". [...] The second possibility ([losing] against our "friends") is absolutely not acceptable. We will have to [...] decide whether we talk to them or whether we just send them a "note" with some special reactions [...] but [then]...we have to go back to all discussions made during yr. last trip to Italy. [non-addressee]. you know, and no problems with Pometon and or [non-addressee]."* According to Pometon<sup>105</sup>, that exchange does not provide any evidence regarding Pometon's participation in the coordination. The Commission disagrees, since the content of that contemporaneous exchange of e-mails clearly shows that [non-addressee] considered [non-addressee], Pometon and [non-addressee] its "friends": a similar reference is used by [non-addressee] which refers to competitors Pometon and [non-addressee] as "friends" (see recital (52)). Therefore [non-addressee] considered Pometon as part of the anticompetitive arrangement. Moreover, the e-mail shows that the anticompetitive arrangement on individual customers functioned rather well in the Italian market, since [non-addressee] had "no problems with Pometon and or [non-addressee]".

- (76) Pometon's involvement in the coordination with regard to individual customers in Italy is further illustrated by an [...] of **20 March 2007** regarding a customer in Italy: "You will remember that last month we discovered that Pometon had poached this agreed client [...] [third party] have now ordered a container of material from us. [...] Asking Pometon what price we should quote this material even though we can't supply appears to have brought Pometon back into line."<sup>106</sup>
- (77) According to Pometon<sup>107</sup>, that e-mail only shows the existence of a high level of conflict between Pometon and [non-addressee]. The Commission does not agree. Even if the document does show a certain degree of conflictuality, this does not prove that Pometon was not involved in coordination in Italy. On the contrary, it presupposes the existence of an arrangement not to compete on price. The e-mail itself clearly refers to an "agreed" client and the fact that upon [non-addressee]'s inquiry about a price to quote, Pometon came back "into line". In an internal e-mail of **19 April 2007** entitled "Italian Mkt Price Rises"<sup>108</sup> [non-addressee] [...] had recently regained that customer from Pometon. [...] it was going to discuss other clients with Pometon in the meeting of 16-17 May 2007 (see also recital (52)). Pometon argued that that e-mail also shows the existence of an elevated conflictuality between Pometon and [non-addressee] rather than the fact that Pometon was part of the arrangement on coordination on individual customers. For the same reasons as explained above in this recital, the Commission does not agree. The fact that there were deviations from the arrangement does not mean that it did not exist.<sup>109</sup>

---

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

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

<sup>107</sup> ID [...].

<sup>108</sup> ID [...].

<sup>109</sup> Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland et al.*, C-204/00 P etc., ECLI:EU:C:2004:6, paragraph 85; judgment of the General Court of 14 May 1998, *Sarrió SA v Commission*, T-334/94, ECLI:EU:T:1998:97, paragraph 118; judgment of 6 April 1995, *Tréfileurope Sales SARL v Commission*, T-141/89, ECLI:EU:T:1995:62, paragraph 85; judgment of the General

- (78) Another example providing evidence of Pometon's involvement in coordination on individual customers is an internal e-mail of [non-addressee] of **26 April 2007** reporting about the meeting with [non-addressee] and stating " [[company representative] of [non-addressee]] *asked about Pom[eton] weakness...We requested that they do not attack...*".<sup>110</sup> Pometon argued that the e-mail shows that [non-addressee] intended to attack Pometon's customers and that therefore there was no coordination on individual customers.<sup>111</sup> The Commission considers that the fact that [non-addressee]'s representative asked [non-addressee]' representative not to attack Pometon shows precisely that Pometon was involved in coordination on individual customers, that is to say, that the default situation was the arrangement not to compete ("not attacking").
- (79) Further evidence of Pometon's involvement in coordination on individual customers in Italy and Germany is an e-mail exchange of **27-30 May 2008**<sup>112</sup> between [company representative], who at that time was employed by [non-addressee] but, until 16 May 2007, had been employed by Pometon S.p.A., and [non-addressee]. In that e-mail, [company representative] stated: "*I always covered your customer in Germany [...] you know how I always strictly respected our agreement*". [company representative] of [non-addressee] stated that "*we tried since years to protect Pom[eton]*" and that "*the agreement has always been that competition is ok but not on price!*". That e-mail exchange clearly shows that at the time when [company representative] was employed by Pometon S.p.A., Pometon was part of the coordination activities regarding customers in Germany and Italy. According to Pometon<sup>113</sup>, the e-mail exchange shows that the non-aggression system was a policy of [third party] ([non-addressee]) and not of Pometon. While in his e-mail [company representative] refers to the current [third party] policy, he also speaks about his protective actions vis-à-vis [non-addressee] "*during the past years*" (emphasis added), which clearly shows that the [third party]' policy was a continuation of the policy that was in place when [company representative] was employed by Pometon. If [company representative] had wanted to limit his statement to the policy of [third party], he would not have had to use plural for "years" only one year after the sale of steel abrasives business by Pometon to [non-addressee].

#### **4.3. Discussion and findings regarding the evidence concerning Pometon**

- (80) In its reply to the SO, Pometon pointed out that some pieces of evidence referred to in the SO do not prove anything with regard to Pometon.<sup>114</sup>
- (81) The evidence presented in Section 4.2 against Pometon consists of statements and documents supplied by the immunity applicant, documents found during the inspections and replies to requests for information and their annexes. Among those materials, there are several pages of direct contemporaneous evidence, namely e-mail exchanges clearly showing collusive contacts between the participants. Even if some pieces of evidence referred to in the SO and in this Decision may not be directly

---

Court of 17 December 1991, *Hercules Chemicals NV v Commission*, T-7/89, ECLI:EU:T:1991:75 paragraph 232.

<sup>110</sup> ID [...].

<sup>111</sup> ID [...].

<sup>112</sup> ID [...].

<sup>113</sup> ID [...].

<sup>114</sup> See for example ID [...].



relevant for establishing Pometon's participation in the infringement, they were included because they are relevant for the presentation of the cartel in which Pometon participated. The inclusion of material not directly relevant to Pometon does not imply that there is insufficient evidence to prove Pometon's participation in the infringement; there is sufficient incriminating evidence against it to prove the conclusions drawn in this Decision.

## **5. APPLICATION OF ARTICLE 101(1) OF THE TREATY AND ARTICLE 53(1) OF THE EEA AGREEMENT**

### **5.1. Jurisdiction**

(82) In this case the Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the illegal conduct had an appreciable effect on trade between Member States and between Contracting Parties to the EEA Agreement (see recital (15)).

### **5.2. Application of the competition rules in this case**

(83) The Commission's legal assessment, having regard to the facts described in Section 4, is set out in sections 5.2.1 to 5.3.1.2.

#### *5.2.1. Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement*

(84) Article 101(1) of the Treaty prohibits as incompatible with the internal 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 internal 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. Article 53(1) of the EEA Agreement contains a similar prohibition to that in Article 101(1) of the Treaty, except that the reference in Article 101(1) to trade "between Member States" is replaced by a reference to trade "between Contracting Parties", and the reference to competition "within the internal market" is replaced by a reference to competition "within the territory covered by the [EEA] Agreement". In this respect, references to Article 101(1) of the Treaty are to be interpreted as also referring to Article 53(1) of the EEA Agreement.<sup>115</sup>

#### *5.2.2. Agreements and concerted practices*

##### *5.2.2.1. Principles*

(85) 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

---

<sup>115</sup> The case law of the Court of Justice and the General Court in relation to the interpretation of Article 101 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement and Case E-1/94 of 16 December 1994, paragraphs 32-35. References in this Decision to Article 101 of the Treaty therefore apply also to Article 53 EEA.

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 101(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of agreement in Article 101(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.

- (86) In its judgment in PVC II<sup>116</sup>, the General Court stated that “[i]t is well established in the case-law that for there to be an agreement within the meaning of Article 101(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way”.
- (87) If, for instance, 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. It is well-settled case-law that “the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anticompetitive 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”.<sup>117</sup> Such distancing should take the form of an announcement by the company, for example, that it would take no further part in the collusive meetings and therefore did not wish to be invited to them.<sup>118</sup>
- (88) Although Article 101(1) of the Treaty and Article 53(1) 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 competition.<sup>119</sup>
- (89) The criteria of co-ordination and co-operation laid down by the case-law of the Court of Justice, 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 internal 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

---

<sup>116</sup> Judgment of the General Court of 20 April 1999, *Limburgse Vinyl Maatschappij NV and others v Commission* (PVC II), Joined Cases T-305/94 T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 715.

<sup>117</sup> *Aalborg Portland et al.*, C-204/00 P etc., paragraph 85; *Sarrió SA v Commission*, T-334/94, paragraph 118; *Tréfileurope Sales SARL*, T-141/89, paragraph 85; *Hercules Chemicals NV*, T-7/89, paragraph 232.

<sup>118</sup> Judgment of the General Court of 24 March 2011, *Comap v Commission*, T-377/06, ECLI:EU:T:2011:108, paragraphs 75-78. “Public distancing forms only one factor amongs others to take into consideration with the view to establishing whether an undertaking has actually continued to participate in an infringement or has, on the contrary, ceased to do so”. See judgment of the Court of Justice in *Total Marketing Services SA v Commission*, C-634/13 P, ECLI:EU:C:2015:614, paragraph 24.

<sup>119</sup> Judgment of the Court of 14 July 1972, *Imperial Chemical Industries v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64.

operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.<sup>120</sup>

- (90) Although in terms of Article 101(1) of the Treaty and of Article 53(1) of the EEA Agreement 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 presumption applies even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.<sup>121</sup> A concerted practice is caught by Article 101(1) of the Treaty even in the absence of anticompetitive effects on the market.<sup>122</sup>
- (91) Moreover, it is established case-law that the exchange between undertakings in pursuance of a cartel falling under Article 101(1) 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 Article.<sup>123</sup>
- (92) In the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice may overlap. The anticompetitive 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 101(1) of the Treaty lays down no specific category for a complex infringement of the type involved in this case.<sup>124</sup>

---

<sup>120</sup> Judgment of the Court of Justice of 16 December 1975, *Suiker Unie and Others v Commission*, Joined Cases C-40 to 48, 50, 54 to 56, 111, 113 and 114-73, ECLI:EU:C:1975:174.

<sup>121</sup> Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands BV and others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, C-8/08, ECLI:EU:C:2009:343, paragraph 62.

<sup>122</sup> See also judgment of the Court of Justice of 8 July 1999, *Hüls v Commission*, C-199/92 P, ECLI:EU:C:1999:358, paragraphs 158-166.

<sup>123</sup> Judgment of the General Court of 6 April 1995, *Société Métallurgique de Normandie v Commission*, T-147/89, ECLI:EU:T:1995:67, paragraph 72; judgment of the General Court of 6 April 1995, *Tréfilunion v Commission*, T-148/89, ECLI:EU:T:1995:68; judgment of the General Court of 6 April 1995, *Société des treillis et panneaux soudés v Commission*, T-151/89, ECLI:EU:T:1995:71, paragraph 72.

<sup>124</sup> *Hercules Chemicals NV*, T-7/89, paragraph 264.

- (93) In its PVC II judgment<sup>125</sup> the General Court stated that “[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 undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty”.
- (94) An agreement for the purposes of Article 101(1) 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 has pointed out, it follows from the express terms of Article 101(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.<sup>126</sup>

#### 5.2.2.2. Application in this case

- (95) The facts described in Section 4 demonstrate that Pometon was involved in collusive anticompetitive arrangements concerning the prices of steel abrasives through participation in a number of meetings and other contacts with competitors. Specifically, Pometon participated in the coordination on the introduction of a uniform calculation model for a common scrap surcharge (see recitals (35)-(56)) and the coordination of behaviour with respect to individual customers (see recitals (57)-(79)).
- (96) The Commission considers that, through their conduct, Pometon and the other participants in the infringement knowingly substituted the risks of competition between them for practical co-operation.<sup>127</sup> The participants in the infringement, refrained from determining the commercial policy that they intended to adopt on the market independently and coordinated their pricing behaviour instead of setting their respective pricing policies individually. Their behaviour therefore had all the characteristics of an agreement and/or concerted practice within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

#### 5.2.3. *Single and continuous infringement*

##### 5.2.3.1. Principles

- (97) An infringement of Article 101 of the Treaty or of Article 53(1) of the EEA Agreement 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 101 of the Treaty. Where the different actions form part of an overall plan, because their identical object distorts competition within the internal market, the Commission is

---

<sup>125</sup> *Limburgse Vinyl Maatschappij NV and Others (PVC II)*, T-305/94 et al., paragraph 696.

<sup>126</sup> Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Participazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 81.

<sup>127</sup> *Imperial Chemical Industries*, C-48/69, paragraph 64.

entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.<sup>128</sup>

- (98) The concept of a single infringement covers a situation, such as that in this case, in which a number of undertakings have participated in an infringement consisting of continuous conduct in pursuit of a single economic aim designed to distort competition or, alternatively, in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, which are aware that they are participating in the common objective).<sup>129</sup>
- (99) According to settled case-law, the agreements and concerted practices referred to in Article 101(1) of the Treaty and in Article 53(1) of the EEA Agreement 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.<sup>130</sup>
- (100) An undertaking which has participated in such a single and complex agreement through its own conduct and intended, through that conduct, to contribute to the common objectives pursued by all the participants and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of those same objectives or could reasonably have foreseen it and was prepared to take the risk, can be held liable in relation to the infringement as a whole.<sup>131</sup>
- (101) If an undertaking has directly participated in one or more of the forms of anticompetitive conduct comprising a single and continuous infringement, but it is not shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of the other parties' anticompetitive conduct planned or put in effect in pursuit of the same objectives, or that it could reasonably have foreseen that conduct and was prepared to take the risk, the Commission is entitled to hold that undertaking liable only for the conduct in which it participated directly.<sup>132</sup>
- (102) The fact that an undertaking did not take part in all aspects of an anticompetitive arrangement cannot relieve it of liability for conduct in which it has undeniably taken part.<sup>133</sup>

---

<sup>128</sup> Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 41; *Aalborg Portland et al.*, C-204/00 P et al., paragraph 258; *Anic Partecipazioni*, C-49/92 P, paragraph s 78-81, 83-85 and 203.

<sup>129</sup> Judgment of the General Court of 28 April 2010, *Amann & Söhne GmbH & Co. KG a.o. v Commission*, T-446/05, ECLI: EU:T:2010:165, paragraph 89.

<sup>130</sup> *Anic Partecipazioni*, C-49/92 P, paragraph 79.

<sup>131</sup> *Verhuizingen Coppens*, C-441/11 P, paragraph s 42-43; *Aalborg Portland et al.*, C-204/00 P etc., paragraph 83; *Anic Partecipazioni*, C-49/92 P, paragraph 87; judgment of the General Court of 30 November 2011, Judgment of the General Court of 30 November 2011 *Quinn Barlo and Others v Commission*, T-208/06, ECLI: EU:T:2011:701, paragraph 128.

<sup>132</sup> *Verhuizingen Coppens*, C-441/11 P, paragraph 44.

<sup>133</sup> *Verhuizingen Coppens*, C-441/11 P, paragraph 45; *Aalborg Portland et al.*, C-204/00 P etc., paragraph 86; *Anic Partecipazioni*, C-49/92 P, paragraph 90.

- (103) Such a conclusion is not at odds with the principle that responsibility for such an infringement is personal in nature, nor does it ignore individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.<sup>134</sup>
- (104) The notion of an overall plan means that the Commission may assume that an infringement has not been interrupted even if, in relation to a specific period, it has no evidence of the participation of the undertaking concerned in that infringement, provided that that undertaking participated in the infringement prior to and after that period and provided that there is no proof or indicia that the infringement was interrupted so far as concerns that undertaking.<sup>135</sup>

#### 5.2.3.2. Application in this case

- (105) Against the background of the facts described in Section 4, the Commission considers that Pometon, together with the other participants in the infringement, took part in collusive meetings and held other anticompetitive contacts that pursued a single anticompetitive object and a single economic aim, namely the distortion of the normal movement of prices and restriction of price competition in relation to steel abrasives. Pometon, with the other participants in the infringement, adhered to a common scheme which laid down the lines of their action in the market and restricted their individual commercial conduct. The overall aim of the cartel was to coordinate prices of steel abrasives and to restrict competition. In order to achieve their aim Pometon, together with the other participants in the infringement, engaged in anticompetitive contacts on both a bilateral, and a multilateral, basis. Those contacts were used by the participants in the infringement to discuss the key price components applicable to all their sales of steel abrasives in the EEA. In particular, Pometon used those contacts to:
- (a) coordinate with the other participants in the infringement the introduction of a uniform calculation model for a common scrap surcharge - a variable surcharge that would be applicable to the price of all steel abrasives in the EEA; the common surcharge was applicable throughout the entire period of the infringement (see recitals (35), (55)-(56)); and
  - (b) coordinate with the other participants in the infringement its behaviour with respect to individual customers; Pometon and the other participants in the infringement discussed (mainly in the course of bilateral contacts) which parameters of competition would be allowed between them as regards individual customers: in principle price competition was restricted, which limited competition only to quality and services (see recitals (57)-(79)).
- (106) While the Commission considers that each of the elements of coordination outlined in Section 4 constitutes an infringement of Article 101(1) of the Treaty and Article 53 of the EEA Agreement in their own right, taken together they also form a single

---

<sup>134</sup> Judgment of the General Court of 12 December 2007, *BASF and UCB v Commission*, Joined Cases T-101/05 and T-111/05, ECLI: EU:T:2007:380, paragraph 160.

<sup>135</sup> Judgment of the General Court of 16 June 2015, *FSL Holdings and Others v Commission*, T-655/11, ECLI: EU:T:2015:383, paragraph 481.

and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement<sup>136</sup> for the reasons explained in recitals (107) to (113).<sup>137</sup>

- (107) The existence of a single and continuous infringement and Pometon's participation in it is supported by the fact that the cartel arrangements were all concerned with price coordination and followed the same pattern throughout the infringement period, the undertakings involved as well as the executives concerned were essentially the same, the contacts between competitors concerned the same products and only one specific element of their price, and there was a continuity in the method of coordination throughout the entire infringement period.
- (108) By agreeing to apply a common scrap surcharge system and not to compete on price with respect to individual customers, Pometon and the other participants in the infringement coordinated their behaviour in relation to the pricing of steel abrasives to remove uncertainty concerning elements of the price (that is to say, the scrap surcharge) and pricing to customers. They often discussed all or several elements of the cartel at the same meetings and in the same communications.<sup>138</sup> Therefore Pometon and the other participants in the infringement substituted practical cooperation between them for the risks of competition. Pometon took account of information exchanged with the other participants in the infringement in determining its own conduct on the market.<sup>139</sup>
- (109) The coordination on the scrap surcharge and on individual customers was carried out with the full participation and/or knowledge of the top executives of Pometon (see for example recitals (35), (46), (61) and (62)). Indeed, Pometon, together with [non-addressee] and [non-addressee], was at the origin of the conception of the agreement on the uniform scrap surcharge formula (see recitals (35)- (37)). It is clear from the evidence described in Section 4 (see for example recitals (35), (40) and (79)) that Pometon was intentionally establishing and participating in an overall long-term plan to distort the normal movement of prices of steel abrasives through the coordination on the scrap surcharge and the agreement not to compete on price with respect to individual customers. The Commission does not have to show that Pometon had direct knowledge of all the actions envisaged and implemented by other participants in the infringement. It is sufficient that, in holding meetings and having other contacts with the other participants in the infringement, Pometon could reasonably foresee such actions.<sup>140</sup> Given that Pometon directly participated in both the establishment and implementation of the uniform scrap surcharge formula and in coordination with respect to individual customers and was in contact with different participants in the infringement, the Commission concludes that it could have reasonably foreseen all the actions envisaged and implemented by the other participants in the infringement.

---

<sup>136</sup> As regards the other parties, this single and continuous infringement also entailed coordination on the introduction of energy surcharge in summer 2008 but at that moment Pometon had already exited the steel abrasives market by selling its business to [non-addressee].

<sup>137</sup> *Aalborg Portland et al.*, C-204/00 P etc., paragraph 258.

<sup>138</sup> For example ID [...], ID [...], ID [...], ID [...] and ID [...].

<sup>139</sup> Commission Decision of 28 March 2012, in case AT.39462 - Freight Forwarding, paragraph 572; upheld by the General Court with judgments of 29 February 2016 in Cases T-251/12; T-254/12; T-265/12 and T-267/12.

<sup>140</sup> Judgment of the General Court of 23 January 2014, *Gigaset AG, formerly Arques Industries AG v Commission*, T-395/09, ECLI: EU:T:2014:23, paragraph 117.

- (110) The evidence in Section 4 shows that the unlawful contacts between Pometon and the other participants in the infringement were of a continuous nature. The bilateral contacts often followed or took place in parallel with multilateral contacts, when this was considered necessary by the participants.
- (111) The evidence in Section 4.2.1 shows that the collusive contacts on the scrap surcharge varied in intensity over the course of the cartel. In the period following the establishment of the uniform scrap surcharge formula in autumn 2003 and until the revision of the scrap surcharge in summer 2007 the contacts were less intense. This is because there was no need for the participants to communicate further as changes in the index were automatically applicable according to the agreed uniform scrap surcharge formula (see recital (38)). The participants needed to communicate only when a disagreement arose (see for example recitals (59) and (76)-(78)).
- (112) In addition, the evidence in Section 4.2.2 shows that during the same period, in parallel to the coordination on the scrap surcharge, the parties coordinated their behaviour with the objective not to compete on price with regard to individual customers. Pometon claims that the evidence does not show that it was involved in frequent contacts of a continuous nature with regard to coordination on individual customers. However, the Commission considers that there is sufficient evidence showing that throughout the period of coordination on the scrap surcharge Pometon was also involved in coordination with regard to individual customers. There is no specific level of frequency of contacts that the Commission is required by case-law to show in order to prove Pometon's participation in that coordination. What is important is that those contacts were of a continuous nature. Even if the documents discussed in Section 4.2.2 concern coordination with regard to customers in different countries, they often contain references to protection or coverage, which shows continuous conduct in pursuit of a single economic aim. Although it is true that the period separating two manifestations of infringing conduct is a relevant criterion in order to establish the continuous nature of an infringement, the assessment of whether that period is sufficiently long to constitute an interruption of an infringement needs to be made in the context of the functioning of the cartel in question. In this respect, the Commission refers to the reasoning set out in Section 6 concerning the duration of the infringement (and in particular to recital (164)).
- (113) The practices described in Section 4 were part of an on-going process according to an overall cartel scheme and were not isolated or sporadic occurrences. The different elements of the infringement were in pursuit of a single anticompetitive object, namely to distort the normal movement of prices of steel abrasives. Moreover, there is no evidence available that Pometon disassociated itself from the cartel arrangements at any point in time before it sold its business to [non-addressee].

#### 5.2.3.3. Discussion and findings

- (114) In its reply to the SO Pometon did not contest the fact that it had entered into the agreement on the scrap surcharge but argued that it did not apply it from 2004 onwards. Regarding its customers, Pometon argued that it was competing rather than coordinating its behaviour with the other participants in the infringement. According to Pometon<sup>141</sup>, there is no evidence that it applied the scrap surcharge from 2004 onwards or that it was involved in frequent contacts of a continuous nature with

---

<sup>141</sup> ID [...].



regard to coordination on individual customers. However, the contemporaneous evidence in the file, the overall functioning of the cartel and the fact that Pometon did not distance itself at any point from the anticompetitive arrangements, do not support those arguments, as explained in detail in Section 5.2.3.2.

- (115) In particular, Pometon argued that the Commission relied on three factual elements to support its objection that the participants in the infringement, including Pometon, had applied the scrap surcharge from 2004 onwards, including most notably: (a) the communication of the monthly scrap surcharge by [non-addressee]; (b) the publication of the scrap surcharge by [non-addressee] on its website from May 2004; and (c) the publication of the scrap surcharge by [non-addressee] on a dedicated website from October 2007. According to Pometon, the evidence relied on by the Commission in the SO shows that [non-addressee] had regularly communicated the monthly scrap surcharge to the other participants in the infringement, but never to Pometon, in any of those forms and therefore there was no evidence that Pometon had applied the scrap surcharge system from 2004 onwards.<sup>142</sup> In addition, according to Pometon, the evidence referred to by the Commission dating from November to December 2003 and that from end-March 2004 does not prove that Pometon applied the scrap surcharge system from 2004 onwards.<sup>143</sup>
- (116) In its reply to the SO, Pometon also argued that based on the information provided [...] <sup>144</sup>, although the contacts between the other participants in the infringement regarding the implementation of the scrap surcharge system were quite regular, there were no contacts at all involving Pometon.<sup>145</sup>
- (117) Regarding the coordination on individual customers, in its reply to the SO, Pometon referred to documents that it claimed showed that it had attempted or managed to distance itself from the arrangement not to undercut its competitors' prices to individual customers in Spain. On that basis Pometon concluded that it was competing rather than coordinating its behaviour with the other participants in the infringement.<sup>146</sup> Pometon furthermore argued that it is not mentioned in the immunity applicant's statements describing the coordination on customers.<sup>147</sup>
- (118) Pometon also argued that the Commission misinterpreted the immunity applicant's statements as regards the geographic scope of the coordination relating to individual customers.<sup>148</sup> According to Pometon, the immunity applicant stated that the coordination on individual customers took place only with regard to some European sales regions, in particular Italy, Spain, Germany, the United Kingdom and France, and did not concern the entire EEA.
- (119) Pometon has further pointed out that it did not participate in all the elements of the infringement, unlike the other participants and its contacts regarding individual customers could not be considered as an expression of an anticompetitive design

---

<sup>142</sup> See ID [...].

<sup>143</sup> See ID [...].

<sup>144</sup> ID [...].

<sup>145</sup> See ID [...].

<sup>146</sup> ID [...].

<sup>147</sup> ID [...].

<sup>148</sup> ID [...].

having a multilateral character<sup>149</sup> applicable to the whole EEA. Furthermore, Pometon argued that it did not participate in coordination on the energy surcharge. According to Pometon, in the SO, the Commission did not demonstrate that Pometon was aware or could reasonably have been expected to be aware of the fact that its contacts on individual customers were contributing to the realisation of a “global plan” to coordinate the behaviour of the participants in the infringement with regard to individual customers within the entire EEA and that the coordination on the energy surcharge was part of this “global plan”.

- (120) In that respect, Pometon has submitted that the Settlement Decision mentions that the first discussions on the energy surcharge started in 2006. Pometon has accordingly argued that it did not participate in that part of the coordination between the participants in the infringement, because it was not considered by the other participants as a party to the cartel (and not because it had exited the market following the transfer of its steel abrasives business to [non-addressee]).
- (121) As regards Pometon's arguments that there is no evidence that it (a) applied and (b) received the scrap surcharge from 2004 onwards (see recitals (114)-(116)), the Commission considers that the evidence in the file clearly shows that Pometon agreed on a surcharge pricing system with the other participants in the infringement and applied the uniform scrap surcharge formula from 2004 onwards (see Section 4.2.1.3); and that all the elements in the case file considered show that Pometon received or otherwise monitored the data concerning the monthly scrap surcharges to apply.<sup>150</sup>
- (122) First, the evidence clearly shows that Pometon actively contributed to establishing the agreement on the uniform scrap surcharge formula (see recitals (35)-(36)). In its communications subsequent to the meeting with [non-addressee] and [non-addressee] of 3 October 2003, Pometon confirmed the agreement, took measures to apply it and was active in ensuring that the other participants in the infringement would do the same (see for example recital (48)). This even entailed coordination with the other participants in the infringement on letters to be sent to customers informing them of the new scrap surcharge (see for example recital (44)).
- (123) Second, after the new system was set up, there was no need for the participants to communicate further on how to apply the uniform scrap surcharge formula (see recital (38)). Notwithstanding this, there were still occasional contacts between Pometon and the other participants in the infringement between 2004 and 16 May 2007, mainly to ascertain that all of them actually applied the agreement. The fact that the contacts involving Pometon may have been less regular than the contacts between the other participants in the infringement is not relevant.<sup>151</sup> What is relevant

---

<sup>149</sup> ID [...]. In the original Italian: "*gli elementi fattuali [...] escludono, di per sé, che Pometon possa aver preso parte ad un disegno spartitorio di portata multilaterale*".

<sup>150</sup> Judgment of the General Court of 10 October 2014, *Soliver v Commission*, T-68/09, ECLI:EU:T:2014:867, paragraph 59, referring to *Aalborg Portland*, paragraphs 55-57 and to judgment of the Court of Justice, *Sumitomo Metal Industries v Commission*, ECLI:EU:C:2007:52, paragraph 51.

<sup>151</sup> The leniency applicant's information may be relying on the fact that [company name]'s [function] did not speak often directly with Pometon's [function of representative] himself but spoke with [non-addressee]'s representative, who in turn spoke to Pometon's [representative] (see ID [...]). This seems to be consistent with the evidence available in the file, particularly from the period of the preparation and follow-up of the agreement on the scrap surcharge of 3 October 2003.

is that those contacts (see recitals (48)-(52)) show that Pometon continued to apply the agreed scrap surcharge from 2004 onwards (see for example recital (48)).

- (124) Third, Pometon had agreed with [non-addressee] and [non-addressee] that [non-addressee] would take the lead in the announcement of the new system and all participants had access to [non-addressee]'s website as from the end of April 2004. This is illustrated by [non-addressee]'s e-mail of 30 April 2004 to [non-addressee], announcing that the new scrap surcharge could be found on [non-addressee]'s website.<sup>152</sup> That e-mail opens with "*dear all*", which indicates that [non-addressee] was not the only addressee of the e-mail and that the other addressees could not have been anybody else but all other participants.
- (125) Fourth, regarding the e-mails sent by [non-addressee] to communicate the monthly scrap surcharge, [...] <sup>153</sup>, the Commission notes that it is likely that [non-addressee] sent the e-mails stating the monthly scrap surcharge not only to [non-addressee], but also to the other participants in the infringement. There are examples of such e-mails to both [non-addressee] and [non-addressee] in the file.<sup>154</sup> [...] [S]uch e-mails were also sent to the other parties. In a fax of 14 February 2003 from Pometon to [non-addressee], Pometon itself refers to "*the scrap surcharge index you kindly send us every month*".<sup>155</sup> Furthermore, Pometon clearly confirmed to [non-addressee] the agreement reached at the meeting of 3 October 2003 and was in contact with [non-addressee] regarding its implementation after that meeting. The file also contains a number of examples of faxes that [non-addressee] sent to Pometon with the monthly scrap surcharges that applied before the new EEA-wide and Italian surcharges were agreed on.<sup>156</sup>
- (126) Fifth, the Commission considers that given that Pometon was an active participant in the establishment of the uniform scrap surcharge formula and well informed of the various indexes<sup>157</sup>, it was also aware of how to apply the scrap surcharge independently and therefore applied it even when it was not receiving the updates from [non-addressee]. An internal e-mail of 16 February 2004 from [non-addressee]'s UK subsidiary explaining the new scrap surcharge made it clear that, to apply the scrap surcharge, it was sufficient to check the Eurofer website for the index and apply the formula.<sup>158</sup> In its reply to the SO<sup>159</sup>, in order to show that Pometon could not apply the scrap surcharge without receiving it from [non-addressee], Pometon argued that the CAEF 225 index published on the Assofermet website and used as a basis for the calculation of the scrap surcharge for Italy was not a single monthly figure. Instead, there was a minimum and maximum figure and those figures were published every 15 days, making four figures a month. While this is true, it must be borne in mind that Italy was Pometon's home market and that it was very active in contributing to the choice of the index for the formula applicable to Italy (see recitals (35)-(37)) and Pometon therefore did not need to receive the monthly scrap surcharge from [non-addressee] by e-mail. The Commission concludes, in view of

---

<sup>152</sup> See ID [...].

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

<sup>154</sup> See ID [...], ID [...], ID [...] and ID [...].

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

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

<sup>157</sup> See for example ID [...].

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

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

the above, that Pometon, as well as the other participants in the infringement, knew how to arrive at a monthly figure on the basis of those four figures and was therefore able to apply the formula for the Italian market.

- (127) At the oral hearing Pometon argued that the fact that the scrap surcharge was published in parallel with the circulation of e-mails means that the publication on the website was not a substitute for the monthly communication by e-mail. There is nothing in the file to indicate that those two information channels both had to be present in order for the scrap surcharge system to apply; they were, rather, alternative and substitutable, that is to say, there is nothing that points to the fact that the information published on the website was different from the information circulated by e-mail. Moreover, as it was published on [non-addressee]'s website, that information was easily accessible to anyone (including Pometon), even if Pometon did not receive the e-mail from [non-addressee].
- (128) Finally, there is no evidence that Pometon distanced itself from the agreement at any point.<sup>160</sup> Given that Pometon and the other participants in the infringement continued to actively implement their agreement on the scrap surcharge system throughout the infringement period (see for example recital (52)), it is unlikely that a sudden withdrawal from the agreement by Pometon, would not have been noticed by other participants in the infringement, even if Pometon did not expressly state its intention to do so.<sup>161</sup>
- (129) On the basis of all the above evidence, the Commission concludes that Pometon adhered to the agreement on the scrap surcharge from 3 October 2003, and continuously and effectively applied the common scrap surcharge from 2004 until 16 May 2007, which is the date on which the sale of its steel abrasives business took place.
- (130) As regards Pometon's arguments in relation to the coordination on individual customers, the Commission notes the following:
- (131) The fact that Pometon did not always respect the arrangement as regards individual customers does not mean that it was not part of it. It is clear from the documents referred to by Pometon that [non-addressee] considered that such an arrangement existed and treated Pometon's actions as occasional departures from it, which was not uncommon. If Pometon had intended to discontinue its participation in the coordination with respect to individual customers entirely, it would have had to make [non-addressee] and the other participants in the infringement understand that this was the case.<sup>162</sup> However, for example, an internal e-mail of [non-addressee] of 15 July 2005<sup>163</sup> discussing Pometon's attempt to undercut its price for its "exclusive" client in Spain and the fact that during the upcoming meeting a message needed to be passed to Pometon that such behaviour would not be accepted, clearly shows that

---

<sup>160</sup> See *Anic Partecipazioni*, C-49/92 P, paragraph 96 and *Aalborg Portland and Others*, C-204/00 P etc., paragraph 81. In its judgment in *Archer Daniels Midland v Commission*, C-510/06 P, ECLI:EU:C:2009:166, paragraph 120, the Court held that "it is indeed the understanding which the other participants in a cartel have of the intention of the undertaking concerned which is of critical importance when assessing whether that undertaking sought to distance itself from the unlawful agreement."

<sup>161</sup> See *Total Marketing Services SA*, C-634/13, paragraph 24.

<sup>162</sup> See *Archer Daniels Midlands*, C-510/06 P, paragraph 120.

<sup>163</sup> ID [...].

[non-addressee] was under an understanding that Pometon was part of the arrangement (see recital (67)).

- (132) The Commission also disagrees with the argument that Pometon is not mentioned by the immunity applicant in its description of coordination on customers. The immunity applicant does mention Pometon as being among the five companies involved in coordination on customers.<sup>164</sup> For example, [non-addressee] "*began attending regular meetings with [[non-addressee]], [non-addressee], [non-addressee], and while it still was an independent company before being taken over by [[non-addressee]], Pometon, in which the German market was discussed*".<sup>165</sup>
- (133) Regarding Pometon's arguments on the geographic scope of the collusion on individual customers, the evidence available shows that Pometon itself clearly considered the arrangement on coordination regarding individual customers to be at least EEA-wide. In his response of 7 October 2002 to [company representative]'s fax of 5 October 2002<sup>166</sup> regarding [non-addressee]'s complaint that Pometon undercut its prices in Germany, [company representative] stated: "*It is normal that our competitors [complain] with us; and it is also obvious that their complaints are addressed to the head office<sup>167</sup> of the company [for alleged breaches of the agreements in Germany]: for example in the past competitors' protests originated in Spain (against [company representative]) or in England (against [company representative]) were directed to me. This is due to the fact that **the menaces of reprisal are normally worldwide extended.** [...] you [k]now that reactions and bad reaction in particular can normally spread all over the world: this is the reason why Pometon S.p.A. must be present at any possible meetings with competitors*" (emphasis added).<sup>168</sup>
- (134) Furthermore, the fact that the arrangement went beyond certain sales regions, namely beyond what was suggested by the immunity applicant, is confirmed by evidence of coordination in Belgium, uncovered during the inspections, as well as by a suggestion to explore "*the different possibilities*" regarding customers in Scandinavia and Eastern European countries (see recitals (61)-(63)). In addition, [...] contacts with competitors relating to Belgium and the Netherlands.<sup>169</sup>
- (135) In view of the reasons stated in recitals (133)-(134), the Commission maintains that the arrangement on coordination with regard to individual customers was EEA-wide (see also recital (60)).
- (136) As regards Pometon's argument that it was not aware and could not have reasonably been expected to be aware of the fact that the "global plan" included coordination on the energy surcharge (see recital (119)), the Commission considers that the fact that

---

<sup>164</sup> See for example ID [...] and ID [...].

<sup>165</sup> See ID [...].

<sup>166</sup> ID [...] and ID [...]. While these documents are dated prior to the infringement period, they demonstrate Pometon's general position regarding coordination on individual customers and form part of the body of evidence showing that coordination was not limited to the major sales regions (see in particular ID [...], ID [...], and ID [...]). See *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH*, T-83/08, paragraph 188 and *FSL and Others*, T-655/11, paragraph 178.

<sup>167</sup> Namely Pometon S.p.A.

<sup>168</sup> ID [...] also confirms that disputes over observance of the agreement in the sales regions were frequently escalated to the European sales managers.

<sup>169</sup> ID [...].

talks on the energy surcharge may have started in mid-2006 does not mean that Pometon was not considered as part of the cartel or that it was not aware of a global plan, since at that time Pometon was still active in the supply of steel abrasives and the single and continuous infringement consisted only of coordination on the scrap surcharge and coordination with regard to individual customers. The evidence that Pometon referred to in order to prove its point is one bilateral contact reported by [non-addressee] about a meeting between [non-addressee] and [non-addressee].<sup>170</sup> It did not involve other parties that were subsequently part of the agreement on energy surcharge. What is relevant is that it was established in the Settlement Decision that the agreement on the energy surcharge applied only from mid-2008, that is to say, a year after Pometon exited the market. Therefore, the Commission concludes that Pometon's argument cannot be accepted. In any event, Pometon will not be held liable for the collusion on the energy surcharge (see recital (34)).

#### 5.2.4. *Restriction of competition*

##### 5.2.4.1. Principles

- (137) Article 101(1) of the Treaty and Article 53 of the EEA Agreement expressly prohibit as incompatible with the internal market such agreements and concerted practices which have as their object or effect the restriction of competition by directly or indirectly fixing prices or any other trading conditions.
- (138) It is settled case-law that, for the purpose of the application of Article 101 of the Treaty and Article 53 of the EEA Agreement, there is no need to take into account the effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the internal market.<sup>171</sup> The same applies to concerted practices.<sup>172</sup>
- (139) Price-fixing shields cartel members from price competition and transfers wealth from consumers to the conspiring undertakings. The Union Courts regard price fixing agreements as having as their object the restriction of competition for the purposes of Article 101(1) of the Treaty<sup>173</sup>, so that there is no need to show that they have the effect of doing so. Previous Commission decisions have found that agreements on the amount and introduction of surcharges<sup>174</sup> and agreements not to make deviations from published prices<sup>175</sup> infringe Article 101(1) of the Treaty and Article 53 of the EEA Agreement.
- (140) The General Court has confirmed that price fixing agreements on surcharges<sup>176</sup> or agreements which fix part of the final price<sup>177</sup> are prohibited by the competition

---

<sup>170</sup> ID [...].

<sup>171</sup> *T-Mobile Netherlands BV and others*, C-8/08, paragraph 29 and case-law cited therein.

<sup>172</sup> *Hüls*, C-199/92 P, paragraphs 158-166.

<sup>173</sup> *Hüls*, C-199/92 P, and *Suiker Unie and Others*, Joined Cases C-40 to 48, 50, 54 to 56, 111, 113 and 114-73.

<sup>174</sup> Commission Decision of 30 October 1996 in Case IV/34.503 (Ferry Operators), OJ L 26 of 29.01.1997, p. 23.

<sup>175</sup> Commission Decision of 15 May 1974 in Case IV/400 (Agreements between manufacturers of glass containers) OJ L 160 of 17.06.1974 p. 1 and Commission Decision of 15 July 1975 in Case IV/27.000 (IFTRA rules for producers of virgin aluminium), OJ L 228 of 29.08.1975 p. 3.

<sup>176</sup> Judgment of the General Court of 13 December 2001, *Acerinox v Commission*, T-48/98, ECLI:EU:T:2001:289, paragraphs 54-55.

rules. Furthermore, it is long established that exchanges of information between competitors in respect of pricing matters can only be explained by the desire to replace the risks of pricing competition with practical cooperation.<sup>178</sup>

- (141) In *Groupement des cartes bancaires v Commission*, the Court of Justice recently recalled that "it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers".<sup>179</sup>

#### 5.2.4.2. Application to this case

- (142) As is clear from the facts set out in Section 4.2, Pometon was involved in horizontal anticompetitive arrangements which formed part of an overall scheme pursuing a single anticompetitive object. The cartel aimed at influencing pricing through the setting of a scrap surcharge and through coordination in respect of individual customers. Therefore, the object of Pometon's behaviour was to restrict competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (143) The participants in the infringement coordinated their behaviour to remove uncertainty between them in relation to an essential element of price. Metal scrap constitutes 25-45% of the production costs of steel abrasives. The metal scrap market is characterised by sharp price fluctuations as well as significant price differences between Member States. The repeated contacts, often of a bilateral nature but sometimes also multilateral meetings, over a significant period of time and covering the aspects described in Section 4.2, bear the hallmark elements of a complex infringement that restricts competition within the internal market.

#### 5.2.4.3. Pometon's arguments

- (144) In its reply to the SO<sup>180</sup>, Pometon argued that the scrap surcharge of 2003 could not have restriction of competition as its object or effect because it was not a form of overcharge, but a means to ensure that the parties to the formula agreement could cover the costs of acquiring scrap metals<sup>181</sup>, and that scrap cost was not a relevant element for competition on the market.<sup>182</sup> Furthermore, Pometon argued that the

---

<sup>177</sup> Judgment of the General Court of 21 February 1995, *SPO and Others v Commission*, T-29/92, ECLI:EU:T:1995:34, paragraph 146.

<sup>178</sup> Judgment of the Court of 13 July 1966, *Consten and Grundig v Commission*, Joined Cases 56 and 58-64, ECLI:EU:C:1966:41 and judgement of the General Court of 15 March 2000, *Cimenteries CBR v Commission*, Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103 and 104/95 ECLI:EU:T:2000:77, paragraphs 1120 and 1170.

<sup>179</sup> Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 51, referring to the Case-law in *Clair*, Case 123/83, EU:C:1985:33, paragraph 22.

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

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

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

behaviour subject to the proceedings in this case was different from any behaviour sanctioned by the Commission in the past.<sup>183</sup>

#### 5.2.4.4. Discussion and findings

- (145) It is clear from the facts described in Section 4 that Pometon, together with the other participants in the infringement, was involved in horizontal anticompetitive arrangements which formed part of an overall scheme pursuing a single anticompetitive object of restricting competition on the price of steel abrasives. Within that overall scheme, described in recitals (32)-(33), the participants coordinated their behaviour to remove uncertainty between themselves in relation to pricing in the steel abrasives market. Therefore, the object of the behaviour of Pometon, together with the other participants in the infringement, was to restrict competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (146) Even if there is evidence in the file suggesting that the scrap surcharge was a form of overcharge, that is to say that the scrap surcharge covered more than the cost of the scrap, whether it actually was and whether or not it covered the price of acquiring scrap is irrelevant.<sup>184</sup> What is relevant is that the scrap surcharge is an element of the price of steel abrasives and that the parties coordinated on this particular element. Therefore, the infringement is to be considered a restriction of competition by object.<sup>185</sup>
- (147) As regards Pometon's argument that scrap cost was not a relevant element for competition<sup>186</sup>, the evidence that Pometon referred to merely shows that the concept of the scrap surcharge had become widely accepted by customers and discussions on that part of the price were minimal. This does not mean that it is not a relevant element for competition. The fact that an illegal agreement has been implemented to the extent there is no longer resistance from customers cannot then render it legitimate. At most, the fact that the scrap surcharge was not widely questioned by customers made it easier for the parties to cartelise.
- (148) The fact that an agreement having an anticompetitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market.<sup>187</sup> The facts described in Section 4.2.1.3 show that the anticompetitive cartel arrangements were implemented. Moreover, the fact that the base price may have been still freely negotiated does not attenuate the consequences deriving from the fact that a surcharge was agreed and passed on to the customers in a coordinated way by the parties to the agreement.
- (149) Finally, as regards Pometon's argument that the behaviour subject to the current proceedings is different from other behaviour condemned by the Commission in the past, the Commission is not departing from previous practice. This is a case of horizontal collusion on price on which the Commission has imposed sanctions many

---

<sup>183</sup> In this respect Pometon referred to Commission Decision of 21 January 1998 in Case IV/35814 - Extra Alloy.

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

<sup>185</sup> *FSL Holdings and Others*, T-655/11, paragraphs 428 and 467-469.

<sup>186</sup> In this respect Pometon is relying on ID 1164/2.

<sup>187</sup> Judgment of the General Court of 25 October 2005, *Groupe Danone v Commission*, T-38/02, ECLI:EU:T:2005:367, paragraph 148.



times. Furthermore, the Commission has previously imposed sanctions on cartels where collusion has taken place on an element of price (see for instance the *Freight Forwarding* case<sup>188</sup>). In any event, according to settled case-law<sup>189</sup>, the Commission's past practice does not bind it for the future cases.

#### 5.2.5. *Effect upon trade between Member States and between Contracting Parties to the EEA Agreement*

##### 5.2.5.1. Principles

- (150) Article 101(1) 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 internal market. Similarly, Article 53 (1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
- (151) The Union Courts 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*".<sup>190</sup> In any event, whilst Article 101 of the Treaty does not require that agreements have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect.<sup>191</sup>
- (152) The application of Article 101 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 Contracting Parties to the EEA Agreement.<sup>192</sup>
- (153) Point 61 of the Notice on the effect on trade concept<sup>193</sup> provides that agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States.

##### 5.2.5.2. Application in this case

- (154) In this case, the cartel arrangements covered the whole territory of the EEA. As shown in Section 2.3, the market is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the

---

<sup>188</sup> Commission Decision in case AT.39462 - Freight Forwarding (see footnote 139).

<sup>189</sup> For example judgment of the General Court of 17 December 2014, *Pilkington v Commission*, T-72/09, ECLI:EU:T:2014:109, paragraph 291.

<sup>190</sup> Judgment of the Court of Justice of 30 June 1996, *Société Technique Minière (L.T.M. v Maschinenbau Ulm GmbH (M.B.U.))*, C-56/65, ECLI:EU:C:1966:38, paragraph 7; judgment of the Court of Justice of 11 July 1985, *Remia and Others v Commission*, C-42/84, ECLI:EU:C:1985:327, paragraph 22, *Cimenteries CBR*, Joined Cases T-25/95 and judgment of the Court of Justice of 28 April 1998, *Javico v Yves Saint Laurent Parfums SA (YSLP)*, C-306/96, ECLI:EU:C:1998:173, paragraph 16.

<sup>191</sup> Judgment of the Court of Justice of 17 July 1997 in *Ferriere Nord SpA v Commission*, C-219/95 P, ECLI:EU:C:1997:375, paragraph 19.

<sup>192</sup> *Imperial Chemical Industries*, T-13/89, paragraph 304.

<sup>193</sup> Commission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101, 27.04.2004, p. 81.

Union and EFTA countries belonging to the EEA. Therefore, the cartel arrangements must have resulted, or were likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.<sup>194</sup> The pricing coordination by Pometon and the other participants in the infringement was therefore capable of having an appreciable effect upon trade between Member States and between Contracting Parties to the EEA Agreement.<sup>195</sup>

- (155) After the accession to the Union of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia on 1 May 2004 and Romania and Bulgaria on 1 January 2007, Article 101(1) of the Treaty became applicable to the cartel activities in those Member States.

#### 5.2.6. *Appreciable effects on competition and trade*

- (156) All of the arrangements covered by this Decision had the object of restricting price competition. Such agreements cannot benefit from the *de minimis* thresholds in the Notice on agreements of minor importance.<sup>196</sup> The Commission refers, in this respect, also to the judgment of the Court of Justice in *Expedia*, in which the Court stated in a preliminary ruling: "*an agreement that may affect trade between Member States and that has an anticompetitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.*"<sup>197</sup>
- (157) In any event, trade between Member States and between Contracting Parties to the EEA Agreement was affected in an appreciable manner, given the substantial volume of trade in steel abrasives and the fact that the cartel arrangements covered the whole territory of the EEA.

### **5.3. Application of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement**

#### 5.3.1.1. Principles

- (158) The provisions of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement may be declared inapplicable under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement in the case of an agreement or concerted practice which 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.

---

<sup>194</sup> Judgment of the Court of Justice of 29 October 1980, *Van Landewyck and others v Commission*, Joined Cases C-209 to C-215 and C-218/78, ECLI:EU:C:1980:248, paragraph 170.

<sup>195</sup> Judgment of the Court of Justice of 24 September 2009, *Erste Group Bank and Others v Commission*, C-125/07 P, ECLI:EU:C:2009:576, paragraph 39.

<sup>196</sup> Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291/01, 30.08.2014.

<sup>197</sup> Judgment of the Court of Justice of 13 December 2012, *Expedia*, C-226/12, ECLI:EU:C:2012:795, paragraph 37.

### 5.3.1.2. Application in this case

- (159) Pometon did not submit any claim based on Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement. On the basis of the facts before the Commission, there are no indications that the conditions of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement could be fulfilled with regard to the cartel in this case. The conditions for exemption provided for in Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement are therefore not met in this case.

## 6. DURATION OF THE INFRINGEMENT

- (160) On the basis of the facts set out in Section 4.2 (see in particular recital (36)), the starting date of Pometon's participation in the infringement is set at 3 October 2003. Pometon did not contest this starting date in its reply to the SO.
- (161) As regards the end date, according to Pometon<sup>198</sup>, the last contact by Pometon in relation to the scrap surcharge was March 2004 while in relation to coordination on individual customers it was 28 September 2004 or, at the latest, 9 June 2005. Pometon contends that the gap between those contacts and 16 May 2007, considered to be the end date by the Commission, was "sufficiently long" for it to be necessary to consider whether the Commission has discharged its burden of proof in establishing the end date.<sup>199</sup> According to Pometon, its absence from contacts after March 2004 or 9 June 2005 could have been interpreted by the other participants in the infringement as Pometon having distanced itself from the alleged infringement.<sup>200</sup>
- (162) As pointed out by Pometon itself referring to *IMI*<sup>201</sup>, whether a period separating two manifestations of infringing conduct is long enough to constitute an interruption of the infringement needs to be assessed in the context of the functioning of the cartel in question, that is to say that the scrap surcharge system had a self-executing nature and that contacts between the participants were necessary only in case of a disagreement. In *Tomkins* the General Court examined this question by looking at the specific features of the cartel at issue.<sup>202</sup> As regards the scrap surcharge the specific feature of the agreement is that, in principle, once the parties had agreed on the scrap surcharge formula, contact between the parties was not necessary for the agreement to be applied<sup>203</sup>, unless the parties needed to ascertain that there were no deviations by any of them. After the agreement on the scrap surcharge was reached no regular contacts were necessary (see recital (163)). Therefore, the case-law on cartels involving regular meetings that were necessary for a cartel to function is not relevant in this case.<sup>204</sup>

---

<sup>198</sup> ID [...].

<sup>199</sup> Pometon relied on judgment of the General Court of 24 March 2011, *Tomkins plc v Commission*, T-382/06, ECLI:EU:T:2011:112, paragraph 49.

<sup>200</sup> *Ibidem*.

<sup>201</sup> Judgment of the General Court of 19 May 2010, *IMI plc and others v Commission*, T-18/05, ECLI:EU:T:2010:202, paragraph 89.

<sup>202</sup> *Tomkins plc*, T-382/06, paragraph 51.

<sup>203</sup> *T-Mobile Netherlands BV and others, C-8/08*, paragraph 60 that established that even a single meeting between competitors may constitute a sufficient basis on which to implement the anticompetitive object which the participating undertakings aim to achieve.

<sup>204</sup> Pometon referred in this respect to following judgments of the General Court: *IMI plc and Others*, T-18/05, *Tomkins plc*, T-382/06 and *Quinn Barlo and Others*, T-208/06.

- (163) Contrary to Pometon's claim, Pometon's last contact with the other participants in the infringement regarding the scrap surcharge was the meeting of 16-17 May 2007 (see recitals (52) and (55)). There is also evidence of Pometon's adherence to the agreement on the scrap surcharge between March 2004 and 16-17 May 2007 (see recitals (48)-(50)). Moreover, the continuous nature of the coordination in place did not require constant contacts between the participants in the infringement since the anticompetitive arrangements on the scrap surcharge were automatically applicable and the parties met only when disagreements arose (see recitals (38), and (57), (59), (76)-(78) and (110)-(111)). Therefore, the Commission considers that it is sufficiently proven that the period between March 2004 and 16 May 2007 was not sufficiently long to constitute an interruption of the infringement and that, consequently, that period could not have been interpreted by the other participants in the infringement as meaning that Pometon had distanced itself from the anticompetitive arrangements.
- (164) Further, the specific feature of coordination on individual customers was that, with the exception of coordination on individual customers in Germany (see recitals (68) and (74)), the contacts were not organised in any structured manner; rather, they took place on an ad hoc basis and when disagreement between the parties arose (see recital (111)) In this sense, the case-law on cartels involving regular meetings that were necessary for the cartel to function is not relevant for the purposes of this case, since there was actually no need for the parties to meet as long as the anticompetitive arrangements worked well (see also for example (75) concerning Italy). The Commission notes that even in *Tomkins*, where the cartel was characterised by various contacts that took place at least once or twice a year, the General Court concluded that the fact that an undertaking did not participate in one or two meetings that were held after it last took part in a meeting relating to the cartel could not be interpreted by the other members of the cartel as meaning it had distanced itself from cartel arrangements.<sup>205</sup>
- (165) As regards coordination on individual customers in Germany, Pometon argued that the fact that it did not participate in 12 meetings after 9 June 2005 should be interpreted as meaning that Pometon had distanced itself from the alleged infringement. The Commission does not agree. Contemporaneous evidence in the file clearly shows that even after mid-2005 Pometon continued to be part of the arrangements regarding customers in Germany (see for example recital (71), the e-mail from [company representative] of Pometon found at the premises of [non-addressee] regarding the meeting on 9 June 2005). [...] Pometon also took part in meetings after mid-2005 [...].<sup>206</sup> Therefore, in the absence of an explicit statement from Pometon that it was distancing itself from the coordination arrangements or of any evidence capable of being interpreted as a declared intention by Pometon to distance itself from those arrangements, the Commission concludes that the other parties could not have been under the impression that Pometon had withdrawn from the alleged infringement.<sup>207</sup>
- (166) The evidence shows that Pometon was part of the arrangements up until the sale of its steel abrasives business to [non-addressee] on 16 May 2007 (see in particular

---

<sup>205</sup> *Tomkins plc*, T-382/06, paragraph 52.

<sup>206</sup> ID [...].

<sup>207</sup> *Tomkins plc*, T-382/06, paragraph 53.

recitals (52) and (77)-(78)), from which date participation in the the arrangement regarding application of the scrap surcharge and the agreement not to compete on prices with respect to individual customers can no longer be imputed to Pometon S.p.A. and its relevant subsidiaries acting independently on the steel abrasives market. There are no indications in the file that Pometon publicly distanced itself from the arrangements with the other participants in the infringement until that time. On this basis, 16 May 2007 should be taken as the end date of Pometon's participation in the infringement.

## **7. THE ADDRESSEE OF THIS DECISION**

### **7.1. Principles**

- (167) Union competition rules apply to "undertakings". The concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The concept of an undertaking does not correspond with the notion of corporate legal person in the applicable commercial or tax laws but must be understood as designating an economic unit even if in law that unit consists of several natural or legal persons.
- (168) When such an economic unit infringes Article 101 of the Treaty, it is responsible for the infringement and, according to the principle of personal responsibility, it falls on the entities representing the unit to answer for that infringement. It is settled case law of the Union Courts that an infringement must be imputed unequivocally to the relevant persons on whom fines should be imposed.<sup>208</sup> The same principle holds true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.
- (169) In that respect, the conduct of a subsidiary within the economic unit responsible for an infringement may be imputed to its parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Union competition law. In such circumstances, a decision imposing fines can be addressed to the parent company, without it being necessary to establish the personal involvement of the parent company in the infringement.<sup>209</sup>
- (170) In the specific case in which a parent company holds (directly or indirectly) a 100% or near 100% control in a subsidiary which has directly participated in an infringement of Article 101 of the Treaty (and of Article 53 of the EEA Agreement) there is a rebuttable presumption that the parent has exercised a decisive influence

---

<sup>208</sup> Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission*, C-97/08 P, ECLI:EU:C:2009:536, paragraphs 56 and 57 and the case law referred to in those paragraphs.

<sup>209</sup> *Akzo Nobel and others*, C-97/08 P, paragraphs 58 and 59 and the case law referred to in those paragraphs.

over its subsidiary and can be held liable for the direct participation of the subsidiary in the infringement.<sup>210</sup>

- (171) In those circumstances, it is sufficient for the Commission to prove that the subsidiary is 100% or near 100% owned by the parent company in order to presume that the parent company exercises a decisive influence over the commercial policy of the subsidiary. The parent company can be held jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.<sup>211</sup>
- (172) In cases where such exercise of decisive influence cannot be presumed, it has to be demonstrated on the basis of factual evidence, including in particular the management powers that the parent has over the subsidiary.<sup>212</sup> It follows from the case-law that such powers can be not only directly concluded from the parent's specific instructions, guidelines or rights of co-determination on the commercial policy given to their subsidiary, but also indirectly inferred from the totality of the economic and legal links between the parent company and its subsidiary<sup>213</sup> influencing it in aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters, even if each of those elements taken in isolation may not have sufficient probative value.<sup>214</sup> Among those elements, the General Court has considered, for example, the implementation of the applicable statutory provisions, agreements between the parent companies in relation to the management of their common subsidiary, the presence in management positions within the subsidiary of individuals who occupy simultaneously (or even consecutively)<sup>215</sup> managerial posts within the parent company,<sup>216</sup> or the business relationships that they have with each other (for example, where a parent company is also the supplier or customer of its subsidiary).<sup>217</sup>
- (173) The existence of an economic unit may be inferred from a body of consistent evidence, even if some of that evidence, taken in isolation, is insufficient to establish the existence of such a unit.<sup>218</sup>

---

<sup>210</sup> *Akzo Nobel and others*, C-97/08 P, paragraph 60 and the case law referred to in that paragraph. See also judgment of the General Court of 30 September 2009, *Elf Aquitaine SA v Commission*, T-174/05, ECLI:EU:T:2009:368, paragraphs 125 and 155-156 and the case law referred to in those paragraphs and judgment of the General Court of 30 September 2009, *Arkema SA v Commission*, T-168/05, ECLI:EU:T:2009:367, paragraphs 69-70 and the case law referred to therein, as well as paragraph 100.

<sup>211</sup> *Akzo Nobel and others*, C-97/08 P, paragraph 61 and the case law referred to in that paragraph, notably judgment *Elf Aquitaine SA*, T-174/05, paragraph 156 and judgment *Arkema SA*, T-168/05, paragraph 70.

<sup>212</sup> Judgment of the General Court of 2 February 2012, *The Dow Chemical Company v Commission*, T-77/08, ECLI:EU:T:2012:47, paragraph 76.

<sup>213</sup> *The Dow Chemical Company*, T-77/08, paragraph 77.

<sup>214</sup> Judgment of the General Court of 12 July 2011, *Fuji Electric Co. Ltd v Commission*, T-132/07, ECLI:EU:T:2011:344, paragraph 183.

<sup>215</sup> Judgment of the General Court of 2 February 2012, *EI du Pont de Nemours and Others v Commission*, T-76/08, ECLI:EU:T:2012:46, paragraphs 70 and 74.

<sup>216</sup> *Fuji Electric Co. Ltd*, T-132/07, paragraph 184.

<sup>217</sup> *Fuji Electric Co. Ltd*, T-132/07, paragraph 184.

<sup>218</sup> Judgment of the Court of Justice of 1 July 2010, *Knauf Gips KG v Commission*, C-407/08 P, ECLI:EU:C:2010:389, paragraph 65.

- (174) The question of decisive influence relates to the level of autonomy of the subsidiary with regard to its overall commercial policy and does not require awareness of the parent company with respect to the infringing behaviour of the subsidiary. Attribution of liability to a parent company flows from the fact that the two entities constitute a single undertaking for the purposes of the Union rules on competition<sup>219</sup> and does not require proof of the parent's participation in or awareness of the infringement, either as regards its organisation or implementation.
- (175) Once the Commission has determined that an undertaking composed of the parent and one or more subsidiaries implicated in the infringement exists, it has discretion in deciding which entities are to be held accountable for the infringement in its decision. It is established case-law that the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period<sup>220</sup>, or both.

## **7.2. Application in this case**

- (176) In order to identify the undertaking or undertakings to which this Decision should be addressed, it is necessary to determine the legal entities that should be held liable for the infringement.
- (177) The evidence referred to in Section 4 shows that executives of Pometon S.p.A., Pometon España S.A. and Pometon Deutschland GmbH directly participated in anticompetitive meetings and contacts from 3 October 2003 until 16 May 2007. That evidence shows that Pometon S.p.A. was involved in coordination on the scrap surcharge and individual customers with other participants in the infringement at the highest level of management. Accordingly, Pometon S.p.A. should be held liable for its own participation in the infringement.
- (178) Moreover, based on the information provided to the Commission, from July 1996 until June 2008, Pometon S.p.A. owned 99.9% of the shares of Pometon España SA.<sup>221</sup> A presumption therefore exists that Pometon S.p.A. exercised decisive influence over Pometon España S.A. and consequently that Pometon S.p.A. and Pometon España S.A. formed part of the same undertaking that committed the infringement. In its reply to the SO, Pometon did not contest this presumption.
- (179) Accordingly, Pometon S.p.A. should also be held liable as a parent company for Pometon España S.A.'s participation in the infringement from 3 October 2003 to 16 May 2007.
- (180) The evidence referred to in Section 4 further shows that Pometon S.p.A.'s subsidiary Pometon Deutschland GmbH also directly participated in the infringement.

---

<sup>219</sup> Judgment of the General Court of 15 June 2005, *Tokai Carbon Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission*, Joined Cases T-71/03, T-74/03, T-87/03, and T-91/03, ECLI:EU:T:2005:220, paragraph 54.

<sup>220</sup> Judgment of the General Court of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others v Commission*, Joined Cases T-259/02 to T-264/02 and T-271/02, ECLI:EU:T:2006:396, paragraph 331 and the case law referred to therein, confirmed by the judgment of the court of Justice in *Erste Group Bank and Others*, C-125/07 P, paragraphs 81 and 82. See also Judgment of the General Court of 29 February 2016 *Deutsche Bahn AG, Schenker AG, and Others v Commission*, case T-267/12, ECLI:EU:T:2016:110, paragraphs 129-130 and 138.

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

- (181) Based on the information provided to the Commission, from 2001 until November 2007, Pometon S.p.A., through Finmetal Holding GmbH, owned 74% of the shares of Pometon Deutschland GmbH, the remaining shares being in the hands of its general manager, [company representative], who had no veto right.<sup>222</sup> This means that Pometon S.p.A. had the ability to exercise decisive influence on Pometon Deutschland GmbH. Furthermore, the evidence presented in recitals (182)-(192) shows that Pometon S.p.A. actually exercised a decisive influence on Pometon Deutschland GmbH. Pometon Deutschland GmbH did not decide independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by Pometon S.p.A., having regard to the economic, organisational and legal links between the two entities.
- (182) The corporate structure of Pometon Deutschland GmbH and the powers of representation and decision by its managers and shareholders point to the decisive influence of Pometon S.p.A. on the way Pometon Deutschland GmbH ran its business.
- (183) According to Article 6 of the Articles of Association of Pometon Deutschland GmbH, "*The [function] must take into account the internal limitations of their mandate as defined by the meeting of shareholders from time to time.*"<sup>223</sup> Moreover, according to Article 8 of the Articles of Association of Pometon Deutschland GmbH, "*Any decisions not involving amendments to the Articles [of Association] shall be passed with a simple majority unless provided for otherwise herein.*"<sup>224</sup> Therefore the minority shareholder [company representative] had no veto right and the decisions were actually all taken by Pometon S.p.A.. The provisions of Article 8 imply that decisions concerning the appointment of managers were also taken by simple majority, giving that power to Pometon S.p.A., which, according to Article 6, also held the power to define and set any "internal limitations" to the mandate of the [functions].
- (184) In addition to [company representative], [company representative] was also appointed as an additional [function] of Pometon Deutschland GmbH and was authorised to act on behalf of the company in the same way as [company representative].<sup>225</sup> According to Pometon<sup>226</sup>, Pometon S.p.A.'s [function], [company representative], was supposed to step in as a [function] only in the event that [company representative] was not able to conduct the business and [company representative] has never acted as a [function] of Pometon Deutschland GmbH. The Commission however considers that what is relevant is that, according to the Articles of Association of Pometon Deutschland GmbH, Pometon S.p.A.'s [function] was also a [function] of Pometon Deutschland GmbH and that even when [company representative] was able to conduct business, [company representative] was authorised, together with [company representative], to act on behalf of the company.<sup>227</sup> The Commission refers in this respect to case-law according to which

---

<sup>222</sup> ID [...].

<sup>223</sup> ID [...]. In Italian it reads: "*Gli [function] devono tenere conto delle limitazioni interne della propria delega definite di volta in volta dall'assemblea dei soci.*"

<sup>224</sup> ID [...]. In Italian it reads: "*Decisioni che non prevedano modifiche dello statuto vengono prese a maggioranza semplice, salvo che il presente statuto non preveda altrimenti.*"

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

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

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



representation of the parent company in the management bodies of its subsidiary is a relevant piece of evidence of the exercise of effective control over the latter's commercial policy.<sup>228</sup>

- (185) Pometon Deutschland GmbH was explicitly established by Pometon S.p.A. as a branch of the Pometon group in Germany with the purpose of selling Pometon products on the German market, as stated by Pometon S.p.A. itself: "*the company was established in order to provide **our group** with a more widespread presence on the German territory, where **we were previously absent***"<sup>229</sup> (emphasis added). This is also spelled out in the Articles of Association of Pometon Deutschland GmbH, which say the following: "*The company has as its object the sale of Pometon S.p.A. products in Germany and related services.*" (see also recital (192)).<sup>230</sup> Pometon S.p.A. has also stated that it was the primary supplier of Pometon Deutschland GmbH.<sup>231</sup>
- (186) According to Pometon<sup>232</sup>, the fact that a company is part of a group does not mean that it forms part of a single undertaking and even if the subsidiary is economically dependent on the parent, that does not imply liability of the parent for the actions of its subsidiary. The Commission, however, considers that the fact that two companies present themselves towards the outside world as forming part of the same group constitutes relevant evidence to be taken into consideration when assessing whether they form part of the same economic unit.<sup>233</sup> Furthermore, where a parent company is also the supplier of its subsidiary, it has a very specific interest in managing the distribution activities of the subsidiary.<sup>234</sup>
- (187) Moreover, in an e-mail on or around 30 September 2002, in reply to a complaint by [non-addressee] on prices in Germany, [company representative] wrote that "*in fact Pometon Deutschland policy could not be different to ours*".<sup>235</sup> According to Pometon<sup>236</sup>, Pometon S.p.A. meant that the policy of a distributor can only reflect that of its supplier, particularly because the costs of acquiring the product need to be taken into account. By stating this Pometon S.p.A. acknowledges that, in fact, it was deciding on the commercial policy of Pometon Deutschland GmbH.

---

<sup>228</sup> Judgment of 13 December 2013, *HSE v Commission*, T-399/09, EU:T:2013:647, paragraph 38 and case-law cited therein.

<sup>229</sup> ID [...]. In Italian reads as follows: "*La società [...] fu fondata con lo scopo di garantire al **ns. gruppo** una presenza più capillare nel territorio tedesco, dove **eravamo precedentemente assenti***" (emphases added).

<sup>230</sup> ID [...]. In Italian it reads: "*Lo scopo della società è la vendita di prodotti della Pometon S.p.A. in Germania, nonché i servizi correlati.*"

<sup>231</sup> ID [...].

<sup>232</sup> ID [...].

<sup>233</sup> *HSE*, T-399/09, paragraph 36.

<sup>234</sup> *Fuji Electric*, T-132/07, paragraph 184. See also judgment of the General Court of 12 July 2011, *Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce*, C-293/13 P, EU:C:2015:416, paragraph 90.

<sup>235</sup> ID [...]. While this document is dated prior to the infringement period, it demonstrates Pometon's position and forms part of the body of evidence showing that Pometon Deutschland GmbH could not decide on a different policy than Pometon S.p.A (see in particular ID [...], ID [...] and ID [...]). See *Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH*, T-83/08, paragraph 188 and *FSL and Others*, T-655/11, paragraph 178.

<sup>236</sup> ID [...].

- (188) There is also evidence as to how the exercise of decisive influence by Pometon S.p.A., in accordance with the powers it was given in the Articles of Association, functioned in practice. The evidence referred to in recitals (46) and (73) shows that discussions took place between [company representative] and [company representative] regarding Pometon Deutschland GmbH's pricing policy.<sup>237</sup> Specifically, [company representative] asked for guidance and approval from [company representative]. The communication referred to in recital (46) also shows how [company representative] discussed the cartel arrangements with [company representative] and gave explicit instructions to apply the scrap surcharge as agreed between the participants. The communication referred to in recital (73) also shows discussions between the same persons on implementation of the cartel arrangements, including by Pometon Deutschland GmbH.
- (189) The evidence referred to in recital (133) further shows that [company representative] himself (when discussing [non-addressee]'s complaints about Pometon Deutschland GmbH undercutting prices with [company representative]) considered it normal that the complaints from competitors about issues relating to the adherence of Pometon Deutschland GmbH to the cartel arrangements came to Pometon S.p.A. and not to Pometon Deutschland GmbH.
- (190) According to Pometon<sup>238</sup>, Pometon Deutschland GmbH's [function] [company representative], limited himself to informing Pometon S.p.A. of the actions that he unilaterally decided, without asking for guidance and approval. In addition, according to Pometon, the evidence relied on by the Commission in the SO only comprises communication from [company representative] to [company representative] and not vice versa. The Commission maintains its view that the evidence referred to in recital (46) clearly shows that Pometon S.p.A. had instructed Pometon Deutschland GmbH to apply the agreed scrap surcharge. Also, the fact that the fax of 4 December 2003 from [company representative] to [company representative] refers to the telephone call that [company representative] received from [company representative] and is a follow up to that call and the discussion of the fax of 1 December 2003 shows that there was a relationship of interaction between [company representative] and [company representative] and not only of [company representative] reporting to [company representative] as alleged by Pometon.
- (191) In addition, an e-mail of 13 September 2004 from a representative of [non-addressee] to a number of other cartel participants, including Pometon, through its head company Pometon S.p.A.,<sup>239</sup> confirming a meeting in Germany says: "*in the meantime I received the confirmation from all of you that the 28<sup>th</sup> September will be ok for everyone. Also [company representative] confirmed that he will join us*"

---

<sup>237</sup> According to established case-law, the decisive influence does not concern only the commercial policy *stricto sensu*, such as, for example, pricing policy, see for example judgment of the General Court in *HSE*, T-399/09, paragraph 53 and case-law cited therein. As AG Kokott put it in her opinion in *Akzo Nobel and others v Commission*, C-97/08, paragraph 89, "*the decisive influence of the parent company on the conduct of its subsidiary does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities [...] Such instructions are merely a particularly clear indication of the existence of the parent company's decisive influence of the parent company over its subsidiary's commercial policy.*"

<sup>238</sup> ID [...].

<sup>239</sup> See the e-mail address [sales@pometon.com](mailto:sales@pometon.com) in the list of addressees.

(emphasis added). This shows that the primary contact for competitors regarding the German market was also Pometon S.p.A.. According to Pometon<sup>240</sup>, the fact that both [company representative] and [company representative] participated in the German meetings shows that [company representative] represented Pometon Deutschland GmbH. The Commission does not agree and considers that that e-mail is a clear indication that, despite having created the German subsidiary, Pometon S.p.A. was still involved in coordination talks with other parties regarding the German customers instead of leaving it solely to the [function] of Pometon Deutschland GmbH. Furthermore, [company representative]'s participation in the meeting regarding customers on the German market is particularly clear evidence that Pometon S.p.A. knew about and approved Pometon GmbH's participation in the infringement.<sup>241</sup>

- (192) Finally, in the Principal Terms Agreement signed with [non-addressee] in April 2007, despite the fact that Pometon S.p.A. owned 74% of the shares of Pometon Deutschland GmbH, it gave a commitment to [non-addressee] – as part of the non-competition agreement – [business secret].<sup>242</sup> [business secret]. It is noted that the relevant subsidiaries, including Pometon Deutschland GmbH, are called "*controlled companies*" by Pometon.<sup>243</sup>
- (193) Consequently, the Commission considers that Pometon S.p.A. and Pometon Deutschland GmbH formed part of the same undertaking that committed the infringement.
- (194) It follows that Pometon S.p.A. as the parent company of Pometon Deutschland GmbH should be held liable for the participation of the latter in the infringement from 3 October 2003 to 16 May 2007.
- (195) With reference to what is indicated above (see recitals (177)-(194)) and taking account of the principles outlined in recital (175) with respect to the undertaking comprising Pometon S.p.A., Pometon España S.A. and Pometon Deutschland GmbH, Pometon S.p.A. should be held liable both for its direct participation in the infringement and in its capacity as parent company of its directly participating subsidiaries, namely Pometon España S.A. and Pometon Deutschland GmbH, from 3 October 2003 to 16 May 2007.

## 8. REMEDIES

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

- (196) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement it may by decision require the

---

<sup>240</sup> ID [...].

<sup>241</sup> Judgment of the General Court of 26 April 2007, *Bolloré SA and Other v Commission*, 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, EU:T:2007:115, paragraph 40 and case-law cited therein.

<sup>242</sup> ID [...], ID [...] and ID [...].

<sup>243</sup> See in this respect ID [...]. In reply to Commission's request to provide copies of all the agreements concluded between Pometon S.p.A. or any of its subsidiaries and [third party] ([non-addressee] group), Pometon answered that there were no specific agreements concluded between its subsidiaries and the [non-addressee] group and added: "[business secret]".

undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

- (197) Given the secrecy in which the cartel arrangements were carried out, in this case it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertaking to which this Decision is addressed to bring the infringement to an end (if it has not already done so) and to refrain from any agreement or concerted practice which may have the same or a similar object or effect.

## **8.2. Applicability of limitation periods**

- (198) Pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing or repeated infringements, the limitation period begins to run on the day the infringement ceases.<sup>244</sup> Any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement interrupts the limitation period and each interruption starts time running afresh.<sup>245</sup> However, the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a periodic penalty payment.<sup>246</sup>
- (199) In its reply to the SO<sup>247</sup>, Pometon argued that, given that the last contact in which Pometon could be considered involved was on 9 June 2005 and the inspection by the Commission took place on 15 June 2010, the power of the Commission to impose a fine on Pometon is time-barred.
- (200) The Commission does not agree with Pometon's argument. In the light of the evidence in recitals (50)-(52), (67), (75) and (78), which establishes that Pometon continued to participate in the infringement until 16 May 2007, the Commission concludes that it has the power to impose a fine on Pometon.

## **8.3. Article 23(2) of Regulation (EC) No 1/2003**

- (201) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty.<sup>248</sup> For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.
- (202) Based on the facts described in Section 4, the Commission considers that the infringement was committed intentionally. Even if Pometon did not act intentionally, it acted at least negligently. A fine should therefore be imposed on the undertaking to which this Decision is addressed.

---

<sup>244</sup> Article 25(2) of Regulation (EC) No 1/2003.

<sup>245</sup> Article 25(3) of Regulation (EC) No 1/2003.

<sup>246</sup> Article 25(5) of Regulation (EC) No 1/2003.

<sup>247</sup> ID [...].

<sup>248</sup> According to Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for 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 101 and 102 of the Treaty] of the EC Treaty [...] shall apply *mutatis mutandis*” (OJ L 305, 30.11.1994, p.6.).

- (203) Pursuant to Article 23(3) of Regulation (EC) No 1/2003 the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission should set the fine at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking in the infringement should be assessed on an individual basis.
- (204) The principles used by the Commission to set fines are laid down in the "Guidelines on fines".<sup>249</sup>

#### 8.4. Calculation of the fine

- (205) In applying the Guidelines on fines, the basic amount results from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last full business year of the infringement) multiplied by the number of years of the undertaking's participation in that infringement. The additional amount (also called the "entry fee") is calculated as a percentage between 15% and 25% of the value of sales, irrespective of the duration.<sup>250</sup> The resulting basic amount can then be increased or reduced for each undertaking depending on whether there are any aggravating or mitigating circumstances.

##### 8.4.1. Value of sales

- (206) The basic amount of the fine is set by reference to the value of the undertaking's sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA.<sup>251</sup> In this case the relevant value of sales is Pometon's sales of steel abrasives (as defined in recital (5)) in the EEA.
- (207) The Commission normally takes the sales made by the undertakings during the last full business year of their participation in the infringement. If the last year is not sufficiently representative, the Commission may take into account one or more other years for the determination of the value of sales.<sup>252</sup> In this case, Pometon's sales in the last full business year of its participation in the infringement, that is 2006, should be used.
- (208) In its reply to the SO<sup>253</sup>, Pometon argued that the value of sales of three entities of its group, namely PMT S.p.A., Finmetal Holding GmbH and Pometon Ltd, for the behaviour of which the Commission did not intend to hold Pometon S.p.A. liable, should not be included. According to point 13 of the Guidelines on fines, the sales of the whole undertaking should be taken into account. It would *"be contrary to the goal pursued by [point 13 of the Guidelines] if [the concept of the value of sales]*

---

<sup>249</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 OJ C 210, 1.9.2006, p. 2. According to point 37 of the Guidelines on fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in their point 21.

<sup>250</sup> Points 19-26 of the Guidelines on fines.

<sup>251</sup> Point 12 of the Guidelines on fines.

<sup>252</sup> Point 13 of the Guidelines on fines.

<sup>253</sup> ID [...].

were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel.<sup>254</sup> Point 13 of the Guidelines on fines covers sales in the relevant market, which is the market concerned by the infringement.<sup>255</sup> Therefore, given that PMT S.p.A. and Finmetal Holding GmbH were 100% owned by Pometon, their sales should be included in the total value of sales of Pometon. The sales of the third entity, Pometon Ltd, should not be included in the total value of relevant sales. However, the sales by Pometon S.p.A. to Pometon Ltd should be included as Pometon S.p.A. itself participated in the cartel and these are thus relevant sales. Therefore, the sales by Pometon S.p.A. to Pometon Ltd should be included.

- (209) In its reply to the SO<sup>256</sup>, Pometon also pointed out that it had erroneously included the value of sales made to one client as the product sold to that client is not steel abrasives as covered by these proceedings. On the basis of further information provided by Pometon regarding the product sold to that client<sup>257</sup>, the value of sales to that client should not be taken into account in the total value of sales of Pometon.
- (210) In order to take into account the enlargement of the Union on 1 May 2004, the values of sales of Pometon to be taken into account for 2006 should be the values of sales in both EEA(18) and EEA(28), based on the information provided by Pometon, as set out in Table 2.

<b>Table 2</b>	
<b>Value of sales (EUR)</b>	
<b>EEA(18)<sup>258</sup></b>	<b>EEA(28)<sup>259</sup></b>
[18 630 000-24 000 000]	[22 500 000- 27 100 000]

#### 8.4.2. Determination of the basic amount of the fine

##### 8.4.2.1. Gravity

- (211) The gravity of the infringement determines the percentage of the value of sales taken into account in setting the variable amount of the fine to be imposed. In assessing the gravity of the infringement, the Commission has regard to a number of factors, such

<sup>254</sup> Judgment of the Court of Justice of 23 April 2015, *LG Display and LG Display Taiwan v Commission*, C-227/14 P, ECLI:EU:C:2015:258, paragraph 53; judgment of the Court of Justice of 12 novembre 2014, *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 57 and judgment of the Court of Justice of 11 July 2013, *Team Relocations and Others v Commission*, C-444/11 P, EU:C:2013:464, paragraph 76.

<sup>255</sup> Judgment of the Court of Justice of 9 July 2015, *InnoLux v Commission*, C-231/14, EU:C:2015:451, paragraph 51 and *LG Display and LG Display Taiwan*, C-227/14 P, paragraph 57.

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

<sup>257</sup> ID [...], ID [...] and ID [...].

<sup>258</sup> EEA(18) refers to the 15 EU Member States until 1 May 2004 and Norway, Iceland and Liechtenstein.

<sup>259</sup> EEA(28) refers to the 25 EU Member States as of 1 May 2004 and Norway, Iceland and Liechtenstein.

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.<sup>260</sup>

- (212) According to Pometon, its conduct cannot be qualified as grave as the revision of the scrap surcharge in 2007 and 2008 and the introduction of the energy surcharge in 2008 by other parties, in which Pometon did not participate, had the objective of generating profits and its impact on the market was different from that of the contacts in which Pometon participated. According to Pometon, the scrap surcharge introduced in 2003 was not meant as an overcharge and its content and objectives were different from those of the revisions of the formula in 2007 and 2008, which had no objective justification and had a clear goal of generating profits.
- (213) The objectives and impact of the other parties' coordination on the scrap surcharge and the energy surcharge after Pometon exited the market are not relevant. What is relevant is that Pometon, together with the other parties, engaged in coordination on the price of steel abrasives. Nevertheless, the evidence shows that Pometon's [function], [company representative], also had a clear aim of profit when discussing the 2003 scrap surcharge formula. In his e-mail to [non-addressee]<sup>261</sup> he said: "*I think that if we must do this great effort of changing the index and spreading the news among our customers, agents and distributors, it's important trying to do it **with the aim of maximising our profit***"(emphasis added).
- (214) In its assessment of the gravity of the infringement, the Commission takes into account the facts of the case. First, the scrap surcharge and the base price on which Pometon coordinated with the other parties are elements of the price of steel abrasives. Price coordination arrangements are, by their very nature, among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale of the value of sales.<sup>262</sup> Accordingly, 15%, which is the minimum for price-fixing<sup>263</sup>, should be used as the basis for the determination of the gravity percentage in this case (see recital (105)). Second, the infringement covered the entire EEA. Pometon does not contest the fact that coordination on the scrap surcharge covered the whole EEA. The fact that Pometon's contacts regarding individual customers extended only as far as Pometon had sales in certain Contracting Parties to the EEA Agreement (see recitals (58) and (133)-(135)), does not affect the geographic scope of the infringement, owing to the fact that coordination on the scrap surcharge covered the whole EEA.<sup>264</sup>
- (215) According to Pometon, it is nonetheless necessary to differentiate Pometon's position from that of the other parties. In this regard the Commission refers to the judgement in *Gigaset*, according to which the basic amount of the fine should reflect the gravity of the infringement and not the gravity of the respective participation by each undertaking. The latter should be addressed in the context of aggravating or mitigating circumstances.<sup>265</sup> In addition, the Commission considers that during the

---

<sup>260</sup> Points 21 and 22 of the Guidelines on fines.

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

<sup>262</sup> Point 23 of the Guidelines on fines.

<sup>263</sup> See *FSL and Others*, T-655/11, paragraphs 525 and 530.

<sup>264</sup> See *BASF and UCB*, joined cases T-101/05 and T-111/05, paragraph 217 by analogy.

<sup>265</sup> *Gigaset*, T-395/09, paragraph 143.

period when Pometon was producing and marketing steel abrasives, that is until May 2007, the infringement among the parties consisted of coordination on the scrap surcharge and coordination with regard to individual customers. Pometon played a full part in that unlawful conduct. Both features of the infringement, that is to say the coordination with regard to the scrap surcharge and the coordination with regard to individual customers, amount to price coordination and, accordingly, have the same nature. On the other hand, the coordination on the energy surcharge and the revision of the scrap surcharge took place only after Pometon had exited the market and is not attributable to Pometon. Since the Commission considers that the different elements of price coordination are part of the same single and continuous infringement concerning prices, the relevant factors for the assessment of the gravity of the infringement are common to all the participants in the infringement<sup>266</sup> and it is not appropriate to apply a lower percentage in respect of gravity to Pometon than to the other participants in the infringement, even if it did not take part in the coordination on the energy surcharge and the revision of the scrap surcharge.

- (216) Accordingly, considering the nature and the geographic scope of the infringement, the proportion of the value of sales to be taken into account is 16%.

#### 8.4.2.2. Duration

- (217) In calculating the fine to be imposed on an undertaking, the Commission also takes into consideration the duration of the undertaking's participation in the infringement.<sup>267</sup>
- (218) As set out in Chapter 6, the period to be taken into account for the purposes of calculating the fine to be imposed on Pometon is 3 October 2003 – 16 May 2007. The resulting multiplier for duration, rounded down to the full month, should therefore be 3.58 years.

#### 8.4.2.3. Additional amount

- (219) The infringement concerns a price coordination cartel. In such cases, the Commission includes in the basic amount of the fine a sum of between 15% and 25% of the value of sales to deter the undertaking from entering into such illegal practices, irrespective of the duration of the undertaking's participation in the infringement ("entry fee").<sup>268</sup>
- (220) Taking into account the factors listed in recital (214) with respect to the variable amount relating to the nature and the geographic scope of the infringement, the percentage to be applied for the purposes of calculating the entry fee is 16%.
- (221) In its reply to the SO<sup>269</sup>, Pometon argued that the Commission should use its discretion under point 37 of the Guidelines on fines in order not to apply the entry fee. The Commission does not agree. The purpose of point 25 of the Guidelines on the entry fee is to deter undertakings from entering into anticompetitive agreements and its application is standard practice in Commission decisions. On the other hand, point 37 does not serve a general deterrence purpose. It is rather applied in the context of a particular case, in order to achieve specific deterrence or in view of the

---

<sup>266</sup> *Timab*, T-456/10, paragraph 163.

<sup>267</sup> Point 24 of the Guidelines on fines.

<sup>268</sup> Point 25 of the Guidelines on fines.

<sup>269</sup> ID [...].



particularities of a given case. For this reason point 37 is applied only in exceptional circumstances. Moreover, the Commission considers that point 37 should be applied in this case (see recital (229) below). Therefore, since Pometon has entered into coordination arrangements on elements of the price of steel abrasives, the Commission concludes that the entry fee should apply with regard to Pometon.

#### 8.4.2.4. Calculation of the basic amount of the fine

(222) Based on the value of sales, the percentages to be applied to it and the multiplier to be applied in respect of duration, the basic amount of the fine to be imposed on Pometon should be EUR [...].

#### 8.4.3. *Adjustment of the basic amount of the fine: aggravating and mitigating circumstances*

(223) The Commission may increase the basic amount of the fine where it considers that aggravating circumstances apply. Those circumstances are listed in a non-exhaustive way in point 28 of the Guidelines on fines. The Commission may also reduce the basic amount where it considers that mitigating circumstances apply. Those circumstances are listed in a non-exhaustive way in point 29 of the Guidelines on fines.

(224) There are no aggravating circumstances that would require an increase in the basic amount of the fine for Pometon.

(225) The evidence shows that Pometon contributed to a lesser extent than some other parties in maintaining the arrangement on coordination on individual customers (see in particular recital (58)). The Commission therefore considers that mitigating circumstances apply, resulting in a reduction of 10% in the fine to be imposed on Pometon.

(226) In its reply to the SO<sup>270</sup> Pometon argued that the Commission should apply a higher reduction with regard to Pometon in respect of mitigating circumstances than with regard to any other party. The Commission considers that Pometon has failed to explain why it deserves a greater reduction than the other parties. As set out in recital (58) the Commission has, in any event, taken into account Pometon's more occasional participation in the coordination on individual customers which it considered to be comparable to that of [non-addressee].

(227) The resulting adjusted basic amount of the fine to be imposed on Pometon is EUR [...].

#### 8.4.4. *Adaptation of the adjusted basic amount*

(228) In the Settlement Decision the Commission used its discretion under point 37 of the Guidelines on fines which allows it to depart from the methodology of the Guidelines.<sup>271</sup> The adjusted basic amounts were adapted for all the settling parties, taking into account the fact that for all of them that amount would have reached the 10% of turnover limit laid down in Article 23(2) of Regulation (EC) No 1/2003, that the value of sales of the cartelised product represented a high proportion of their total

---

<sup>270</sup> ID [...].

<sup>271</sup> See recitals 104-105 of the Settlement Decision. This is in line with the case law of the Union Courts. See for instance the judgment of 16 June 2011, *Putters v Commission*, T-211/08, EU:T:2011:289, paragraph 75.

turnover and that there were differences between the settling parties with regard to their individual participation in the infringement.<sup>272</sup>

- (229) Whilst the case law confirms that the Commission can impose fines that reach the upper limit of 10% of each undertaking's total turnover<sup>273</sup>, in view of the specific circumstances of this case and the need to observe the principle of equal treatment<sup>274</sup>, the Commission deems it appropriate to exercise its discretion and to apply point 37 of the Guidelines on fines also with regard to Pometon, taking into account the fact that the adjusted basic amount of the fine to be imposed on it would reach the 10% of turnover limit laid down in Article 23(2) of Regulation (EC) No 1/2003 and that there are differences between its individual participation in the infringement and the individual participation of the other participants in the infringement. Overall, the fine should be set at a level that is proportionate to the infringement and achieves a sufficiently deterrent effect.
- (230) In its reply to the SO<sup>275</sup>, Pometon argued that the Commission should use point 37 of the Guidelines on fines to reduce the fine proportionally to the fine imposed on [non-addressee] as the SO equated Pometon's position to that of [non-addressee]. However, the SO only equated the situation of Pometon and that of [non-addressee] as regards their lower level of participation in coordination in respect of individual customers. Therefore, the reduction on the grounds of that mitigating circumstance (and not the calculation of the whole fine) should be the same for both Pometon and [non-addressee] and amounts to 10% (see recital (226)).
- (231) The resulting amount of the adjusted basic amount of the fine after adaptation to be imposed on Pometon is EUR 6 197 000.

#### 8.4.5. *Application of the 10% of turnover limit*

- (232) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking participating in the infringement must not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision. In this case, the total turnover of 2015 will be used for the purposes of applying the 10% limit.
- (233) The fine does not exceed 10% of Pometon's total turnover for 2015.

---

<sup>272</sup> The non-confidential version of the Settlement Decision is available on the DG Competition website.

<sup>273</sup> Judgment of the Court of Justice of 12 July 2012, *Cetarsa v Commission*, C-181/11 P, EU:C:2012:455, paragraph 80. See also to this effect judgment of the Court of Justice of 28 June 2005, *Dansk Rørindustri and others v Commission*, joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 277 - 278; judgment of the Court of Justice of 29 June 2006, *SGL Carbon v Commission*, C-308/04 P, EU:C:2006:433, paragraph 82; judgment of the General Court of 20 March 2002, *HFB and others v Commission*, T-9/99, EU:T:2002:70, paragraph 453; judgment of the General Court of 13 September 2010, *Trioplast Wittenheim v Commission*, T-26/06, EU:T:2010:387, paragraph 148; and judgment of the General Court of 29 November 2005, *Union Pigments v Commission*, T-62/02, EU:T:2005:430, paragraph 158; *Pilkington*, T-72/09.

<sup>274</sup> See *Timab*, T-456/10, paragraph 163, paragraphs 72 and 74: "even in such a hybrid case, involving the adoption of two decisions with different addressees and following two separate procedures, at issue are participants in one and the same cartel, so that the principle of equal treatment must be observed. [...] in determining the amount of the fine, there cannot be any discrimination between the participants in the same cartel with respect to the information and calculation methods which are not affected by the specific features of the settlement procedure."

<sup>275</sup> ID [...].

8.4.6. *Final amount of the fine*

- (234) The fine to be imposed on Pometon pursuant to Article 23(2) of Regulation (EC) No 1/2003 is EUR 6 197 000,

HAS ADOPTED THIS DECISION:

*Article 1*

Pometon S.p.A. has infringed Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement by participating in a single and continuous infringement concerning prices in the steel abrasives sector, which consisted of the coordination of its pricing behaviour and covered the entire EEA.

The duration of the infringement was from 3 October 2003 until 16 May 2007.

*Article 2*

For the infringement referred to in Article 1, the following fine is imposed on Pometon S.p.A.: EUR 6 197 000.

The fine shall be credited in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT  
1-2, Place de Metz  
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000  
BIC: BCEELULL  
Ref.: European Commission – BUFI/AT.39792

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where the undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012.<sup>276</sup>

*Article 3*

Pometon S.p.A. shall immediately bring to an end the infringement referred to in Article 1 insofar as it has not already done so.

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

*Article 4*

This Decision is addressed to Pometon S.p.A., via Circonvallazione 62, 30030 Maerne di Martellago, Venice, Italy.

---

<sup>276</sup> Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union, OJ L 362, 31.12.2012, p. 1.

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 25.5.2016

*For the Commission*  
*Margrethe VESTAGER*  
*Member of the Commission*

