



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

28 March 2019*

(Competition – Agreements and concerted practices – European steel abrasives market – Decision finding an infringement of Article 101 TFEU and Article 53 of the EEA Agreement – Price coordination throughout the EEA – Chronologically staggered ‘hybrid’ procedure – Presumption of innocence – Principle of impartiality – Charter of Fundamental Rights – Evidence of the infringement – Single and continuous infringement – Restriction of competition by object – Duration of the infringement – Fine – Exceptional adaptation of the basic amount – Obligation to state reasons – Proportionality – Equal treatment – Unlimited jurisdiction)

In Case T-433/16,

Pometon SpA, established in Maerne di Martellago (Italy), represented by E. Fabrizi, V. Veneziano, and A. Molinaro, lawyers,

applicant,

v

European Commission, represented by P. Rossi and B. Mongin, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment of Commission Decision C(2016) 3121 final of 25 May 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39792 – Steel Abrasives).

THE GENERAL COURT (Third Chamber, Extended Composition),

composed of S. Frimodt Nielsen, President, V. Kreuschitz, I.S. Forrester, N. Póltorak and E. Perillo (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 31 May 2018,

gives the following

* Language of the case: Italian.

Judgment

I. Background to the dispute

- 1 The applicant, Pometon SpA, is an Italian undertaking specialising in the treatment of metals. It was active on the steel abrasives market until 16 May 2007, when it sold its business line in that sector to one of its competitors, the French company Winoa SA. On that date, the applicant's abovementioned business was transferred to the company Pometon Abrasives Srl, owned by the Winoa group.
- 2 Steel abrasives are steel particles, either in round or angular form, mainly used in the steel, automotive, metallurgy, petrochemical and stonecutting industries. They are produced from steel scrap residue.
- 3 By Decision C(2016) 3121 final of 25 May 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39792 – Steel Abrasives; 'the contested decision'), the European Commission found that, between 3 October 2003 and 16 May 2007, the applicant had participated, either directly or through its representatives or the representatives of two of its subsidiaries, Pometon España SA and Pometon Deutschland GmbH, in a cartel consisting of agreements or concerted practices with four other undertakings, namely the US group Ervin Industries Inc. ('Ervin'), the French company Winoa SA ('Winoa') and the German companies MTS GmbH and Würth GmbH, essentially designed to coordinate the price of steel abrasives throughout the European Economic Area ('EEA'). The applicant and its two subsidiaries mentioned above are hereafter referred to as 'Pometon'.

A. Investigation stage and initiation of proceedings

- 4 On 13 April 2010, Ervin applied for immunity from fines under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17).
- 5 Following that application, Ervin made oral statements and adduced documentary evidence. On 31 May 2010, the Commission granted it conditional immunity pursuant to point 8(a) of that notice.
- 6 Between 15 and 17 June 2010, the Commission conducted unannounced inspections at the premises of various producers of steel abrasives, including Pometon. It subsequently sent several requests for information to the undertakings which it believed were parties to the cartel.
- 7 On 16 January 2013, the Commission, in accordance with Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18), initiated investigation proceedings as provided for in Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1) against Pometon and the other four cartel participants (Ervin, Winoa, MTS and Würth). It set a time limit for them to indicate in writing to the Commission whether they were prepared to engage in settlement discussions, in terms of Article 10a(1) of Regulation No 773/2004.

B. Settlement procedure and Pometon's decision to withdraw from that procedure

- 8 The five parties to the alleged cartel expressed their willingness to engage in settlement discussions. Between February and December 2013, three rounds of bilateral meetings took place between the Commission and the parties to the cartel, during which the substance of the objections and the evidence underpinning them were set out. The Commission provided each party to the cartel with the range of fines likely to be imposed on them.

- 9 In January 2014, the undertakings concerned forwarded their settlement submissions within the prescribed period, except for the applicant, who decided to withdraw from that procedure. Consequently, on 10 February 2014, the applicant returned to the Commission the CD-ROM which the latter had given it on 21 February 2013 in the context of the settlement procedure.
- 10 On 13 February 2014, the Commission sent a statement of objections to each of the other four parties to the alleged cartel and, on 2 April 2014, it adopted settlement decision C(2014) 2074 final against them, on the basis of Articles 7 and 23 of Regulation No 1/2003 ('the settlement decision').

C. Adoption of the contested decision under the ordinary procedure and content of that decision

- 11 On 3 December 2014, the Commission sent a statement of objections to the applicant, who replied on 16 February 2015, after having had access to the file. The applicant subsequently took part in a hearing held on 17 April 2015.
- 12 On 25 May 2016, the Commission adopted the contested decision on the basis of Articles 7 and 23 of Regulation No 1/2003. The operative part of that decision is worded as follows:

'Article 1

Pometon SpA 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 SpA: EUR 6 197 000 ...'

- 13 It is apparent, in essence, from the contested decision as a whole that Pometon and the other cartel participants introduced (first limb of the cartel) a uniform calculation model enabling them to achieve a coordinated increase in the price of steel abrasives based on price indexes for scrap ('the scrap surcharge'; see paragraphs 132 and 136 below). At the same time, they also agreed (second limb of the cartel) to coordinate their behaviour as regards the sale price of steel abrasives charged to individual customers, in particular by undertaking not to compete by means of price cuts (recitals 32, 33, 37 and 57 of the contested decision; see paragraph 173 below).
- 14 Concerning the classification of the infringement at issue, the Commission found that there had been a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement. Not only did all of the anticompetitive arrangements of the participants concern price coordination and the same products, they also followed the same pattern throughout the infringement period, from 3 October 2003 to 16 May 2007, when the applicant sold its business in the steel abrasives sector to Winoia. Finally, the undertakings involved in the infringement and the persons acting on their behalf were essentially the same (recitals 107 and 166 of the contested decision).
- 15 In short, according to the Commission, the object of such a cartel was to restrict competition and significantly affect trade in the product concerned between Member States and the parties to the EEA Agreement (recitals 142 and 154 of the contested decision).

- 16 As regards the duration of the applicant's participation in the infringement, the Commission fixed the beginning of that participation as 3 October 2003 and, relying on the fact that Pometon had not formally distanced itself from the cartel, it found that that undertaking's involvement in the cartel continued until 16 May 2007, when the applicant sold its business in the steel abrasives sector to Winoa (recitals 160 and 166 of the contested decision; see, also, paragraph 1 above).
- 17 Based on the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines on the method of setting fines'), the Commission set the basic amount of Pometon's fine at 16% of the value of sales made by the applicant in the markets of EEA countries in 2006, namely the last full year of Pometon's participation in the infringement at issue before selling its steel abrasives business to a French competitor.
- 18 That percentage comprises a base figure of 15% plus a further 1% to take account of the geographic scope of the infringement covering the entire EEA (recitals 214 to 216 of the contested decision). The variable part of the basic amount of the fine was then increased by an additional fixed amount of 16%, applied with the aim of deterring undertakings from entering into price coordination agreements, under point 25 of the Guidelines on the method of setting fines (recital 220 of the contested decision).
- 19 Furthermore, the basic amount of the fine thus calculated was not increased on the ground of aggravating circumstances. On the contrary, Pometon received a 10% reduction of that amount on account of mitigating circumstances, since it had participated to a lesser extent than the other undertakings in the second limb of the cartel (recital 225 of the contested decision).
- 20 Finally, pursuant to point 37 of the Guidelines on the method of setting fines, a provision allowing the Commission to depart from the methodology laid down in those guidelines when 'the particularities of a given case' may justify doing so, the Commission adapted the adjusted basic amount of the fine (recitals 228 to 231 of the contested decision), resulting in a 60% reduction.
- 21 In short, as is clear from Article 2 of the contested decision, following that calculation the amount of the fine imposed on the applicant stood at EUR 6 197 000 (see paragraph 12 above).

II. Procedure and forms of order sought

- 22 The applicant brought the present action by application lodged at the Court Registry on 3 August 2016.
- 23 The parties were notified of the closure of the written part of the procedure on 21 February 2017. By document lodged at the Court Registry on 24 March 2017, the applicant submitted a reasoned request for a hearing to be held, in accordance with Article 106(2) of the Rules of Procedure of the General Court.
- 24 By decision of 21 March 2018, the Court referred the case to the Chamber sitting in extended composition, pursuant to Article 28 of the Rules of Procedure.
- 25 By order of 22 March 2018, upholding the applicant's alternative request seeking the adoption of a measure of inquiry, the Court ordered the Commission, on the basis of Article 91(b), Article 92(1) and Article 103(1) of the Rules of Procedure, first, to produce a copy of the full text of the settlement decision and a copy of the leniency applicant's statements contained in documents ID 5, ID 10, ID 136 and ID 643 in the administrative file and, secondly, to state the total turnover in 2009 of the addressees of the settlement decision which had been taken into account in that decision.

- 26 By order of 4 May 2018, *Pometon v Commission* (T-433/16), the Court, ruling on the applications for confidential treatment of the documents produced by the Commission in compliance with the abovementioned order of 22 March 2018, decided that documents ID 5, ID 10, ID 136 and ID 643 containing the transcription of the leniency applicant's oral statements could be consulted by the applicant's lawyers at the Court Registry. However, it rejected the application for confidential treatment as regards the respective turnover in 2009 of the four undertakings to whom the settlement decision was addressed and the data set out in tables 1 (recital 90), 3 (recital 100) and 4 (recital 103) of that decision.
- 27 By measures of organisation of procedure, first, the Court asked the applicant to submit its written observations on the relevance of the non-confidential data referred to in paragraph 26 above to the fifth plea in law, concerning the adaptation of the basic amount of the fine under point 37 of the Guidelines on the method of setting fines. The applicant complied with that request within the prescribed period. Secondly, the Court requested the parties to reply orally, at the hearing, to a number of written questions.
- 28 Moreover, at the hearing, the Commission sought leave to lodge a document consisting of a table containing data relating to the five undertakings party to the cartel at issue, data which it stated it had relied on to determine, for each of those undertakings, the adaptation of the basic amount of the fine under point 37 of the Guidelines on the method of setting fines. It applied for the confidential treatment of such data vis-à-vis the public.
- 29 The Court decided to place that document on the file, without prejudice to the assessment of its admissibility, and gave the applicant until 2 July 2018 to submit its comments on it, pursuant to Article 85(4) of the Rules of Procedure. The applicant submitted its comments on 2 July 2018 and the oral part of the procedure was closed on the same date.
- 30 By order of 8 November 2018, the President of the Third Chamber reopened the oral part of the procedure. The Commission was asked to submit its comments on a new piece of information contained in the applicant's comments of 2 July 2018 and it complied with that request within the prescribed period. By decision of 17 January 2019, the President of the Third Chamber closed the oral part of the procedure.
- 31 The applicant claims that the Court should:
- annul the contested decision;
 - in the alternative, annul or vary the contested decision, in so far as the Commission states that the applicant participated in the infringement until 16 May 2007 and imposes a fine on it even though it was time-barred;
 - in the further alternative, annul or reduce the amount of the fine;
 - order the Commission to repay any sums disbursed by the applicant before delivery of the judgment and any other costs borne by it in complying with that decision;
 - adopt the measures of organisation of procedure or, in the alternative, the measures of inquiry sought by the applicant;
 - order the Commission to pay the costs.
- 32 The Commission contends that the Court should:
- dismiss the action;

- dismiss the application for measures of organisation of procedure or inquiry;
- order the applicant to pay the costs.

III. Law

- 33 The applicant relies on four pleas in law in support of its first two heads of claim. First, it submits that the contested decision is vitiated by an infringement of the principle of a fair trial, the principle of the presumption of innocence and the rights of the defence, in so far as the Commission ascribed specific conduct to the applicant in the settlement decision itself, thus influencing the claims subsequently made against it in the contested decision.
- 34 Secondly, the applicant alleges infringement of Article 101 TFEU and Article 53 of the EEA Agreement, an inadequate and contradictory statement of reasons and infringement of the rights of the defence and the rules governing the burden of proof, in so far as the Commission ascribed to the applicant, without evidence, participation in a cartel in which it did not, in fact, participate.
- 35 Thirdly, the contested decision is said to be vitiated by an infringement of Article 101 TFEU and Article 53 of the EEA Agreement, in so far as the Commission found that the cartel constituted a restriction of competition by object.
- 36 Fourthly, the applicant disputes the duration of its participation in the cartel and pleads time bar.
- 37 Lastly, in support of its third head of claim seeking the annulment or variation of the amount of the fine, the applicant alleges infringement of the obligation to state reasons and of the principles of proportionality and equal treatment, as regards the exceptional adaptation of the basic amount of the fine carried out by the Commission pursuant to point 37 of the Guidelines on the method of setting fines.

A. First plea in law: infringement of the duty of impartiality, the principle of the presumption of innocence and the rights of the defence, in so far as the Commission ascribed specific conduct to the applicant in the settlement decision, thus influencing the assessments set out in the contested decision

1. Arguments of the parties

- 38 The applicant states that, although the settlement decision was not addressed to it, several references were made to it in section 4 of that decision ('Description of the events') as an undertaking which, in essence, actively participated in the cartel. It draws attention in particular to the following passages of the settlement decision, in which the Commission expressly referred to its conduct:

'(26) Ervin, Winoa, Pometon, MTS and Würth engaged in frequent contacts on bilateral as well as multilateral bases, in which they discussed the key price components applicable to all their EEA steel abrasives sales, that is to say the scrap and energy surcharges. They also discussed (mainly through bilateral contacts) which parameters of competition would be allowed between them as regards individual customers. In the framework of that overall understanding, the parties engaged in behaviour covering the EEA.

...

- (28) In October 2003, Winoa, Ervin and Pometon met at the Lago di Garda (Italy) to agree on a uniform calculation model for a common scrap surcharge to be applied by all of them. ...

(29) ... MTS and Würth ... did not participate in the initial stages of the process when the agreement between Wino, Ervin and Pometon was concluded.

...

(31) The contacts continued with Pometon until 16 May 2007 when it sold the steel abrasives business to Wino and exited the business.

...

(38) The evidence demonstrates that contacts involving Wino, Ervin and Pometon evolved into a pattern of behaviour as of October 2003.'

- 39 The applicant contends that those references were neither necessary nor useful. In particular, first, it argues that the information provided in recital 31 of the settlement decision – essentially stating that it participated in the cartel until 16 May 2007, when it sold its business to Wino and left the market – did not appear in the settlement submissions of the other four undertakings concerned. Secondly, in any event, in a settlement procedure, the final decision should be concerned only with the conduct of the undertakings party to the settlement and the penalties imposed on them.
- 40 It claims that that analysis is moreover confirmed by comparing the settlement decision with Commission Decision C(2014) 4227 final of 25 June 2014 in Case AT.39965 – Mushrooms, which also relates to a settlement procedure. According to the applicant, that decision did not contain, in the description of the relevant events, any reference to the non-settling undertaking.
- 41 In those circumstances, the references in the settlement decision to conduct ascribed to the applicant clearly show that, even before the applicant had the opportunity to defend itself, the Commission had already prejudged its guilt. The contested decision is therefore vitiated by a breach of the principle of a fair trial, the principle of the presumption of innocence and the rights of the defence of the applicant.
- 42 Furthermore, in that connection, the applicant disputes the Commission's arguments based on the interpretation provided by the European Court of Human Rights ('the ECtHR') of Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, on the presumption of innocence.
- 43 With regard to that provision, the applicant claims in particular that, contrary to the Commission's assertions (see paragraph 51 below), the ECtHR, in its judgment of 27 February 2014, *Karaman v. Germany* (CE:ECHR:2014:0227JUD001710310), held that where, in criminal proceedings involving several persons who cannot be tried together, it is necessary, in order to assess the guilt of the accused, to refer, in an initial judgment, to the participation in the offence of an accused who will subsequently be tried in a second set of criminal proceedings at a later point in time, the competent court should avoid giving more information than that required for the assessment of the criminal liability of the accused who are standing trial at that time (ECtHR, 27 February 2014, *Karaman v. Germany*, CE:ECHR:2014:0227JUD001710310, §§ 64 and 65).
- 44 According to the applicant, the same criterion should apply where the Commission, as in the present case, after initiating infringement proceedings against five undertakings suspected of having participated in a cartel, first of all, adopts a settlement decision in respect of four of them and thereafter adopts, against the fifth undertaking, which has, in the intervening period, withdrawn from the settlement procedure, an infringement decision following an ordinary procedure conducted on the basis of the general provisions of Regulation No 773/2004.

- 45 Moreover, as regards the Commission's argument that the applicant's name was inadvertently mentioned in the publication of the provisional text of the settlement decision, the applicant states that the infringement of the principle of the presumption of innocence arises in this case from the fact that, irrespective of the manner in which the settlement decision was published, Pometon was the subject in that decision of specific allegations concerning its participation in the cartel at issue. The replacement of the applicant's name in the text of the settlement decision subsequently published on 6 January 2015 by the words 'another undertaking' is therefore not capable of curing the infringement of that principle in the contested decision.
- 46 The Commission contests those arguments.
- 47 First of all, the references which the applicant complains of are intended only to establish the liability of the other four undertakings that participated in the cartel and, moreover, do not affect the Commission's duty to complete the adversarial procedure in relation to the applicant after its withdrawal from the settlement procedure.
- 48 Any other approach, according to the Commission, would result, both procedurally and substantively in terms of the penalty, in a form of 'immunity from fines' benefiting undertakings which withdraw from settlement procedures they had initially agreed to.
- 49 The Commission goes on to claim that the combination of those two procedures indeed constitutes a complex procedure, also known as a 'hybrid' procedure, since it is governed by separate legal provisions – the settlement procedure is specifically governed by Article 10a of Regulation No 773/2004, while the adversarial procedure is governed by other provisions of that regulation – the lawfulness of which is not, moreover, called into question in any way by the applicant. However, even in a hybrid procedure, the position of a non-settling undertaking cannot confer a procedural advantage on it enabling it to derogate from the applicable rules.
- 50 The Commission submits that, in any event, it had due regard, in its dealings with the applicant, for the principle of the presumption of innocence and, in particular, the requirements laid down by the ECtHR in its judgment of 27 February 2014, *Karaman v. Germany* (CE:ECHR:2014:0227JUD001710310). The Commission argues that it exercised caution and expressly stated, in footnote 4 of the settlement decision and recitals 27 and 28 of the contested decision, that the description of events set out in the settlement decision did not draw any conclusions as to Pometon's guilt regarding its participation in the cartel, it being necessary for an adversarial procedure establishing the infringement to be conducted at a later stage in respect of that undertaking.
- 51 In short, in order to determine here whether the principle of the presumption of innocence has been infringed, the Commission claims that it is necessary to look at the observance of Pometon's rights of the defence, which were, in the present case, guaranteed throughout the ordinary procedure leading to the adoption of the contested decision.

2. Findings of the Court

(a) Legal background to the present dispute in the light of the key aspects of the Commission's settlement decision

- 52 Before turning to the analysis of this plea, it should be briefly noted that the applicant pleads breach of its rights of the defence solely in relation to the fact that the Commission referred to some of its conduct in the settlement decision, which is not, however, addressed to it. Therefore, in no way does it criticise the Commission for failing to observe, during the procedure leading to the adoption of the contested decision, all of the procedural safeguards associated with its rights of the defence, such as those laid down by the general provisions of Regulation No 773/2004.

53 Having clarified the subject matter of this plea, it must be stated, as a preliminary point, that the parties disagree, among other things, on the scope of Article 41(1) and Article 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), particularly as regards the latter provision, in connection with their differing interpretations of the ECtHR's judgment of 27 February 2014, *Karaman v. Germany* (CE:ECHR:2014:0227JUD001710310), concerning respect for the principle of the presumption of innocence in complex criminal proceedings involving several persons who cannot be tried together (see paragraphs 43 and 50 above). Those two articles of the Charter are worded as follows:

'Article 41

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

...

Article 48

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

54 It should be recalled that, according to settled case-law, even though, in the exercise of its powers when dealing with infringements of competition law, the Commission may not be classified as a 'tribunal' within the meaning of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, or, *inter alia*, a public authority exercising functions of a criminal nature, it is nevertheless required to respect the fundamental rights of the European Union during the administrative procedure, including the right to good administration enshrined in Article 41 of the Charter. In particular, it is that provision, not Article 47 of the Charter, concerning the right to an effective remedy and to a fair trial, which governs the administrative procedure relating to restrictive practices before the Commission (judgment of 11 July 2013, *Ziegler v Commission*, C-439/11 P, EU:C:2013:513, paragraph 154).

55 It also follows from the case-law that the principle of the presumption of innocence – which, by virtue of its origin, is peculiar to the area of criminal law – as it is currently enshrined in EU law by Article 48(1) of the Charter, also applies *mutatis mutandis* to the administrative procedures relating to compliance with EU competition rules, given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties (judgment of 8 July 1999, *Hüls v Commission*, C-199/92 P, EU:C:1999:358, paragraph 150; see, also, to that effect, judgments of 21 January 2016, *Eturas and Others*, C-74/14, EU:C:2016:42, paragraphs 38 to 40, and of 12 April 2013, *CISAC v Commission*, T-442/08, EU:T:2013:188, paragraphs 93 and 94).

56 Accordingly, within the current EU legal framework for punishing infringements of the competition rules, respect for the fundamental and procedural rights which an undertaking accused by the Commission of an infringement of Article 101(1) TFEU must be able to enjoy is ensured, first, by that institution's duty to act, at all stages of a proceeding pursuant to the competition rules, with complete impartiality (Article 41 of the Charter), which also includes the obligation to observe the presumption of innocence of the companies under investigation (Article 48 of the Charter), and, secondly, by the right of any addressee of a binding act adopted by that institution under Article 101(1) TFEU to bring proceedings, in its defence, before the EU Courts, initially before the General Court at first instance and subsequently, where appropriate, before the Court of Justice on appeal.

- 57 Having set out those general premisses, it should be recalled, as regards the relevant procedural rules in the present case, that under Article 2 of Regulation No 773/2004, when the Commission decides to initiate proceedings against certain undertakings in order to investigate ‘cases of suspected infringement’ (see Article 105 TFEU), it issues ‘a statement of objections or a request for the parties to express their interest in engaging in settlement discussions’.
- 58 In the second case, Article 10a(1) of that regulation provides that ‘after the initiation of proceedings ..., the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions’.
- 59 In that respect, point 11 of the Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ 2008 C 167, p. 1; ‘the settlement notice’) states, furthermore, that the written declarations of undertakings which have expressed an interest in engaging in those discussions ‘[do] not imply an admission by the parties of having participated in an infringement or of being liable for it’.
- 60 However, to enable more specific progress to be made in the planned negotiations, Article 10a(2) of Regulation No 773/2004 provides as follows:
- ‘Parties taking part in settlement discussions may be informed by the Commission of:
- (a) the objections it envisages to raise against them;
 - (b) the evidence used to determine the envisaged objections;
 - (c) non-confidential versions of any specified accessible document listed in the case file at that point in time ...;
 - (d) the range of potential fines.’
- 61 In the present case, the file shows that the five undertakings involved in the alleged steel abrasives cartel, including Pometon, received, following their written statements, all of the information set out in Article 10a(2) of Regulation No 773/2004 (see paragraphs 8 and 60 above).
- 62 It is in that legal and factual context that the substance of this plea must be assessed.

(b) Scope of the Commission’s duty of impartiality and of the principle of the presumption of innocence, in particular in the specific case of a hybrid procedure staggered over time

- 63 In order to determine, in the first place, whether the Commission complied with its duty of impartiality vis-à-vis Pometon, particularly in the context of the settlement procedure from which Pometon nevertheless withdrew, it should be noted that the settlement decision adopted by the Commission in respect of the other four undertakings party to the cartel undoubtedly brought an end to the infringement of which that institution had accused them and, in consequence, also brought an end to the cartel in question and its negative effects on the relevant market, since four of the five undertakings concerned admitted coordinating the price of steel abrasives and agreed to terminate it immediately.
- 64 However, that settlement decision did not bring an end to the Commission’s actions as regards the infringement proceedings initiated against Pometon on 16 January 2013 (see paragraph 7 above), as Pometon decided to withdraw from the settlement procedure in which it had initially expressed an interest and the investigation in respect of it therefore had to continue by means of an adversarial

procedure, within the framework of infringement proceedings that had acquired a hybrid nature. Indeed, owing to Pometon's withdrawal from the settlement procedure, footnote 4 of the settlement decision reads 'the administrative proceedings under Article 7 of Regulation (EC) No 1/2003 against [Pometon] are pending'.

- 65 Against that background, the applicant's proposition that the references to some of its conduct in the settlement decision infringed its right to the presumption of innocence, thereby compromising the impartiality which the Commission is required to display towards it, is objectively inconsistent with the fact that the Commission, especially in footnote 4 of the settlement decision, expressly ruled out Pometon's guilt at that stage of the procedure, precisely because the investigation in its case had to continue by means of an adversarial procedure on the basis of a specific allegation, namely the statement of objections that the Commission in fact adopted on 3 December 2014.
- 66 In particular, the reference to Pometon's conduct in recital 38 of the settlement decision, in which the Commission states that the evidence in its possession 'demonstrates that contacts involving Winoia, Ervin [the leniency applicant] and Pometon evolved into a pattern of behaviour as of October 2003' (see paragraph 38 above), cannot cast doubt on that finding.
- 67 First of all, the wording used does not contain any legal characterisation of the facts in question or objectively support the conclusion that the Commission had, at the stage of the settlement decision, already established Pometon's guilt, since it had not demonstrated, in that introductory section of the settlement decision, the guilt of the other four parties to the cartel, which were the only addressees of the decision.
- 68 Next, the fact that the same settlement decision states, in the following section concerning the legal characterisation of the conduct ascribed to those other four undertakings (Legal Assessment), that they acknowledged their involvement in the infringement and thus admitted their guilt does not automatically convert, *de facto* and *de jure*, references to some of the applicant's behaviour in the description of events into a form of 'disguised verdict' by the Commission also covering Pometon's guilt.
- 69 That being the case, when drafting a settlement decision adopted, as here, in a procedure which has become hybrid in nature, the dividing line between, on the one hand, the description of the facts relating to the cartel as a whole and, on the other, the legal characterisation of the facts specifically attributed to the undertakings which have admitted their guilt should remain as clear and precise as possible, precisely so as to ensure that, in the same administrative matter, in this case the steel abrasives cartel (see paragraph 3 above), the definitive legal situation of the settling undertakings is not treated in the same way as the situation of the undertaking which exercised its right to withdraw from the settlement procedure and in respect of whom the administrative procedure is still ongoing (see paragraph 64 above).
- 70 For that reason, it is in the first place the fundamental obligation of impartiality, imposed by Article 41 of the Charter on all EU institutions, as the Court recalled in its judgment of 11 July 2013, *Ziegler v Commission* (C-439/11 P, EU:C:2013:513, paragraph 154), which must guide the Commission when drawing up a settlement decision in the specific context of a procedure that has become hybrid in nature concerning an undertaking which has withdrawn from that procedure (see paragraph 54 above).
- 71 An undertaking which ultimately decides to withdraw from the settlement procedure therefore does not lose its right to be treated impartially or its right to the presumption of innocence as regards the infringement at issue, even though no formal allegations will be made against it until the adoption of the statement of objections initiating the adversarial procedure, which, in the present case, was notified to the applicant on 3 December 2014.

- 72 Therefore, compliance with the duty of impartiality enshrined in Article 41 of the Charter requires the Commission, in a procedure that has acquired a hybrid nature, to draw up and state the reasons for the settlement decision exercising all necessary drafting precautions to ensure that that decision, while not addressed to the undertaking which withdrew from the settlement procedure, does not undermine the body of procedural safeguards which it must enjoy in the subsequent adversarial procedure. It is true that such drafting precautions should prompt the Commission to avoid as far as possible naming the non-settling undertaking in the settlement decision. However, they cannot lead to a prohibition on any direct or indirect reference to that undertaking.
- 73 The ECtHR's decision in the case giving rise to the judgment of 27 February 2014, *Karaman v. Germany* (CE:ECHR:2014:0227JUD001710310) (see paragraph 53 above), does not support the applicant's contention that the Commission, pursuant to its duty of impartiality and the principle of the presumption of innocence, as they apply to administrative proceedings to establish an infringement of Article 101 TFEU, should not have mentioned some of its conduct.
- 74 In the judgment of 27 February 2014, *Karaman v. Germany* (CE:ECHR:2014:0227JUD001710310), the ECtHR acknowledged that, in complex criminal proceedings involving several co-accused, the holding of separate trials staggered over time is nevertheless consistent with the principle of respect for the presumption of innocence in criminal law, provided, however, that the court concerned exercises particular caution when drafting the first of the two criminal judgments, which were necessary and were staggered over time specifically to ensure that proceedings against a large number of co-accused could be conducted in the best way possible.
- 75 In the case in point, this is what the Commission did, *mutatis mutandis*, as regards the applicant when it drafted the settlement decision addressed to the other four undertakings involved in the same cartel, as is apparent from the findings made in paragraphs 63 to 68 above.
- 76 Furthermore, upon reading the settlement decision, no potentially interested persons could objectively infer from the references to some of Pometon's conduct in the provisional settlement decision (see paragraph 45 above) that it was conclusively guilty, since that decision made clear, leaving no room for doubt, that it was addressed exclusively to the other four undertakings which had agreed to settle and that the case concerning Pometon would be dealt with at a later stage in a separate adversarial procedure.
- 77 Based on the foregoing considerations, it then remains only to be ascertained, for completeness of analysis of the plea, whether the references to the name and to some of the applicant's conduct in the 'Description of the events' of the settlement decision could actually be considered necessary for the fullest possible description of the facts at the origin of the cartel in question.
- 78 In that respect, it should be noted in the first place that, since parties to one and the same cartel are involved, such an examination must be carried out in the light not only of the factual and legal context concerning the four undertakings to whom the settlement decision was addressed, but also the broader context of an investigation procedure which has become hybrid in nature and which therefore must inevitably also include the situation of the applicant as a participant in the alleged infringement at issue, against whom the Commission adopted, on 16 January 2013, the decision initiating the investigation into the steel abrasive cartel (see paragraph 7 above).
- 79 In view of the continuity of the Commission's actions between the settlement procedure followed in this case in respect of the other four undertakings and the ordinary procedure that led to the adoption of the contested decision against the applicant (see paragraph 64 above), the disputed references to some of the latter's conduct in the settlement decision may prove to be objectively relevant to the description of the origin of the cartel as a whole.

- 80 However, in order to determine whether the Commission complied with its obligation of impartiality throughout the hybrid procedure at issue, it is necessary to take as a basis – as, moreover, the parties did – the interpretation criteria developed by the ECtHR in its judgment of 27 February 2014, *Karaman v. Germany* (CE:ECHR:2014:0227JUD001710310). Of course, such criteria can only be taken into consideration here *mutatis mutandis*, due to the fact that, in *Karaman*, those parameters related to proceedings staggered over time of an exclusively criminal nature (see paragraph 74 above), which is not the case in the hybrid administrative procedure followed in this case.
- 81 First, as regards the precautions taken by the Commission in the settlement decision, it should again be noted that the references which the applicant challenges, appearing exclusively in section 4 of the settlement decision, headed ‘Description of the events’, do not contain any legal characterisation of the conduct of that undertaking.
- 82 In addition, in section 2 of the settlement decision, immediately after the list in section 1 of the four undertakings to whom the settlement decision was addressed, the Commission expressly describes the applicant in subsection 2.25 as an undertaking subject to the investigation proceedings initiated in respect of the participants in the cartel at issue, not as a party to the settlement procedure. In order to avoid any possible ambiguity, the Commission again points out that the applicant is not an addressee of that decision.
- 83 Furthermore, as has already been noted in paragraphs 64 and 65 above, in footnote 4 of the settlement decision, the Commission states that the decision is based on matters of fact as accepted by the four settling undertakings and that the references to Pometon’s conduct are used to establish only the liability of those four undertakings for the infringement, since the proceedings in respect of Pometon are pending.
- 84 It follows that those references to Pometon do not provide objective grounds for suspecting that the Commission deliberately prejudged the guilt and liability of that undertaking in connection with the cartel as early as the settlement decision addressed to the other four undertakings involved in it.
- 85 Secondly, as for whether the references in the settlement decision to the applicant’s conduct were necessary to establish the liability of the addressees of that decision, the Court must first of all reject the comparison which the applicant draws with the settlement decision of the Commission in the case giving rise to Decision C(2014) 4227 final, in which one of the undertakings involved in the cartel also withdrew from the settlement (see paragraph 40 above).
- 86 The facts of those two cases are not identical. In any event, the applicant fails to identify any plausible similarity between the cartel in that case and the cartel here.
- 87 That said, it must be recalled, next, that the wording of recital 38 of the settlement decision, according to which the references to the applicant’s situation in the preceding recitals ‘[demonstrate] that contacts involving Winoa, Ervin and Pometon evolved into a pattern of behaviour as of October 2003’, thus marking the beginning of the infringement, does not mean that, at that stage of the statement of reasons for the settlement decision, the Commission had already established all of the conditions of fact and law proving that Pometon, in the same way as the other four undertakings that had admitted their guilt, was guilty of having participated in the infringement at issue (see paragraphs 66 and 67 above).
- 88 As regards, moreover, recital 37 of the settlement decision concerning the geographic scope of the cartel covering, for the five undertakings concerned, the entire EEA, it should be pointed out that, since the Commission found that there was a single and continuous infringement, it was necessary to specify the territorial extent of the cartel as a whole (see paragraph 259 below).

- 89 Finally, recital 31 of the settlement decision, which states that ‘the contacts continued with Pometon until 16 May 2007 when it sold the steel abrasives business to Winoa and exited the business’, is not meant as a finding of the applicant’s liability for the infringement in question, but rather seeks to describe the development over time of the cartel in which the four addressees of the settlement decision admitted having participated, specifically in the light of Winoa’s acquisition on that date of Pometon’s business (recitals 32 to 35 of the settlement decision).
- 90 In those circumstances, and in accordance with the provisions applicable in this case, as set out in paragraphs 57 to 60 above – the lawfulness of which was not challenged by the applicant – the applicant cannot legitimately complain that the Commission, by referring to some of its conduct in the settlement decision in relation to the conduct of the other four undertakings concerned, infringed its fundamental duty of impartiality in the way it subsequently dealt with the still pending steel abrasives case against the applicant, or infringed the applicant’s presumption of innocence, as an undertaking that had decided not to take further steps in the settlement procedure while the other four competitors had, by contrast, agreed to it.
- 91 The applicant nevertheless maintains that, in the present case, the infringement of the presumption of innocence stems from the fact that the two procedures relating to the steel abrasives cartel to which it was subject – first, the settlement procedure, followed by the adversarial procedure – were staggered over time, which should have compelled the Commission to omit any reference to its specific situation from the settlement decision (see paragraphs 7, 10 and 11 above).
- 92 It is clear here that the fact that four of the five undertakings involved in the cartel admitted their guilt is a factor capable of having a significant and inevitable impact on the facts relating to the participation of the fifth undertaking suspected of having been a party to the same cartel, namely Pometon.
- 93 However, when an undertaking freely decides to opt for the hybrid procedure rather than provide the Commission with settlement submissions, it cannot claim, by relying on the principle of the presumption of innocence, that the Commission, as the authority responsible for ensuring compliance with the competition rules, is required to completely disregard in the settlement decision certain facts admitted by the other settling undertakings which are relevant for assessing the existence of that cartel as a whole, even though they relate to the conduct of the applicant who chose to take no further steps in the settlement procedure.
- 94 Moreover, the Commission’s argument that the applicant’s proposition would be tantamount in practice to conferring a form of ‘immunity from fines’ on undertakings that withdraw from settlement procedures cannot be upheld, either.
- 95 The point of law raised in that respect by the applicant does not seek to challenge the Commission’s power to impose a fine on it, but rather has its sights on the duty of impartiality that that institution is bound to comply with in dealing with the steel abrasives case against it and, therefore, on respect for the principle of the presumption of innocence in a hybrid procedure staggered over time.
- 96 However, the right of an undertaking to withdraw from a settlement procedure does not also confer on it the right to an irrebuttable presumption of innocence, that is to say, a presumption which cannot be disproved by evidence to the contrary, evidence that it is, in the instant case, for the Commission to adduce precisely in the course of an adversarial procedure with the undertaking concerned.
- 97 Consequently, notwithstanding its hybrid nature and the fact that it is staggered over time, such a procedure nevertheless allows, on the one hand, the Commission to fulfil in a proper manner its task of monitoring and punishing conduct which may prevent, restrict or distort free competition within the internal market (Article 101(1) TFEU) and, on the other, the undertakings concerned to assert fully their rights of the defence, in the specific context of a direct and adversarial confrontation with the Commission.

- 98 In addition, the applicant does not contend that such a time lag between the two procedures, when they are implemented, is, as such, contrary to the relevant provisions of the applicable regulations or the provisions of Article 41 of the Charter, concerning the duty of impartiality of the EU institutions. By contrast, the applicant submits that, in the present case, the time lag between the settlement decision and the contested decision undermines the presumption of innocence it must enjoy until its guilt has been established according to law.
- 99 It should be observed, however, that the decision to initiate an adversarial procedure in respect of an undertaking that has withdrawn from a settlement procedure does not require the Commission to delay or suspend the adoption of ‘appropriate measures to bring ... an end’ to the cartel in question (Article 105 TFEU), particularly those relating to other undertakings that have admitted their liability and submitted final settlement submissions. The adoption of a settlement decision when all legal conditions so permit is, in fact, in the overriding public interest of safeguarding competition to the benefit of consumers. As also stated in recital 3 of Commission Regulation (EC) 2015/1348 of 3 August 2015 amending Regulation No 773/2004 (OJ 2015 L 208, p. 3), ‘the interests of consumers in ensuring that secret cartels are detected and punished outweigh the interest in imposing fines ... on those undertakings that enable the Commission to detect and prohibit such practices’.
- 100 Accordingly, first, none of the provisions of EU law that apply in this case require the Commission to adopt a settlement decision at the same time as the infringement and penalty decision against an undertaking which has withdrawn from the settlement procedure or has even refused to participate in such a procedure from the outset. In that situation, the possibility of a time lag expressly follows from point 19 of the settlement notice, which states:
- ‘Should the parties concerned fail to introduce a settlement submission, the procedure leading to the final decision in their regard will follow the general provisions, in particular Articles 10(2), 12(1) and 15(1) of Regulation (EC) No 773/2004, instead of those regulating the settlement procedure.’
- 101 Secondly, in consequence, even in the particular context of a hybrid procedure staggered over time, the applicable provisions of EU law enable the Commission to fulfil its task of monitoring and punishing cartels effectively, provided however that it fully complies with its duty of impartiality and the presumption of innocence with regard to the party which withdrew from the settlement and chose to have its case dealt with by that institution by means of a specific adversarial procedure.
- 102 During such an adversarial procedure, the undertaking concerned may, by invoking, inter alia, all the powers associated with the rights of the defence conferred on it by EU law, challenge all the inculpatory evidence put forward by the Commission and, at the same time, put forward all relevant exculpatory arguments.
- 103 For all of those reasons, in the light of both the drafting precautions taken by the Commission when drawing up the settlement decision and the substantive content of the disputed references to the applicant in that decision, those references cannot be regarded as evidence of a lack of impartiality on the part of that institution towards the applicant and, consequently, a lack of respect for the presumption of innocence in the contested decision.
- 104 In view of the foregoing, the first plea in law must therefore be rejected.

B. Second plea in law: infringement of Article 101 TFEU and Article 53 of the EEA Agreement, inadequate and contradictory statement of reasons, and infringement of the rights of the defence and the rules governing the burden of proof, in so far as the Commission ascribed to the applicant participation in the cartel

- 105 This plea may be broken down into three parts. In the first two parts, the applicant denies that it participated in each of the two limbs of the alleged cartel relating, first, to the method for calculating the scrap surcharge and, secondly, coordination in respect of individual customers. In the third part, it claims that it did not participate in the alleged single and continuous infringement. In support of those three parts, the applicant essentially pleads that the evidence which the Commission relied on in the contested decision was insufficient since it was unclear, inconsistent and contradictory.
- 106 Before addressing each of the three parts of this plea, some preliminary remarks should be made concerning the rules on the burden of proof and the taking of evidence.

1. Preliminary observations on the burden of proof and the taking of evidence

- 107 Article 2 of Regulation No 1/2003 expressly provides that ‘the burden of proving an infringement of [Article 101(1) or Article 102 TFEU] shall rest on the party or the authority alleging the infringement’. Thus, it is incumbent on the Commission to prove the infringement found by it and to demonstrate to the requisite legal standard the existence of the circumstances constituting an infringement (see, to that effect, judgment of 12 April 2013, *CISAC v Commission*, T-442/08, EU:T:2013:188, paragraph 91 and the case-law cited).
- 108 Therefore, in accordance with the principle of the presumption of innocence, any doubt of the Court when it is called upon to assess whether the Commission has established to the requisite legal standard that an undertaking is guilty of an infringement of Article 101 TFEU must benefit the undertaking to whom the decision finding the infringement was addressed (see, to that effect, judgment of 12 April 2013, *CISAC v Commission*, T-442/08, EU:T:2013:188, paragraph 92 and the case-law cited).
- 109 Thus, the Commission must, in that situation, adduce precise and consistent evidence to support the finding that the infringement and the penalty in question were established according to law, namely in compliance with the applicable legal rules and, in particular, the rights of the defence, which is guaranteed for anyone who has been charged. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the set of indicia relied on by the Commission, viewed as a whole, meets that requirement (see, to that effect, judgments of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 52, and of 12 April 2013, *CISAC v Commission*, T-442/08, EU:T:2013:188, paragraphs 96 and 97).
- 110 Since the prohibition on participating in anticompetitive practices and agreements and the penalties which offenders may incur are well known, it is increasingly common for collusive activities to take place in a clandestine fashion, for meetings between representatives of the undertakings to be held in secret, most frequently in a non-member State, and for the associated documentation to be reduced to a minimum, precisely in order to avoid detection of the cartel and penalties which are quite rightly severe.
- 111 Thus, even if the Commission discovers evidence explicitly showing unlawful contact between the operators of the companies concerned, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction (judgments of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P,

C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 55 and 56, and of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 50).

- 112 Therefore, the existence of anticompetitive practices or agreements must, in most cases, be inferred from a number of coincidences or indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (judgments of 17 September 2015, *Total Marketing Services v Commission*, C-634/13 P, EU:C:2015:614, paragraph 26, and of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 51).
- 113 Faced with anticompetitive practices which are ever more difficult to detect, the Commission may, among other things, take account of elements from outside the infringement period if they form part of the body of evidence it relies on to prove the infringement. It may thus rely on factual circumstances prior to the anticompetitive conduct in order to confirm the content of an objective item of evidence (see, to that effect, judgment of 2 February 2012, *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, not published, EU:T:2012:48, paragraph 188) or even on circumstances subsequent to that conduct (judgment of 16 June 2015, *FSL and Others v Commission*, T-655/11, EU:T:2015:383, paragraph 178).
- 114 Moreover, where the Commission relies, in establishing an infringement of competition law, on documentary evidence, the burden is on the undertakings concerned not only to put forward a plausible alternative to the Commission's view but also to allege that the evidence it relied on in the contested decision to establish the existence of the alleged infringement is insufficient (see judgment of 16 June 2015, *FSL and Others v Commission*, T-655/11, EU:T:2015:383, paragraph 181 and the case-law cited).
- 115 As regards the evidence that may be relied on to establish an infringement of Article 101 TFEU, the principle which prevails in EU law is that of the unfettered evaluation of evidence, from which it results, first, that where evidence has been obtained lawfully, its admissibility cannot be contested before the General Court, and, secondly, that the only relevant criterion for the purpose of assessing the probative value of evidence lawfully adduced relates to its credibility (judgment of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 128).
- 116 According to the generally applicable rules on evidence, the credibility and, therefore, the probative value of a document depend on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and the soundness and reliable nature of its contents.
- 117 Special importance should therefore be attached to documents which have been drawn up in close connection with the events or by a direct witness of those events. That is the case, in particular, as regards documents relating directly to meetings at which the planning or implementation of the cartel was discussed and which were clearly drawn up without any thought for the fact that they might fall into the hands of third parties (see, to that effect, judgments of 27 September 2012, *Shell Petroleum and Others v Commission*, T-343/06, EU:T:2012:478, paragraph 207, and of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 109).
- 118 From that point of view, statements made by other incriminated undertakings may be of significance for the purposes of determining the existence of a cartel. In particular, statements made in the context of an application for immunity under the Commission's leniency programme (see recital 3 of Regulation 2015/1348, cited in paragraph 99 above) have a high probative value (see, to that effect, judgments of 8 July 2004, *JFE Engineering and Others v Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraphs 205, 211 and 212, and of 20 May 2015, *Timab Industries and CFPR v Commission*, T-456/10, EU:T:2015:296, paragraph 115). Indeed, any attempt by a leniency

applicant to mislead the Commission could call into question the sincerity and the completeness of its cooperation and, thus, expose it to losing the benefit of such cooperation (see, to that effect, judgment of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 138).

- 119 For that reason, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter undertakings unless it is supported by other evidence, given that the degree of corroboration required may be lesser in view of the reliability of the statements at issue (judgments of 19 December 2013, *Siemens and Others v Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 135, and of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 28).
- 120 In short, when considering the evidence of the infringement alleged by the Commission, each item of evidence put forward by that institution does not necessarily have to be specific and constitute in itself independent proof of the infringement. It is sufficient for the entire adversarial process and the body of evidence produced by the Commission, assessed as a whole, to meet the basic requirements relating to proof of guilt, so that the EU Courts before which proceedings may be brought to review the infringement decision are able to find that guilt has been proven according to law (see paragraph 109 above).

2. First part of the second plea in law: the applicant did not participate in the first limb of the cartel relating to the method for calculating the scrap surcharge

(a) Arguments of the parties

- 121 The applicant claims that the Commission's finding that it participated in the arrangement concerning the method for calculating the scrap surcharge is incorrect and is not based on any evidence. It argues that the scrap surcharge could not be applied automatically and that it required regular exchanges between the undertakings involved as well as meetings and other contacts which constituted the very essence of the cartel.
- 122 In the first place, the applicant asserts that it was not sufficient for each producer to consult the price indexes for scrap, namely the CAEF 225 index for Italy and the Eurofer index for the other EEA countries, and for it then to calculate, independently, the amount of the scrap surcharge by applying the previously agreed formula. On the contrary, the applicant states that it follows from the Commission's findings in the contested decision (recitals 40, 121, 124 and 125) that, in order to determine the scrap surcharge, the producers had to receive the communication that Winoa was required to send every month by email to each cartel participant ('the spreadsheet') or, failing which, they had to consult the website of Winoa on which it published, as from May 2004, information on the scrap surcharge and notified the other parties of that publication.
- 123 In that regard, the applicant claims in any event that it never received from Winoa either the spreadsheets or the notification that it had published the scrap surcharge on its website. Moreover, it denies that such publication could replace the sending of the spreadsheets (recital 127 of the contested decision).
- 124 In the second place, concerning its participation in meetings, the applicant argues that, of the 27 meetings that took place during the period ending on 16 May 2007, it participated in only 2 meetings with the other undertakings concerned: the first on 28 September 2004 and the second on 9 June 2005 (recital 69 of the contested decision).

- 125 In particular, no meeting took place on 16 May 2007. The meeting in Milan (Italy), referred to in recitals 52 to 56 of the contested decision, in fact took place on 17 May 2017, the day after the applicant sold its business in the steel abrasives sector to Winoa and thus left that market for good (recitals 11, 129 and 166 of the contested decision).
- 126 In the third place, regarding the other contacts, the applicant submits that it is not apparent from the documents relied on in the contested decision (recitals 48 to 55) that its contacts with the other cartel participants were such as to prove that it continued to apply, from 2004 onwards, the scrap surcharge agreed to in October 2003.
- 127 In short, the applicant states that the Commission distorted the facts and failed to prove that it had been involved in collusive contacts.
- 128 The Commission contests those arguments.

(b) Findings of the Court

(1) Initial role of the applicant in setting up the scrap surcharge in 2003

- 129 The applicant does not deny its initial liability for the first limb of the cartel as from 3 October 2003. Nor did it contest that liability in its reply to the statement of objections of 3 December 2004 (recitals 114 and 160 of the contested decision). It is thus common ground that the applicant not only concluded the agreement on the method for calculating the scrap surcharge, with Winoa and Ervin, at the meeting of the representatives of those three undertakings on 3 October 2003 at a restaurant on the shores of Lake Garda (Italy), but that it also played an important role in 2003 in the preparation of that meeting and the choice of the new uniform calculation system.
- 130 Furthermore, it follows from the documents in the case that the applicant was involved, after the conclusion of the agreement of 3 October 2003, in coordinating and actually implementing the new system for calculating the scrap surcharge. That involvement is evidenced, first of all, by a series of emails it exchanged with Winoa in October 2003 (recitals 42 to 45 of the contested decision), which the applicant does not dispute, and by an email of 1 December 2003 from the general manager of Pometon Deutschland to the director-general of the applicant (recital 46). That document, in particular, clearly shows that the applicant asked its German subsidiary to apply the scrap surcharge, an instruction which is entirely consistent with the strategy of the cartel at issue. Finally, Winoa's internal email of 9 December 2003 shows that the introduction of that surcharge by the Spanish subsidiaries of Winoa and of the applicant was also the subject of coordination between those undertakings (recital 47 of the contested decision).
- 131 Those facts are also not in dispute.

(2) Automatic application of the scrap surcharge after 1 February 2004

- 132 The uniform scrap surcharge formula, as agreed at the meeting of 3 October 2003 and applied, according to the Commission, by all the cartel participants as from February 2004, is described in recital 37 of the contested decision.
- 133 That formula was based, on the one hand and for the whole of the EEA, except the Italian market, on the Eurofer scrap price index. That index was published every month until 2 March 2016 on the website of Eurofer, the European Steel Association. It was calculated on the basis of the average price in EUR per tonne based on bid and ask prices collected from major traders in Germany, France, Italy, Spain and the United Kingdom (recital 7 of the contested decision).

- 134 On the other hand, for Italy, where scrap prices were significantly higher than in most other European countries, that formula was based on the CAEF 225 index, a national index established by the Milan Chamber of Commerce and published on the website of Assofermet, an Italian association representing undertakings active in the steel products sector.
- 135 Unlike the Eurofer index, the CAEF 225 index did not take the form of a single monthly figure, namely one indicator alone, but rather a minimum and maximum price band published fortnightly by Assofermet (recitals 37 and 126 of the contested decision).
- 136 Based on that information, the scrap surcharge was calculated, under the terms of the agreement, by subtracting, by way of 'offset', the figure 68 from the Eurofer index and the figure 62 from the CAEF 225 index. To construct the base price of steel abrasives applicable to customers, the amount thus obtained was added to the other costs, including the actual purchase price of the scrap.
- 137 Although it does not challenge that calculation method in its pleadings, the applicant submits, however, that the producers concerned could not apply the scrap surcharge automatically on the basis of those two indexes alone.
- 138 According to the applicant, in order to apply the surcharge, each producer either had to receive the spreadsheet every month, namely the monthly email concerning the scrap surcharge that Winoia was responsible for sending to the cartel participants until mid-2007, or had to consult, as from May 2004, the information on the scrap surcharge published on Winoia's website.
- 139 In response to a question from the Court, the applicant argued at the hearing that, particularly in Italy, it would have been very difficult to apply the scrap surcharge without the data contained in the spreadsheets, since the CAEF 225 index consisted in a price band published every 15 days, specifically, four indicators per month (see paragraph 135 above). At the hearing, the applicant also stated that the conversion of those four indicators into a single amount was carried out by Winoia, in the spreadsheets, which also mentioned not only that one amount but also the actual amount of the scrap surcharge.
- 140 Therefore, according to the applicant, the Commission's claims regarding its participation in the first limb of the cartel were incorrect and not supported by sufficient evidence, since the applicant never received the monthly spreadsheets, which it argues were necessary in order to implement the first limb of the cartel, or even Winoia's email informing the other cartel participants of the publication, as from May 2004, of information on its website concerning the scrap surcharge and forwarding them the link to that site (see paragraph 122 above).
- 141 However, that argument, which is essentially based on the premiss that the automatic application of the scrap surcharge agreement was impracticable or impossible, particularly in Italy, cannot be upheld.
- 142 First of all, as regards the application of the scrap surcharge agreement in Italy, it should be noted that since the applicant does not deny having participated in the design and initial set-up of the agreement, it is unlikely that, in the actual implementation of that anticompetitive action plan, Pometon – which was essentially one of the cartel's architects – could reasonably refrain from applying the surcharge, without provoking any reaction from its partners in the cartel, solely because it did not have sufficient information from Winoia. Indeed, that surcharge had been designed by Pometon and agreed with the other undertakings concerned precisely so that it could be implemented autonomously and automatically by each party to the cartel, including on the Italian market, which is primarily Pometon's market.
- 143 It is clearly apparent from the documentary evidence produced by the Commission, such as the email of 5 September 2003 from the applicant's director-general to Winoia, that the scrap surcharge system was, in actual fact, intended to apply automatically and that the indexes on which that system was to

be based had been chosen specifically for that reason. This confirms that it was not absolutely necessary for a monthly notice to be sent to the cartel participants for the purposes of applying the scrap surcharge.

- 144 Next, as regards the calculation, in the strict sense, of the scrap surcharge in Italy, the applicant's argument that it was not readily able to determine the amount of that increase without the benefit of the spreadsheet drawn up by Winoa (see paragraph 139 above) cannot succeed, either. It is expressly stated in the exchange of internal emails within Winoa of 31 May 2007 – on which the applicant relied at the hearing, in reply to a question from the Court – that, in order to determine the level of the CAEF 225 index to be taken into account for the calculation of the surcharge, Winoa's employees simply took the price band drawn up twice a month by the Milan Chamber of Commerce and calculated the average of those four amounts. It is in no way disputed that this approach did not change following the agreement of 3 October 2003 on the new system for calculating the scrap surcharge in question (see paragraph 129 above). Accordingly, there is nothing to suggest that the other parties to the cartel were not able, if needed, to perform the abovementioned calculation.
- 145 Finally, it is apparent from the documents relied on by the Commission in recital 125 of the contested decision, which were produced by the parties, that, even before the introduction of the new system for calculating the scrap surcharge, Winoa would send the applicant every month a spreadsheet referring to the previous index on which the scrap surcharge was based as well as the amount of that surcharge. This is evidenced by the fax sent by the applicant's director-general to Winoa on 14 February 2003 and a number of such spreadsheets contained in the Commission's file. In view of the applicant's involvement in setting up the new system (see paragraphs 129 and 130 above), it is unlikely that Winoa stopped sending spreadsheets to the applicant after 1 February 2004, even though it was agreed that the applicant would be responsible for the monthly announcements concerning the scrap surcharge to be sent to the cartel participants (recital 38 of the contested decision).
- 146 In short, it is apparent from all of the evidence examined in paragraphs 141 to 144 above that the automatic application of the first limb of the cartel cannot be called in question merely because the introduction of the scrap surcharge calculation method was accompanied by the establishment a system of monthly notices, or coordination, ensured by Winoa.
- 147 For all of those reasons, since the Commission has proven to the requisite legal standard that the scrap surcharge was, on any view, automatically applicable, the absence – relied on by the applicant – of documentary evidence showing that Winoa sent spreadsheets to Pometon during the period covering its participation in the infringement is not such as to raise doubts as to the involvement of that undertaking in the first limb of the cartel after 1 February 2004.

(3) Contacts between the applicant and the other cartel participants as from 2004

- 148 In the light of the automatic nature of the scrap surcharge, the applicant's argument that participation in meetings and other contacts were necessary for the implementation by Pometon of the first limb of the cartel, from 2004 onwards, must also fail.
- 149 First, on the matter of meetings, the applicant disputes the Commission's assertion in recital 111 of the contested decision that, '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' and notes that the Commission states that it attended only 2 out of 27 meetings that took place during the period in issue.

- 150 However, due to the automatic nature of the system, and even if it were accepted that the other cartel participants, or some of them, actually held meetings more or less regularly in order to monitor the application of the scrap surcharge, it cannot be inferred from the fact that the applicant did not participate in those meetings that it had ceased to apply that system.
- 151 Secondly, as for other contacts, the arguments put forward by the applicant are also not capable of casting doubt on the probative value of the evidence relied on by the Commission to support its findings regarding Pometon's participation in the first limb of the cartel.
- 152 First of all, the Commission rightly points out that the very purpose of Wino's internal email of 24 March 2004, referred to in recital 48 of the contested decision and describing a conversation held with the general manager of Pometon España, was to monitor the implementation of the scrap surcharge, thus confirming Pometon's involvement in the first limb. The claim put forward by the applicant that the discussion specifically concerned the question of Pometon's compliance with the scrap surcharge agreement in relation to one of its customers in Spain, the company Acerinox, cannot invalidate that finding.
- 153 Next, the emails exchanged between Würth and Pometon between 16 and 18 November 2005, referred to in recital 50 of the contested decision, concerned, as the Commission points out, the extension of the scrap surcharge system in question to supplies of steel abrasives between the cartel members.
- 154 Contrary to the applicant's assertions, those emails clearly refer to that system. In particular, in his email of 17 November 2005, the applicant's director-general told Würth that, in order to set the price for the sale of steel abrasives by Pometon to Würth in 2006, 'the solution would be to apply the monthly scrap surcharge as currently done in the markets'. He thus refers explicitly to the fact that the system in issue was applied by the cartel participants, including Pometon, in the relevant markets and advocated extending it to supplies between producers.
- 155 Finally, the existence of anticompetitive contacts between Pometon and the other cartel participants is also demonstrated by Ervin's internal email of 20 March 2007, mentioned in recital 52 of the contested decision, which states that representatives of Wino and Pometon had invited the author of that email to attend a meeting in Milan, on '16th/17th May' 2007, in order to discuss the application of the scrap surcharge (see paragraph 301 below).
- 156 Thirdly, the references in the contested decision (recitals 69, 95, 107, 108, 110, 113 and 143) to the applicant's participation in meetings or other contacts between the cartel participants cannot be interpreted as meaning that the Commission itself considered that such contacts were necessary for the implementation of the first limb of the cartel, which would be at odds with the evidence on the automatic nature of the scrap surcharge system.
- 157 First of all, the references mentioned in paragraph 156 above, relied on by the applicant, do not relate only to contacts specifically concerning the application of the first limb as from 2004. Also, where they concern the first limb, those references do not, in any way, demonstrate that such contacts were necessary for the purposes of applying the scrap surcharge, but rather support, by precise and consistent evidence, the Commission's findings regarding the applicant's liability for the first limb of the cartel.
- 158 In particular, the Commission's conclusion in recital 95 of the contested decision 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' must be understood, in view of the findings preceding it, as including the preparatory contacts in 2003 for the meeting of 3 October 2003. Furthermore, that conclusion covers not only the scrap surcharge, but both limbs of the cartel. The same holds for recitals 107, 108, 110, 113 and 143 of the contested decision. Lastly, as

for the meetings of 28 September 2004 and 9 June 2005, those meetings are mentioned in recital 69 of that decision only in connection with the implementation of the second limb of the cartel by the applicant in Germany (see paragraphs 215 to 218 below).

159 Accordingly, regarding the first limb of the cartel, the Commission has proven the existence, after the initial set-up phase of the new scrap surcharge system, of a number of collusive contacts between Pometon and the other parties to the cartel (see paragraphs 153 to 156 above), contacts which, without being necessary for the application of that system, were intended to ensure that its application was monitored.

(4) Conclusion on the evidence of the applicant's participation in the first limb of the cartel

160 In the light of all the foregoing considerations, the Court finds that the evidence adduced by the applicant does not show that the Commission failed to prove, to the requisite legal standard, its individual liability for the first limb of the cartel, having regard, in the first place, to the automatic nature of the application of the scrap surcharge (see paragraph 148 above) and, in the second place, to the fact that the applicant's limited but significant contacts with the other cartel participants, relied on by the Commission (see paragraph 160 above), show that the applicant was not only behind the introduction of that system, which it did not dispute, but also took part in monitoring its application. In view of those findings, the applicant's participation in the first limb of the cartel is amply demonstrated, without prejudice to the assessment of the duration of its participation, which is challenged in the arguments put forward by the applicant under the fourth plea in law (see paragraphs 289 to 315 below).

3. Second part of the second plea in law: the applicant did not participate in the second limb of the cartel concerning coordination in respect of individual customers

(a) Arguments of the parties

161 The applicant submits that the reconstruction of the events giving rise to the cartel forming the subject matter of the contested decision is incoherent and inconsistent with the evidence put forward by the Commission itself, especially with the statements of the leniency applicant, who mentioned regular meetings not only in Germany, but also in Italy, where, according to the second of those statements, 'competitors ... met ... about 3-4 times a year'.

162 The applicant observes, in the first place, that none of the leniency applicant's statements names Pometon as one of the undertakings that participated in the overall system of coordination in respect of individual customers. By contrast, those submissions showed that there were frequent collusive contacts between the other cartel participants, particularly concerning actions on the markets of the main sales regions for steel abrasives in Europe, namely Germany, Italy, Spain, France and the United Kingdom.

163 The applicant maintains that the only reference the leniency applicant makes to Pometon regarding the German market relates in actual fact to conduct attributable to Pometon Abrasives, a company belonging to the Winoa group, or to conduct that is not confirmed by documentary evidence (recital 132 of the contested decision). In addition, in respect of the Italian market, the leniency applicant stated that the applicant had participated in two meetings, on 6 June and 4 October 2007, even though it had, by that time, already transferred its business in the steel abrasives sector to Winoa.

- ¹⁶⁴ In the second place, specifically as regards the Spanish market, the applicant submits that the contacts between Pometon and Winoa ‘until 5 April 2004’, to which the Commission refers in recital 64 of the contested decision, were purely bilateral and took place over only six months, between October 2003 and April 2004. As for Winoa’s internal email of 15 July 2005, mentioned in recital 67 of the contested decision, this demonstrates that there was absolutely no customer sharing agreement.
- ¹⁶⁵ The applicant also states that the documents in the file confirm that there was no coordination in respect of individual customers between Pometon and Winoa. That is the case with respect to the minutes of a meeting of 18 May 2004, annexed to one of Winoa’s internal emails, describing ‘difficulties to apply [the scrap surcharge] in a number of customers due to Ilarduya and Pometon competition on fixed price’, and Winoa’s internal email of 15 July 2005, mentioned in recitals 67 and 131 of the contested decision. That email was not, in any event, followed by a meeting with Pometon.
- ¹⁶⁶ In the third place, concerning the French and Belgian markets, the applicant contends that the Commission relies, in recital 63 of the contested decision, on an internal email of Winoa of 19 January 2004 describing a discussion between MTS and Winoa, in which Winoa suspected that Pometon had undercut its price to a French customer. Contrary to the Commission’s assertion, that document proves that Pometon was considered by Winoa to be an aggressive competitor. That is, moreover, consistent with the statements of the leniency applicant, which make no mention at all of Pometon in relation to ‘competitor contacts regarding France and Benelux’.
- ¹⁶⁷ In the fourth place, as regards the German market, the applicant recalls that, according to recital 164 of the contested decision, Germany was the only country where contacts were organised in a structured manner. Of the 14 multilateral and 10 bilateral meetings which took place during the period when Pometon was still active on the steel abrasives market (in other words, until 16 May 2007), the presence of Pometon is confirmed at one multilateral meeting and one bilateral meeting at the most. Furthermore, the applicant disputes the probative value of the second statement of the leniency applicant, referred to in recital 68 of the contested decision. Indeed, the expense reports produced by the leniency applicant do not relate to the applicant. As for the receipt from the NodingerHof hotel, where the meeting of 16 November 2006 took place, this demonstrates that none of Pometon’s representatives attended the meeting, since the receipt does not mention their names, only those of the other participants. Finally, the unreliability of the abovementioned statements as regards Pometon’s alleged participation in meetings with other competitors is confirmed by the fact that they refer to the applicant’s participation in a meeting held on 13 November 2017, six months after Pometon had exited the market.
- ¹⁶⁸ The applicant also disputes the documentary evidence relied on by the Commission to corroborate its participation in the meetings of 28 September 2004 and 9 June 2005. In particular, it claims that there is no documentary evidence of the topics discussed during those meetings and that the leniency applicant does not provide even a brief description in that regard.
- ¹⁶⁹ In the fifth place, in respect of the Italian market, the applicant states, first of all, that the Commission made no finding that it had participated in meetings with its competitors (see the end of paragraph 161 above). Next, it submits that the five documents referred to in recitals 75 to 79 of the contested decision, on which the Commission relies, do not provide a basis ‘to conclude beyond reasonable doubt’ that it was involved in coordination in respect of individual customers.
- ¹⁷⁰ Concerning the fifth document in particular (recital 79 of the contested decision), containing emails exchanged in May 2008 between an employee of Pometon Abrasives, Mr T., and an employee of MTS, the applicant submits that the email of 28 May 2008 from the former to the latter, stating that ‘as you perfectly know, [Pometon Abrasives’s] policy is not to cut the prices but on the contrary to increase them’, referred to the company’s policy after its acquisition by Winoa, not the applicant’s policy.

- 171 The Commission contests all of those arguments. It states, first of all, that it itself acknowledged that Pometon's role in the second limb of the infringement was less important and granted it a 10% reduction of the fine on account of mitigating circumstances.
- 172 However, even though the applicant had only occasional collusive contacts of a bilateral nature concerning a limited number of countries, the contacts that were proven were significant and demonstrate the existence of the cartel and Pometon's involvement in it.

(b) Findings of the Court

- 173 The second limb of the cartel concerns coordination of the commercial terms applied by the participants to some individual customers in order to restrict price competition in respect of those customers. In essence, the Commission considers that the cartel participants discussed, mainly on a bilateral basis, competitive parameters relating to the sale price of steel abrasives to be charged to their respective customers, while quality, services and other commercial terms remained subject to competition.
- 174 Thus, in recital 57 of the contested decision, the Commission states:

'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. In parallel with the coordination on the scrap surcharge (see for example recitals (35), (45), (52), (61) and (77)), the participants agreed in 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.'

(1) Preliminary observations on the scope of the second part of the second plea in law

- 175 It should be noted as a preliminary point that the Commission accepts in the contested decision (recitals 58 and 59) that, while the contacts between Ervin and Winoia to coordinate their conduct towards individual customers were more frequent, the applicant's involvement in such contacts was only occasional, mainly when one of the participants failed to comply or was suspected of not complying with the second limb of the cartel.
- 176 However, the Commission considers (recitals 225 and 226 of the contested decision) that that fact does not rule out Pometon's participation in or liability for the second limb of the cartel, since the more limited nature of its involvement in that limb may nevertheless be taken into account as a mitigating circumstance. Therefore, the Commission granted the applicant a 10% reduction of the fine as it had done, moreover, in the settlement decision (recital 103) as regards MTS and Würth, which had also contributed to a lesser extent than Winoia and Ervin in the second limb of the cartel.
- 177 The applicant, however, denies all liability for the second limb of the cartel.
- 178 It should first be recalled that the case-law distinguishes between, on the one hand, a finding that an undertaking is liable for a single and continuous infringement as a whole, even though that undertaking participated in only some of the collusive conduct, and, on the other, the extent of its individual liability for the infringement on account of its own conduct, for the purposes of calculating the fine which may be imposed only in accordance with the principle that penalties must be tailored to the individual.

- 179 An undertaking that has knowingly taken part in a single and continuous infringement through conduct of its own may also be held responsible for the conduct of other undertakings in the same cartel for the entire period of its participation in that infringement (see paragraphs 243 to 249 below).
- 180 Accordingly, the fact that an undertaking did not take part in all aspects of a cartel or that it played only a minor role in some aspects in which it did participate is not material to the establishment of the existence, on its part, of an infringement of the competition rules, given that those factors need to be taken into consideration only when the gravity of its participation in the infringement in question is assessed and if and when it comes to determining the fine (judgments of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 86, and of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 45).
- 181 In that connection, the third indent of point 29 of the Guidelines on the method of setting fines lists, as one of the mitigating circumstances which may be applied to an undertaking, evidence that its involvement in the infringement is substantially limited and that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting proper competitive conduct in the relevant market.
- 182 In the present case, it follows that Pometon's limited involvement in the numerous meetings and other contacts that took place in relation to the second limb of the cartel cannot preclude its liability for that second limb if the Commission shows, in accordance with the case-law criteria recalled in paragraphs 245 and 246 below, that that undertaking intended to contribute to the single and continuous infringement as a whole, which will be examined in paragraphs 252 to 269 below.
- 183 Thus, the fact that the applicant did not participate in the structured system of coordination organised in the form of multilateral meetings around twice a year in Germany (recitals 68 and 164 of the contested decision) or in the meetings that were held regularly in Italy (see paragraphs 162 above and 222 below) – which, moreover, is not disputed by the Commission (see paragraphs 172 and 173 above) – does not necessarily mean that it did not participate in coordination in respect of individual customers.
- 184 Therefore, in this part of the plea, the Court need only examine the applicant's individual liability for the second limb of the cartel, by reviewing whether the evidence relied on by the Commission has sufficient probative value to demonstrate the existence of collusive conduct relating to price coordination in respect of some customers, conduct which it attributes to Pometon in the contested decision.

(2) Examination of the evidence relating to the applicant's participation in the second limb of the cartel

- 185 It should first be pointed out that the Commission acknowledges that there is evidence of Pometon's participation in the second limb of the cartel in only five EU Member States, namely Belgium, Germany, Spain, France, and Italy.
- 186 It is therefore necessary to determine whether, in the light of all the evidence adduced by the parties, the findings concerning the conduct of Pometon in the second limb of the cartel are supported to the requisite legal standard.

(i) The Spanish market

- 187 As regards, first, the Spanish market, the Commission relies on a number of items of documentary evidence establishing the existence of bilateral contacts between Pometon and Winoia on that market, contacts that were spread out between 20 February 2003 and 15 July 2005. These are (i) emails of

22 October and 21 November 2003 between the applicant's director-general and Winoa (recitals 61 and 62 of the contested decision); (ii) summaries of bilateral meetings and telephone conversations between Pometon and the Spanish subsidiary of Winoa, which took place between 20 February 2003 and 5 April 2004, drawn up by an employee of Winoa who participated in them (recital 64 of the contested decision); (iii) an internal document of Winoa describing a meeting held on 12 February 2004 with the Spanish subsidiary of Pometon in Zaragoza (Spain) (recital 65); and (iv) internal emails of Winoa sent on 17 and 23 March 2004 (recital 66) and 15 July 2005 (recital 67).

- 188 In the first place, it should be noted that the direct involvement of Pometon in coordination in respect of individual customers from the very beginning of the cartel is readily apparent from the abovementioned email of 22 October 2003, expressly mentioned in recital 61 of the contested decision. In that email, the applicant's director-general, referring to three of Pometon's Spanish customers, essentially criticised Winoa for lowering its prices while Pometon raised them and thus asked Winoa for an explanation.
- 189 In the second place, Pometon's participation in price coordination in respect of some individual customers in Spain is evidenced in particular by a number of contacts between that undertaking and Winoa, both before and after the beginning of the cartel. Accordingly, the prices charged to some individual customers were discussed at bilateral meetings at which Pometon was represented by the general manager of Pometon España, for instance those held on 20 February 2003, 12 February 2004 and 16 March 2004, as is apparent from the minutes of those meetings referred to in the contested decision and included in the file. That coordination is also confirmed by the records of telephone conversations, for instance those of 15 and 24 March 2004, during which the need to comply with the agreement was confirmed and the prices to be charged to specific customers were discussed.
- 190 In the third place, the internal email of Winoa of 15 July 2005 (see paragraphs 165 and 187 above), referred to in recital 67 of the contested decision, states that Pometon has 'made offers to customers they know to be exclusive TFM [Winoa's subsidiary in Spain]' and that 'during your meeting with [Pometon], they must understand that we cannot accept such an approach'. It follows that Pometon was at least aware of an agreement intended to protect the exclusive customers of each participant (non-poaching agreement), on account of which, according to Winoa, the applicant should not have made overtures to exclusive customers of that undertaking's subsidiary in Spain.
- 191 Whether the meeting with a representative of Pometon which was to be held the week following 15 July 2005 actually took place or not has no bearing on the significance of that evidence, which demonstrates, in the context under consideration and to the requisite legal standard, that Pometon was a party to the cartel, precisely because, in the case of some of Winoa's Spanish customers, Winoa, as a party to the cartel as well, considered it necessary to remind Pometon to comply with the agreements entered into.
- 192 According to the relevant case-law (see paragraph 115 above), the items of evidence examined in paragraphs 188 to 191 above, the content of which refers to bilateral contacts clearly intended to coordinate prices as regards individual customers, have a high probative value since they are either exchanges of emails between the director-general of the applicant and Winoa, or documents for internal use, detailing the topics discussed at meetings or in telephone conversations between employees of Pometon and of Winoa, drawn up by a direct witness (see paragraph 117 above).
- 193 Therefore, in accordance with the case-law (see paragraph 114 above), the burden is on the applicant not to put forward a plausible alternative to the Commission's view, but to demonstrate that the abovementioned documentary evidence is insufficient.

- 194 The applicant merely argues, in general terms, that the fact of the matter is that its contacts with Winoa took place in a highly competitive context, characterised by tense and relentless confrontations with that undertaking, due to the fact that Pometon had only recently entered the Spanish steel abrasives market while Winoa had long since been the main operator on that market.
- 195 The applicant nonetheless refers to the minutes of one of Winoa's internal meetings, namely that of 18 May 2004 (see paragraph 165 above), describing 'difficulties to apply [the scrap surcharge] in a number of customers due to Ilarduya and Pometon competition on fixed price'.
- 196 It should be noted, however, that that document is essentially concerned with the first limb of the cartel. It is true that it also shows that, as regards several of Winoa's customers in Spain, Pometon did not apply the second limb. However, it is in no way apparent from that document, which refers only to price competition by Pometon in respect of a 'number of customers' operating in the industry sector, that that undertaking was not observing the agreement as regards Winoa's other customers in Spain. The mere fact that the applicant continued not to comply with the second limb of the cartel does not mean that it did not participate in it.
- 197 In any event, the fact, claimed by the applicant, that it was a new entrant on the Spanish market and was therefore in intense competition with Winoa, to the extent that it sought to compete on price to poach customers from Winoa so as to gain a foothold on that market, is not sufficient to rebut the evidence put forward by the Commission of its involvement, albeit limited, in the second limb of the cartel in the territory of that Member State.
- 198 Therefore, the applicant's line of argument (see paragraphs 193 to 197 above) challenging the probative value of the evidence of its involvement in coordination in respect of some individual customers in Spain, as adduced by the Commission and examined in paragraphs 187 to 192 above, cannot be upheld.

(ii) The French and Belgian markets

- 199 As regards the French and Belgian markets, the Commission first of all refers, in recital 62 of the contested decision, to the email of 21 November 2003 from Winoa to the applicant's director-general, with the subject line 'Spain/Belgium', in which Winoa's representative mentions a Belgian customer who was normally to be supplied by his business and asks Pometon not to increase supplies to that customer. The applicant does not dispute that evidence.
- 200 Next, in recital 63 of the contested decision, the Commission relies on an internal email of Winoa of 19 January 2004 reporting on discussions that took place on 15 January 2004 between the author of the email and the sales manager of MTS for France and Belgium, in which the latter confirmed that MTS was not supplying a French customer of Winoa who had obtained a lower price from a competitor. In that email, Winoa's employee inferred from this that it was necessary 'in consequence, to look to Ervin or [Pometon]' and that '[he] would be inclined towards [Pometon, which is] quite capable' of agreeing to such a price reduction.
- 201 The applicant's explanation that that document proves only that Winoa regarded it as an aggressive competitor does not appear to be plausible. A neutral and objective reading of the email in question shows that, on the contrary, it forms part of the activities to monitor compliance with the second limb of the cartel. It is clear from the wording used that Winoa and MTS considered both Pometon and Ervin to be parties to the agreement to refrain from competing on price with respect to some individual customers and that Winoa, after checking with Ervin that it was not MTS, suspected that Pometon had not respected that commitment. By no means can it be inferred from the fact that Winoa suspected Pometon rather than Ervin as regards that specific customer that Pometon was not involved in the second limb of the cartel.

202 Against that background, the mere fact, relied on by the applicant (see paragraph 166 above), that the statements of the leniency applicant did not mention Pometon in relation to ‘competitor contacts regarding France and Benelux’ does not cast doubt on the probative value of the documents examined in paragraphs 199 to 201 above and, therefore, the liability of Pometon for the infringement on the Belgian and French markets. Those documents provide significant indicia as to the existence of collusive contacts between Pometon and Winoia and as to the belief of Winoia and at least one other undertaking party to the cartel that Pometon was involved in coordination in respect of individual customers. In that context, the leniency applicant’s failure to mention Pometon does not mean that that undertaking did not have collusive contacts with the other parties to the cartel as regards France and Benelux and may simply be due to its reduced involvement in the second limb of the cartel, which was moreover expressly admitted by the Commission (see paragraph 176 above).

203 It follows that the Commission has substantiated to the requisite legal standard its findings concerning the applicant’s involvement in coordination in respect of some individual customers in France and Belgium.

(iii) The German market

204 Regarding the German market, the only market on which, according to the Commission, coordination in respect of individual customers was organised in a structured way (see paragraphs 161 and 167 above), that institution refers, in particular, to the second statement of the leniency applicant according to which Pometon participated in most of the multilateral meetings which took place around twice a year in that country (recitals 68 and 132 of the contested decision). To support that statement, the Commission relies on documentary evidence of Pometon’s participation in the multilateral meetings of 28 September 2004 and 9 June 2005 (recitals 69 to 72 of the contested decision). In addition, the Commission took account of an internal fax of that undertaking dated 16 February 2005 concerning an individual customer, which also demonstrates its involvement in the second limb of the cartel (recitals 73 and 74 of the contested decision).

205 It is necessary, in the first place, to consider the applicant’s argument (see paragraph 163 above) that the leniency applicant’s statements, relied on in recitals 68 and 132 of the contested decision, are not credible because they incorrectly ascribe conduct to the applicant which is in actual fact attributable to Pometon Abrasives, a company that was part of the Winoia group.

206 Similarly, the applicant argues that Ervin was also wrong to assert that it participated in a meeting on 13 November 2007 because that date fell six months after it had exited the market.

207 The fact that Ervin mentioned Pometon instead of Pometon Abrasives as regards the meeting of 13 November 2007 in no way affects the credibility of its statements concerning meetings prior to 16 May 2007, statements which must, in line with the case-law (see paragraph 118 above), be accorded a high probative value. Moreover, it is not inconceivable that the abovementioned reference to Pometon by the leniency applicant is instead the result of an error or oversight by it, since the former commercial directors of the applicant, Mr T. and Mr B., who often represented Pometon at meetings with the other cartel participants, were employed by Pometon Abrasives after 16 May 2007.

208 Thus, the error committed by Ervin as regards the meeting of 13 November 2007 does not cast doubt on the reliability of its statement, referred to in recital 68 of the contested decision, according to which representatives of Pometon, Mr W. and Mr T., participated in most of the multilateral meetings which took place around twice a year. As regards the statement mentioned in recital 132 of the contested decision, the precise nature of that statement rules out any likelihood of confusion on the part of Ervin, where it stated that it ‘began attending regular meetings with [Winoia], MTS, Würth, and while it still was an independent company before being taken over by [Winoia], Pometon, in which the German market was discussed’.

- 209 However, and in any event, since the applicant disputes the accuracy of the abovementioned statements, they cannot be regarded as sufficient proof of its participation in meetings with the other cartel participants unless they are corroborated by further evidence.
- 210 Consequently, it is necessary, in the second place, to ascertain, in accordance with the case-law cited in paragraphs 118 and 119 above, whether the statements of Ervin, referred to in paragraph 208 above and disputed by the applicant, are supported by further evidence.
- 211 In that regard, it should be observed, first, that in the contested decision (recital 69), the Commission implicitly admits that it had evidence only in relation to the applicant's participation in two meetings, on 28 September 2004 and 9 June 2005 (see paragraph 204 above), and does not provide details of the applicant's participation in any other meetings.
- 212 However, it is not necessary for the applicant to have participated in the structured system of coordination in order to find that it was involved in the second limb of the cartel (see paragraph 183 above). As regards the meetings, the only question to be considered is therefore whether the Commission's assertion, in the contested decision (recital 69), that the applicant participated in the two abovementioned meetings is substantiated to a sufficient degree. If so, those indicia will be examined alongside the other evidence (see paragraphs 220 and 221 below).
- 213 In that context, the applicant's arguments challenging other items of evidence, which do not concern its conduct but are mentioned in recital 68 of the contested decision to support some of Ervin's declarations referred to in that recital (see paragraph 208 above), are ineffective. Those items of evidence, which are unrelated to the meetings of 28 September 2004 and 9 June 2005, are only put forward by the Commission to confirm, in general terms, that regular meetings were organised in Germany in connection with the second limb of the cartel, not to demonstrate the applicant's participation in such meetings.
- 214 For the same reason, the hotel bill produced by the applicant in the annex to the application, which confirms, according to the Commission's assertions in the defence, the participation of the general manager of the applicant's German subsidiary in the multilateral meeting of 16 November 2006, is irrelevant. Since the Commission in no way claimed in the contested decision that the applicant had participated in that meeting, the applicant's arguments based on that bill are also ineffective. Moreover, and in any event, that bill, which is partly illegible, does not support any firm conclusion as to the participation or non-participation of the applicant at the meeting of 16 November 2006. Therefore, such participation cannot, under any circumstances, be considered to be established.
- 215 Secondly, it is necessary to examine the evidence relied on by the Commission to corroborate the applicant's participation in the meetings of 28 September 2004 and 9 June 2005. As regards the first of those meetings, the evidence takes the form of an email from MTS to Würth, Pometon, Ervin and Winoa, dated 13 September 2004, stating that the date of 28 September 2004 suited everyone and that the general manager of Pometon Deutschland had confirmed his attendance. The second meeting is evidenced by an email of 16 May 2005 from Pometon to Winoa, with Würth and MTS in copy, informing them that 'the next meeting [was] booked for 9 June 2005, in [a hotel] in Düsseldorf'.
- 216 The applicant claims, however, that there is no evidence of the topics discussed at those two meetings in the statement of the leniency applicant or in any other document. In addition, it quotes a passage from that statement in which Ervin indicates that most of the meetings concerning coordination in respect of customers took place at the end of the year (usually between the end of September and November) and the beginning of the year (between January and March), as most customers had yearly contracts that were renewable at the end of the year. Meetings at the beginning of the year were generally focused on whether the price increases had indeed been implemented.

- 217 Nonetheless, it should be noted that the applicant does not deny that it participated in the two meetings mentioned above. Furthermore, it does not explain what, in its view, would have been the purpose of those meetings if not coordination in respect of individual customers. Moreover, it follows from the statement of the leniency applicant invoked by the applicant, stating that most anticompetitive meetings took place at the end or at the beginning of the year, that some of those meetings could also have taken place in the middle of the year.
- 218 Against that background, the two documents on which the Commission bases its finding (see paragraph 215 above) are sufficiently reliable to corroborate the statements of the leniency applicant as regards the applicant's participation in the anticompetitive meetings of 28 September 2004 and 9 June 2005.
- 219 Thirdly, the applicant's involvement in the second limb of the cartel is also confirmed by the fax of 16 February 2005 from the general manager of Pometon Deutschland to the director-general of the applicant, invoked by the Commission in the contested decision in recitals 73 and 74 (see paragraph 204 above).
- 220 In that regard, the Commission rightly points out in the contested decision that it is apparent from that document, the probative value of which is not, moreover, challenged by the applicant, that Pometon participated in the second limb of the cartel in Germany. The fax of 16 February 2005 concerning one of Pometon's customers in Germany stated that 'Ervin did not increase pricing as discussed', that 'if Ervin would have increased pricing as promised, Ervin would have been thrown out due to their position in the quality comparison', that its author 'consider[s] our discussions about protection finished' and does not want 'to wait for more lost quantities (like in UK)', and ended by asking the addressee for his opinion on the matter. Contrary to what the applicant claims in its reply to the statement of objections of 3 December 2014, which was rebutted in recital 74 of the contested decision, that passage does not suggest that the discussions with Ervin concerning that particular customer were over. On the contrary, it shows that the general manager of Pometon's German subsidiary sought instructions from the applicant's director-general on how to react to Ervin's breach of the agreement.
- 221 It follows that the Commission has substantiated to the requisite legal standard its findings concerning the applicant's involvement in coordination in respect of some individual customers in Germany.

(iv) The Italian market

- 222 As regards the Italian market, it must be pointed out first of all that the applicant's non-participation in the meetings in Italy, even if proven, does not preclude its liability for the second limb of the cartel, since such participation was not necessary in order to coordinate prices in respect of individual customers and Pometon's involvement in such coordination, in Italy, is also sufficiently substantiated (see paragraphs 182 to 184 above).
- 223 In its pleadings, the Commission argues that although the leniency applicant did not name the applicant as one of the participants in specific meetings in Italy, it nevertheless stated that Italian territory was shared between Ervin, Winoia and Pometon prior to 16 May 2007.
- 224 In that regard, the Commission essentially relies on five items of documentary evidence (recitals 75 to 79 of the contested decision).
- 225 It is therefore necessary to determine whether such evidence constitutes reliable indicia capable of substantiating the involvement of the applicant in the second limb of the cartel.

- 226 First of all, contrary to the applicant's claims, it is apparent from the internal exchange of emails within MTS of 5 October 2005 relating to the customers it had lost on the Italian market (recital 75 of the contested decision), stating that there were no 'problems with Pometon and or Ervin', that Pometon, Winoa and Ervin were described – unlike other competitors mentioned who were not parties to the cartel – as 'friends', to whom it was 'absolutely not acceptable' to lose customers without taking action. In those emails, the plan was therefore either to talk to the three abovementioned undertakings or send them a 'note' transmitting some complaints and referring to the discussions held during the last trip to Italy made by the addressee of one of those emails. Moreover, it follows from those emails that MTS suspected that Winoa, not Pometon or Ervin, had not complied with the agreement, as it stated: '[Winoa] you know, and no problems with Pometon and or Er[v]in'.
- 227 Next, the internal email of Ervin of 20 March 2007 regarding a client, Zanardi (recital 76 of the contested decision), expressly states that, the month before, 'Pometon had poached this ... client', a client who, it was agreed, would return to Ervin. That email also suggests that Pometon appeared to be back in line after having been contacted by Ervin. Thus, contrary to the applicant's contention, that email does not state that Pometon and Ervin's relationship was highly competitive, but rather confirms that the parties to the cartel closely monitored the customer sharing agreement.
- 228 That monitoring is borne out, moreover, by the internal email of Ervin of 19 April 2007 (recitals 52 and 77 of the contested decision), even though the existence of the price coordination agreement is not expressly apparent from that email. The email in question refers to its author's intention to discuss a number of individual customers with representatives of Winoa and Pometon at the Milan meeting scheduled for 16 and 17 May 2007.
- 229 As regards the internal email of Winoa of 26 April 2007 (recital 78 of the contested decision), reporting on a meeting with MTS held on the same day on which the employee of Winoa, who had attended the meeting, asked MTS not to attack Pometon, that email states that Winoa wanted the agreement to be observed, including vis-à-vis Pometon. Admittedly, as the applicant claims, Winoa was preparing to buy Pometon's business in the steel abrasives sector in 20 days' time and thus had an interest in ensuring that the latter retained its customers. However, according to the information on the file, MTS did not appear to be aware of the proposed acquisition (see paragraph 302 below). Therefore, the fact that MTS consulted with Winoa on a restriction of price competition with respect to Pometon is evidence of the existence of an anticompetitive agreement between those three undertakings.
- 230 Finally, as for the emails exchanged on 27 and 28 May 2008 between an employee of MTS and an employee of Pometon Abrasives, Mr T., who had been commercial director (industry) at the applicant until 16 May 2007 (recital 79 of the contested decision; see, also, paragraph 207 above), the applicant rightly points out (see paragraph 170 above) that it is in no way affected by that employee's assertion that the policy of Pometon Abrasives and the Winoa group (which owns Pometon Abrasives) was not to reduce prices, but to increase them.
- 231 However, that email exchange expressly refers to the application of the agreement with respect to German and Italian customers stretching back several years, thus before the applicant's exit from the market. In the initial email of 27 May 2008, MTS took issue with Pometon Abrasives for failing to comply with the agreement as regards a German customer, a subsidiary of an Italian company, Riva Fire SpA, whose Italian establishment 'Pometon [had] since years [been] supplying'. In addition, the emails of 28 May 2008 also refer to the supply of other German and Italian customers.
- 232 In that context, the Commission quotes a passage from one of those emails from Mr T., in which he maintained that he had always protected the customers of MTS in Germany when he was employed by Pometon, stating: 'during the past years, I always covered your customer in Germany even if I was regularly asked from the italian mother company to supply also the german plant ... you know how I

always strictly respected our agreement'. In reply to that observation, MTS stated in several emails, also dated 28 May 2008: 'We always protected Pom ...'; 'we tried since years to protect Pom'; 'the agreement always has been that competition is ok but not on price!'.

- 233 Having regard to Mr T.'s high level of responsibility when he was the applicant's commercial director, the content of those emails reliably shows that the policy of no price competition of Pometon Abrasives was a continuation of Pometon's policy, which confirms that Pometon was already involved in coordination in respect of individual customers in Italy and Germany. In that context, the fact that there may have been some internal reservations within Pometon – as appears from the email of Mr T. mentioned above – is not such as to relieve Pometon of liability.
- 234 Therefore, the applicant's arguments disputing the probative value of the evidence of its participation in coordination in respect of some individual customers in Italy must be rejected.

(v) Conclusion on the evidence of the applicant's participation in the second limb of the cartel

- 235 The examination of the documentary evidence put forward in the contested decision (see paragraphs 187 to 233 above) thus shows that the Commission relied on a sufficiently serious, detailed, specific and consistent body of evidence to find that the applicant participated in coordination in respect of some individual customers in the abovementioned five Member States (Belgium, Germany, Spain, France and Italy).

4. Third part of the second plea in law: the applicant did not participate in a single and continuous infringement

(a) Arguments of the parties

- 236 In the first place, the applicant disputes the Commission's assessment in recitals 105 to 109 of the contested decision that it participated, with the other four undertakings, in a single and continuous infringement comprising the two limbs of the cartel.
- 237 It submits that, contrary to the Commission's assertions in recital 109 of the contested decision, the fact that Pometon 'was in contact with different participants in the infringement' in no way justifies the conclusion that 'it could have reasonably foreseen all the actions envisaged and implemented by the other participants in the infringement'. There is no evidence that when it engaged in contact, which was of a limited and almost exclusively bilateral nature, Pometon was aware of the existence of the alleged single and continuous infringement. Thus, the Commission failed to discharge the burden of proof.
- 238 In the second place, the applicant denies that it was involved in coordination in respect of individual customers throughout the EEA.
- 239 It submits, first of all, that the Commission did not prove such participation. It states that it used to sell steel abrasives in 21 EEA countries. However, in recital 60 of the contested decision, the Commission found that it was involved in the second limb of the cartel in five countries only (Belgium, Germany, Spain, France, and Italy), which confirms the complete absence of proof of its participation in general cooperation covering the entire EEA.
- 240 Moreover, in recital 60 of the contested decision, the Commission referred to recital 37 of the settlement decision, specifically to support its assertion that 'the arrangements regarding individual customers covered the whole EEA', but it did not demonstrate that the applicant was aware of the geographic scope of those arrangements.

241 Next, the applicant disputes the Commission's assertion, in recitals 133 and 134 of the contested decision, that it necessarily knew that the second limb of the cartel covered the entire EEA. The communications between the applicant and Pometon Deutschland relied on by the Commission are irrelevant because they occurred one year before the beginning of the alleged cartel. In the alternative, the applicant claims that those two documents show that Pometon refused all of MTS's requests for a meeting.

242 The Commission contests those arguments.

(b) Findings of the Court

(1) The case-law definition of single and continuous infringement

243 According to settled case-law, an infringement of Article 101 TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions of the undertakings involved form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (see judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41 and the case-law cited).

244 An undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk, as well as the possible benefits. In that situation, the Commission is entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 43; see, also, judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraph 119 and the case-law cited).

245 It follows, first, that in order to find that a single infringement exists, it is for the Commission to establish that the agreements or concerted practices in issue, although they relate to distinct goods, services or territories, form part of an overall plan knowingly implemented by the undertakings in question with a view to achieving a single anticompetitive objective (judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 168).

246 Links of complementarity between agreements or concerted practices constitute objective indicia of an overall plan. Such links exist, for instance, if those agreements or concerted practices are intended to deal with one or more consequences of the normal pattern of competition and, through their interaction, contribute to the attainment of a single anticompetitive objective (see judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 169).

247 The Commission is in any event required to examine all the facts capable of establishing or of casting doubt on an overall plan (judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 169; see, also, to that effect, judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie v Commission*, T-446/05, EU:T:2010:165 paragraph 92 and the case-law cited). To that end, it must take account, inter alia, of the period of application, the content, including the methods used, and, accordingly, the objective of the various actions at issue

(judgment of 23 January 2014, *Gigaset v Commission*, T-395/09, not published, EU:T:2014:23, paragraph 103). Furthermore, the fact that the same persons were involved in the anticompetitive actions on the whole tends to show the complementary nature of those actions (see, to that effect, judgment of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 197).

248 Next, as regards the intentional element determining that an undertaking has participated in a single and continuous infringement, it should be recalled that the existence of such an infringement does not necessarily mean that an undertaking participating in one or more of the collusive activities may be held liable for the infringement as a whole. The Commission still has to establish first and foremost that that undertaking must have been aware of all the anticompetitive operations implemented at EEA level by the other undertakings party to the cartel or that it could reasonably have foreseen such conduct. In other words, the mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice to render that undertaking responsible for the cartel as a whole. Article 101 TFEU does not apply unless there exists a concurrence of wills between the parties concerned (see, to that effect, judgments of 10 October 2014, *Soliver v Commission*, T-68/09, EU:T:2014:867, paragraph 62, and of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 172).

249 Accordingly, it is for the Commission to establish that the undertaking which has participated in an infringement through its own specific conduct nevertheless intended, through that conduct, to contribute to the objectives pursued by all the participants and that it was aware of the unlawful conduct planned or put into effect by other undertakings in pursuit of the same objectives or could reasonably have foreseen it, so that it was prepared to take the risk of such participation with a view to securing, as the case may be, significant benefits, albeit illegal, flowing from such participation (see, to that effect, judgment of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 42).

(2) The applicant's participation in the single and continuous infringement covering both limbs of the cartel

250 In the present case, the applicant does not dispute the characterisation of the infringement as a single and continuous infringement as stated in recitals 105 and 106 of the contested decision regarding both limbs of the cartel.

251 By contrast, it disputes its participation in such an infringement, arguing that the Commission did not prove that it was aware of all the forms of unlawful conduct aimed at achieving the objectives pursued by the other participants and that it intended to contribute to those objectives.

252 That line of argument cannot, however, be upheld. In order to establish that an undertaking has participated in a single and continuous infringement, the Commission need not prove that that undertaking had direct knowledge of each aspect of the actual conduct planned or put into effect by all the other undertakings involved in the same infringement. It is sufficient, as confirmed by the case-law cited in paragraphs 248 and 249 above, for the Commission to demonstrate that the undertaking in question could reasonably have foreseen such conduct and was prepared to accept the benefits as well as the risks (see, to that effect, judgment of 23 January 2014, *Gigaset v Commission*, T-395/09, not published, EU:T:2014:23, paragraph 117).

253 It is apparent from all of the evidence examined in the context of the second plea that, by its collusive conduct, the applicant intentionally contributed to the implementation of the overall plan mentioned in paragraph 250 above, a plan intended precisely to restrict price competition.

- 254 First, the applicant was behind the agreement on the system for calculating the scrap surcharge, which was moreover designed on the basis of rules allowing for its automatic application throughout the EEA, and actively contributed to the establishment of such a system (see paragraphs 129 and 130 above).
- 255 Secondly, as regards coordination in respect of individual customers, the Commission has shown that Pometon was involved in anticompetitive contacts aimed at achieving such coordination (see paragraph 235 above). Thus, that undertaking's relatively scant participation in multilateral meetings and other contacts designed to discuss or examine, together with the other undertakings concerned, the anticompetitive conduct forming part of the cartel as a whole cannot be interpreted as meaning that it could not have been aware of or have foreseen the future anticompetitive activities of the other cartel participants and did not join in those activities.
- 256 Thirdly, the two limbs of the cartel pursued exactly the same objective of restricting price competition, covered identical products and were implemented by the same undertakings, spurred on, moreover, by the same protagonists. In that regard, the documentary evidence shows that senior executives at Pometon, especially its director-general, were directly involved in both limbs of the cartel and that the applicant was generally represented by the same persons in charge at the collusive contacts concerning that agreement. This also confirms, in the context of the present dispute, not only the complementarity of those two limbs, but also the applicant's intention to contribute to all of the actions designed to implement them (see, to that effect, judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg v Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 60).
- 257 It follows that the Commission was entitled to find that the applicant was aware of the unlawful conduct of the other cartel participants or could reasonably have foreseen it and that it was prepared to take the risk.

(3) The applicant's participation in the single and continuous infringement covering the whole of the EEA

- 258 The applicant does not question the existence of a single and continuous infringement at EEA level but disputes its liability for an infringement with such a geographic extent.
- 259 In recital 60 of the contested decision, the Commission defines the geographic scope of the cartel by reference to recital 37 of the settlement decision: 'The geographic scope of the conduct, as regards all five parties, was EEA-wide during the entire period concerned by this Decision'.
- 260 That being so, it should be noted that in accordance with the case-law (see paragraph 245 above), in the case of a single infringement, the fact that, in practical terms, an undertaking's actual participation in a cartel was limited to only part of the EEA as a whole is not such as to exclude its liability for that cartel as an anticompetitive practice covering all of that territory.
- 261 However, in order to establish that the applicant participated in a single and continuous infringement covering the whole of the EEA, the burden was on the Commission to show, as required by the case-law (see paragraphs 248 and 249 above), that Pometon was aware of the geographic scope of coordination in respect of individual customers or could reasonably have foreseen it and was thus prepared to take the risk.
- 262 Contrary to the applicant's claims (see paragraph 241 above), the evidence relied on in the contested decision confirms that its executives were fully aware of the overall geographic scope of coordination in respect of individual customers.

- 263 In the first place, in its reply of 7 October 2002 to a fax from the general manager of Pometon Deutschland concerning MTS's complaints relating to price reductions applied by the applicant to customers in Germany (recital 133 of the contested decision), the director-general of the latter states, in particular, that the threats of retaliation are normally 'worldwide'. Although that document predates the infringement period, it serves as evidence that the geographic scope of coordination in respect of individual customers was, as far as Pometon's executives were concerned, of a general nature. In contrast to the applicant's assertions, such evidence may, according to the case-law (see paragraph 113 above), be taken into account together with other items of evidence, especially when it comes to assessing the geographic scope of the cartel. Furthermore, those two emails do not show that Pometon refused to hold a meeting with MTS, but rather that it was willing to play for time.
- 264 In the second place, in an email of 21 November 2003 concerning, inter alia, coordination in respect of individual customers in Belgium (recitals 62 and 134 of the contested decision and paragraph 199 above), Winoa suggests to the applicant's director-general that they discuss different possibilities concerning customers in 'Scandinavia and East countries'.
- 265 Therefore, even though the applicant was not present in the markets of the entire EEA and its participation in coordination in respect of some individual customers is proven only in five Member States, it was necessarily aware that the second limb of the cartel covered the EEA as a whole.
- 266 It follows from all of the foregoing that the Commission has proven to the requisite legal standard that the applicant was fully aware not only of the essential characteristics of the cartel (see paragraph 257 above), but also of its geographic scope, and that it therefore intended to participate in the single and continuous infringement at issue.
- 267 Therefore, the Commission was fully entitled to find that the applicant was liable for such an infringement, without prejudice to the assessment of the duration of its participation in that infringement, under the fourth plea, and the seriousness of its individual liability, in the examination of the claim for variation of the fine imposed on it, in accordance with the principle that penalties must be tailored to the individual.
- 268 The three parts of the second plea in law must therefore be rejected.

C. Third plea in law: infringement of Article 101 TFEU and Article 53 of the EEA Agreement, in so far as the Commission found that the cartel constituted a restriction of competition by object

1. Arguments of the parties

- 269 In the first place, the applicant submits that the Commission infringed Article 101 TFEU and Article 53 of the EEA Agreement in finding that the cartel at issue had the object of restricting competition. The contested decision (recitals 142 to 148) is vitiated in that regard by manifest errors of assessment, insufficient investigation and manifest illogicality. The applicant in particular takes issue with the Commission for not carrying out even a superficial analysis of the market affected by the cartel and for failing to take into consideration, as required by the case-law (see paragraph 277 below), the nature of the goods involved as well as the real conditions of the functioning and structure of the market in question.
- 270 In the second place, the applicant claims that the Commission also failed to prove the existence of anticompetitive effects. It simply made the groundless assertion that 'the facts described in [s]ection 4.2.1.3 [concerning the formula for calculating the scrap surcharge] show that the anticompetitive cartel arrangements were implemented' (recital 148 of the contested decision).

- 271 The Commission contends that horizontal price-fixing was the objective of the coordination between competitors in which Pometon participated, as is apparent from the facts set out in recitals 145, 146 and 148 of the contested decision. It states that it identified and described the relevant market and its operators in sufficient detail (section 2 of the contested decision), gave an extensive account of the conduct alleged against the applicant and drew attention to the impact of such conduct on the sales price of steel abrasives (section 5.2.4 of the contested decision).
- 272 The Commission therefore considers that it was entitled, without committing a manifest error of assessment, to conclude that the cartel was restrictive by its object, without there being any need to carry out a detailed analysis of the relevant market.

2. Findings of the Court

- 273 It should be borne in mind that, in order to be caught by the prohibition laid down in Article 101 TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have ‘as [its] object or effect’ the prevention, restriction or distortion of competition in the internal market.
- 274 According to the case-law, the concept of restriction of competition ‘by object’ must be interpreted narrowly and can be applied only to certain types of coordination between undertakings which may be regarded, by their very nature, as being harmful to the proper functioning of normal competition (judgment of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 103).
- 275 The essential legal criterion for ascertaining whether an agreement involves a restriction of competition ‘by object’ is the finding that such an agreement reveals in itself a sufficient degree of harm to competition for it to be considered that it is not appropriate to assess its effects (judgment of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 104; see, also, to that effect, judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraphs 49 and 57).
- 276 In order to determine whether an agreement reveals a sufficient degree of harm that it may be considered to be a restriction of competition ‘by object’ within the meaning of Article 101 TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part (judgments of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53; of 20 January 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraph 27; and of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 105).
- 277 It is true that, according to the case-law relied on by the applicant (see paragraph 269 above), in some circumstances, in order to determine whether an agreement has as its object the restriction of competition, it is necessary to consider the nature of the goods or services affected as well as the real conditions of the functioning and structure of the market or markets in question (see, to that effect, judgments of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 36; of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 53; and of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 21). That is generally the case where the agreement displays features rendering it atypical or complex (Opinion of Advocate General Wathelet in *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2015:427, points 90 and 91).
- 278 However, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may in principle be considered to have such negative effects on the price, quantity or quality of the goods and services that it may be considered redundant, for the purposes of applying Article 101 TFEU, to prove that they have actual effects on the market. Moreover, experience

shows that such behaviour generally leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgments of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; of 26 November 2015, *Maxima Latvija*, C-345/14, EU:C:2015:784, paragraph 19; and of 15 December 2016, *Philips and Philips France v Commission*, T-762/14, not published, EU:T:2016:738, paragraph 56).

- 279 In respect of such agreements, which represent particularly serious restrictions of competition, the analysis of the economic and legal context of which the practice forms part may therefore be limited to what is strictly necessary in order to establish the existence of a restriction of competition by object (see judgment of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, EU:C:2017:308, paragraph 107 and the case-law cited).
- 280 In the present case, the applicant, first, criticises the Commission for finding that the cartel in question constituted a restriction of competition by object, without even examining the nature of the goods affected or the real conditions of the functioning and structure of the market or markets concerned (see paragraph 269 above).
- 281 That complaint cannot, however, be upheld. In accordance with the case-law cited in paragraphs 278 and 279 above, and having regard to the intrinsic features of the horizontal cartel in question, which concerned price-fixing and thus constituted a particularly serious restriction of competition, the Commission was able to carry out an appropriate analysis of the economic and legal context of which the cartel formed part, without there being any need for a detailed examination of the nature of the goods affected and the conditions of the functioning and structure of the market or markets concerned. Compared with the object of the restriction and its seriousness, those aspects acquire secondary importance.
- 282 Therefore, the Commission was fully entitled to conclude in recital 142 of the contested decision that the infringement amounted to a restriction of competition by object, since the applicant was involved in horizontal anticompetitive arrangements forming part of an overall plan with the sole objective of influencing prices through the establishment of the scrap surcharge and through price coordination in respect of individual customers.
- 283 As regards, in particular, the first limb of the cartel, the Commission stated in recital 143 of the contested decision that the participants in the infringement at issue coordinated their behaviour in order to remove any uncertainty between them in relation to an essential element of the price, inasmuch as scrap metal represented 25 to 45% of the production costs of steel abrasives while the scrap metal market was characterised by sharp fluctuations in purchase prices as well as significant price differences between some EU Member States.
- 284 Furthermore, it should be observed that both during the administrative procedure and in its written pleadings before the Court, the applicant did not put forward any specific arguments or even claim that the cartel was especially complex or displayed specific features requiring a more thorough analysis of the economic and legal context in order to determine, in accordance with the case-law cited in paragraph 277 above, whether that cartel involved an agreement of the kind that may be considered, by its very nature, to be harmful to the proper functioning of competition.
- 285 Accordingly, the Commission did not commit any error of assessment in finding that the cartel in question revealed in itself a sufficient degree of harm to competition in so far as it had as its object the prevention, restriction or distortion of price competition to the detriment of consumers.
- 286 It follows that the claim alleging that there was no restriction of competition by object cannot be upheld.

287 In the light of the foregoing considerations, the second complaint put forward by the applicant, alleging that there was no evidence of anticompetitive effects (see paragraph 270 above) must be considered to be ineffective. Having regard to the anticompetitive object of the cartel, the examination of its effects is not, on any view, capable of having any bearing whatsoever on the finding of an infringement.

288 The third plea must therefore be rejected in its entirety.

D. Fourth plea in law: duration of the applicant's participation in the infringement and time bar

1. Arguments of the parties

289 In the alternative, the applicant disputes the duration of its participation in the cartel. It claims that the Commission has not adduced any evidence showing that such participation continued until 16 May 2007, the date of the Milan meeting, which the Commission contends was the 'last contact between Pometon and the other participants in the infringement regarding the scrap surcharge' (recitals 55 and 163 of the contested decision).

290 The applicant essentially states that there was no 'unlawful' meeting, in which it allegedly participated, on 16 May 2007. The second statement of the leniency applicant mentions only one meeting in Milan on 17 May 2007, a date confirmed by two internal emails of Ervin of 17 May 2007 reporting on the content of that meeting.

291 In any event, the applicant maintains that its participation in such an encounter, on 16 May 2007, is not plausible as it would have had no interest in meeting with its competitors to discuss the continuation of the cartel as regards the scrap surcharge on the very day on which the deed recording the sale of its steel abrasives business was to be signed. The Commission's argument that it is likely that such a meeting took place, that the deed of sale was drawn up on the same day in a notary's office close by and that Ervin was not informed about it is tantamount to requiring the applicant to prove the non-existence of that meeting, which amounts, in short, to a *probatio diabolica*.

292 Finally, according to the applicant, in the absence of evidence, the end of the infringement period coincides at most, as far as the applicant is concerned, with the last collusive contacts allegedly attributable to Pometon, namely the meeting of 9 June 2005, or at the latest with the email of 18 November 2005 (see paragraphs 153, 154 and 215 above).

293 The applicant infers from this, at that stage, that since more than five years elapsed between the end of its participation in the cartel on 9 June 2005 and the notification on 15 June 2015 of the act stopping time from running, the Commission's power to impose a fine is time-barred under Article 25(1) of Regulation No 1/2003.

2. Findings of the Court

294 It is necessary, first of all, to determine whether the Commission has proven, to the requisite legal standard, the duration of the applicant's participation in the cartel in question (see, to that effect, judgment of 24 March 2011, *Viega v Commission*, T-375/06, not published, EU:T:2011:106, paragraph 36).

- 295 In the absence of evidence directly establishing the duration of an undertaking's participation in a continuous infringement, the Commission is required to put forward facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (judgment of 19 May 2010, *IMI and Others v Commission*, T-18/05, EU:T:2010:202, paragraph 88).
- 296 In the case in point, in the first place, it is apparent from the Court's examination of the second plea that the Commission has proven to the requisite legal standard that the applicant took part in a number of meetings and other collusive contacts spread out, at least, between 3 August 2003, the date of the scrap surcharge agreement (see paragraph 129 above), and the email exchange from 16 to 18 November 2005 between Würth and Pometon (see paragraph 153 above).
- 297 In addition, the Commission has also established that the applicant was involved in the preparations for the Milan meeting, scheduled to take place on 16 and 17 May 2007.
- 298 As to whether Pometon participated in the meeting in Milan, the applicant is admittedly right to state that the Commission reversed the burden of proof by merely contending that it is likely that an initial meeting – in which the applicant is said to have participated – took place on 16 May 2007 to discuss the continuation of the cartel and was followed by a second meeting on 17 May 2007.
- 299 The proximity, on which the Commission relies, between the meeting place and the notary's office where the deed recording the sale to Winoia of Pometon's business line in the steel abrasives sector was drawn up on 16 May 2007 does not provide reasonable and reliable grounds for believing that an anticompetitive meeting took place on the same day. By contrast, the second statement of the leniency applicant mentions only one meeting in Milan, on 17 May 2007. There is nothing to suggest that the applicant took part in an anticompetitive meeting the day before.
- 300 However, irrespective of the applicant's presence at such a meeting on 16 May 2007, its participation in the cartel at issue, before the transfer of its business in the steel abrasives sector to Winoia on 16 May 2007, is substantiated in the contested decision by a body of sufficiently specific, sound and consistent evidence determining that Pometon was directly involved in the single and continuous infringement at issue during the period preceding the transfer.
- 301 In particular, it follows from the internal email of Ervin of 20 March 2007, referred to in recital 52 of the contested decision – which is not disputed by the applicant and which states that the representatives of Winoia and Pometon had asked the author of that email to attend a meeting scheduled to be held on 16 and 17 May 2007 in Milan to discuss the application of the formula for calculating the scrap surcharge (see paragraph 155 above) – that Pometon played an active part in convening and scheduling the meeting.
- 302 Furthermore, the fact that there was no doubt in the minds of the other participants as to Pometon's participation in that meeting is borne out by Ervin's internal email of 19 April 2007 (see paragraph 228 above). Moreover, Ervin's internal email of 17 May 2007 (recital 55 of the contested decision) suggests that the other cartel participants had not been informed, before the Milan meeting, about the transfer of the business line concerned from Pometon to Winoia. It is apparent from that email that its author, an employee of Ervin who was present at the meeting of 17 May 2007, was surprised by the reticence at that meeting of Mr B., who had been one of the applicant's representatives before being employed by Winoia after the abovementioned transfer on 16 May 2007.
- 303 Lastly, the content of the internal emails of Ervin of 20 March and 19 April 2007 (see paragraphs 227 and 228 above) and of Winoia of 26 April 2007 (see paragraph 229 above) shows that, at least during the two-month period preceding its exit from the steel abrasives market, Pometon not only played an active role in the first limb of the cartel, but was also involved in the second limb.

- 304 In the second place, since the Commission has duly proven that the applicant was directly involved in collusive contacts concerning both limbs of the cartel between 3 October 2003 and 18 November 2005 (see paragraph 296 above) and during the two months prior to its exit from the market on 16 May 2007 (see paragraphs 297 to 303 above), the Court must consider whether the lack of evidence of anticompetitive contact during a period of around 16 months, between 18 November 2005 and March 2007, indicates that the applicant had in fact interrupted its participation in the cartel during that period, as it suggests (see paragraph 292 above), before resuming and repeating its participation in the same infringement a few months before exiting the steel abrasives market (see, to that effect, judgment of 15 September 2016, *Philip Morris v Commission*, T-18/15, not published, EU:T:2016:487, paragraph 97).
- 305 Whether or not the period separating two manifestations of infringing conduct is long enough to constitute an interruption of the infringement must be assessed in the context of the functioning of the cartel in question (judgment of 19 May 2010, *IMI and Others v Commission*, T-18/05, EU:T:2010:202, paragraph 89; see, also, to that effect, judgment of 24 March 2011, *Tomkins v Commission*, T-382/06, EU:T:2011:112, paragraph 51).
- 306 In particular, it is in that context and on the basis of an overall evaluation of all the available evidence that the question of whether that period was long enough to enable the other parties to the cartel to understand that the undertaking concerned intended to interrupt its participation must be assessed, such understanding being of critical importance when determining whether that undertaking sought to distance itself from the unlawful agreement (see, to that effect, judgment of 20 January 2016, *Toshiba Corporation v Commission*, C-373/14 P, EU:C:2016:26, paragraphs 62 and 63).
- 307 It should be recalled that a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the competent administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking concerned liable in the context of a single agreement. Nor is the fact that an undertaking does not act on the outcome of a meeting having an anticompetitive object such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting (see judgment of 26 January 2017, *Duravit and Others v Commission*, C-609/13 P, EU:C:2017:46, paragraph 136 and the case-law cited).
- 308 In the present case, having regard to the specific features of the cartel at issue, the absence of collusive contacts between the applicant and the other parties to the cartel, even during the abovementioned period of around 16 months, does not permit the inference that it had interrupted its participation in the cartel. That cartel was characterised by the automatic application of the scrap surcharge (see paragraph 147 above) and by the close links between the two limbs of the cartel (see paragraphs 228, 256 and 303 above) as well as by the lack, outside the German market, of a structured organisation of contacts between the participants in order to implement coordination in respect of individual customers, whereby specific contact occurred only in the event of disagreement (see paragraph 222 above).
- 309 In the context of such a single and continuous infringement, the applicant does not put forward any evidence to suggest that collusive contacts were nevertheless necessary for its participation in the cartel to continue, without interruption, during the period between 9 June 2005 and March 2007. In particular, it does not refer to any fact that would have affected the functioning of the cartel as transpires from the evidence adduced by the Commission and would have required, during that period, contacts with the other parties to the cartel in order to restart it (see, to that effect, judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg v Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 65).

- 310 Accordingly, in the light of the characteristics of the cartel (see paragraph 308 above), the other participants would have had even less reason to interpret the applicant's possible non-participation in meetings or other collusive contacts during the abovementioned period of 16 months as the applicant distancing itself from the cartel, since Pometon was behind the establishment of the scrap surcharge system and had actively contributed to setting it up (see paragraphs 129 and 130 above).
- 311 Furthermore, the fact that the applicant played an active role in the preparation of the Milan meeting and did not give the other cartel participants advance notice of the transfer to Winoá of its business line in the steel abrasives sector attests to the continuation of the unlawful conduct by Pometon and Winoá. That continuity is also clearly confirmed by the email of 28 May 2008 from Mr T. (see paragraph 231 above).
- 312 For all those reasons, even though the applicant's participation in the cartel is not supported by direct documentary evidence covering the entire infringement period, between 3 October 2003 and 16 May 2007, its continued participation is clearly apparent from the overall examination of the body of evidence produced by the Commission, which is mutually supporting and thus proves the applicant's liability for the entire reference period (see, to that effect, judgment of 26 January 2017, *Commission v Keramag Keramische Werke and Others*, C-613/13 P, EU:C:2017:49, paragraph 55).
- 313 Therefore, in the absence of any evidence that the party concerned distanced itself from the cartel, the Commission has proven to the requisite legal standard that Pometon did not interrupt its participation in the single and continuous infringement at issue, even though it had no direct evidence of collusive contacts for a period of around 16 months (see, to that effect, judgment of 16 June 2015, *FSL and Others v Commission*, T-655/11, EU:T:2015:383, paragraph 481).
- 314 Consequently, since Pometon participated in the cartel until 16 May 2007, and given that the Commission carried out inspections at its premises in June 2010 and initiated proceedings against it, among others, on 16 January 2013 (see paragraphs 6 and 7 above), the power of that institution to impose a fine on it was not time-barred when the contested decision was adopted, within the time limits laid down in Article 25 of Regulation No 1/2003.
- 315 It follows that the fourth plea in law must be rejected in its entirety.
- 316 Thus, since the Court has found that there is no basis to support the second, third and fourth pleas challenging the unlawful conduct ascribed to Pometon and its participation, between 3 October 2003 and 16 May 2007, in the single and continuous infringement in question, it is necessary to reject the applicant's first and second heads of claim in so far as they seek the annulment of Article 1 of the contested decision (see paragraph 31 above).

E. Adaptation of the basic amount of the fine under point 37 of the Guidelines on the method of setting fines

1. Arguments of the parties

- 317 In the further alternative, the applicant seeks the annulment or variation of the fine, claiming that the adaptation of the basic amount of the fine under point 37 of the Guidelines on the method of setting fines is not sufficiently reasoned and is not in line with the principles of proportionality and equal treatment.

- 318 It claims that the explanations provided by the Commission before the Court, including the table produced at the hearing, are entirely new and do not cure the initial inadequate statement of reasons. Furthermore, the production of that table at the hearing was unduly late and the table is therefore inadmissible.
- 319 In addition, in its observations of 2 July 2018 (see paragraph 29 above), the applicant challenged the accuracy of the figure given for the percentage of specific sales worldwide of Pometon in 2006, which was mentioned in that table and taken into account by the Commission when determining the adaptation in respect of it. That figure is 31%, not 21%.
- 320 The Commission contends that the criteria it applied to calculate the adaptation of the basic amount of the fine can be clearly understood from the reasons set out in recitals 228 and 229 of the contested decision (see paragraphs 345 and 346 below). It follows therefrom that it granted the applicant an exceptional reduction, similar to the reductions given to the other four undertakings affected by the settlement decision, in order to establish a level of fine that was proportionate to Pometon's individual liability, in the light of the seriousness and duration of its participation in the cartel compared with the other undertakings mentioned above, and also to ensure that the fine had a deterrent effect.
- 321 In the defence, the Commission explained that in determining the adaptation in respect of the applicant, it factored in a reduction coefficient of 21%, being Pometon's turnover relating to sales of steel abrasives expressed as a percentage of its total turnover in 2006. However, it adjusted that figure upwards by granting the applicant an additional reduction of 39% due to the shorter duration of Pometon's participation in the cartel, its relatively small size and the fact that it did not have a particularly diversified product portfolio. In the rejoinder, the Commission accepted that the percentage of specific sales of Pometon in the EEA in 2006 was actually 23.7% and argued that the difference as compared with the figure of 21% which it had taken into account was offset by the adjustment.
- 322 At the hearing, the Commission stated that it had relied on the value of specific sales worldwide expressed as a percentage of the total turnover of each of the undertakings concerned, as explained in a concise but comprehensive manner in recitals 228 and 229 of the contested decision, and not on the percentage of those sales in the EEA.
- 323 As regards, in particular, the percentage of specific sales worldwide of Pometon, the Commission – in its written observations on the inaccuracy, as claimed by the applicant (see paragraph 319 above), of the figure of 21% mentioned in that connection in the table produced at the hearing – contended, on the basis of supporting documents, that it had relied on the figures provided by the applicant in reply to its requests for information during the administrative procedure.
- 324 The Commission also stated at the hearing that, in order to ensure equality of treatment and fairness, it had adjusted the specific sales figure worldwide mentioned above for each of the parties to the cartel, so as not to confer an unreasonable advantage on the undertakings whose specific sales accounted for a particularly high proportion of their worldwide turnover. That adjustment was made on the basis of the following three criteria, mentioned in the table produced at the hearing which also included data relating to the applicant.
- 325 The most important criterion was that of diversification of sales. The applicant thus received the highest additional reduction (39%), mainly because its sales were highly diversified, while Ervin, Winoia and MTS were penalised (13%, 8% and 4%, respectively) on account of the concentration of their portfolios (88% for Ervin, 83% for Winoia and 94% for MTS). The other two criteria were the size of the undertaking and its 'limited' or 'not limited' role in the infringement.

2. Findings of the Court

(a) Admissibility of the table produced at the hearing and the Commission's application for confidential treatment

- 326 Since the applicant raised a plea of inadmissibility in respect of the table produced by the Commission at the hearing, it is necessary to examine that plea first.
- 327 In the first place, it should be recalled that under Article 85(3) of the Rules of Procedure, 'the main parties may, exceptionally, produce or offer further evidence before the oral part of the procedure is closed ... provided that the delay in the submission of such evidence is justified'.
- 328 In the specific context of this case, the production of that document by the Commission at the hearing follows on from the Court's questions and contains information it needs to identify and assess the criteria applied by that institution when it calculated the fine imposed on the applicant (see paragraphs 366 and 376 below), who, moreover, was invited to submit written observations on the data set out in that table. The production of that document at the hearing is therefore justified within the meaning of Article 85(3) of the Rules of Procedure.
- 329 In the second place, the Court must reject the application for confidential treatment submitted orally by the Commission at the hearing concerning some of the data contained in the abovementioned table, which the Commission justifies on the sole ground that the undertakings concerned, upon being consulted by the Commission on the matter, had considered that the data should be kept confidential.
- 330 According to settled case-law, information which was secret or confidential, but which is at least five years old, must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties (judgment of 14 March 2017, *Evonik Degussa v Commission*, C-162/15 P, EU:C:2017:205, paragraph 64).
- 331 In the present case, the data contained in the abovementioned table are no longer of a confidential nature. As regards, first, the value of the specific sales worldwide of each of the addressees of the settlement decision in 2009, the Commission has not put forward any arguments suggesting that, notwithstanding their – by now – historical nature, such data still constitute an essential element of the commercial position of the undertakings concerned. Next, the various adjustments made by the Commission to determine the adaptations of the basic amount of the fines imposed on those undertakings do not relate in any way to their trade policies and cannot, on that basis, be confidential. Finally, the other data in the table in question were found to be non-confidential by the Court in its order of 4 May 2018, *Pometon v Commission* (T-433/16), cited in paragraph 26 above.
- 332 Consequently, the production of the table at issue, although late, must be considered admissible and there is no justification for omitting from this judgment and not disclosing to the public some of the data it contains.

(b) Application for annulment of the fine due to breach of the obligation to state reasons

- 333 The applicant submits, in essence, that the Commission did not state to the requisite legal standard the reasons for the adaptation of the basic amount of the fine carried out under point 37 of the Guidelines on the method of setting fines.

(1) *Preliminary remarks on the case-law concerning the statement of reasons for fines*

- 334 In the first place, the requirements relating to the duty to state the reasons for fines which the Commission must comply with in an ordinary procedure or a settlement procedure concerning a given cartel are also applicable in the case of a hybrid procedure, even where that procedure is staggered over time (see, by analogy, judgment of 13 December 2016, *Printeos and Others v Commission*, T-95/15, EU:T:2016:722, paragraph 47).
- 335 Although the settlement procedure and the ordinary infringement procedure are two distinct procedures, particularly having regard to the specific aim they pursue, both are governed by the initial decision initiating the investigation into the cartel adopted by the Commission on the basis of Article 2 of Regulation No 773/2004 (see paragraph 7 above) and also have the same public interest objective, namely to bring an end to the anticompetitive practice in question to the benefit of consumers affected by the relevant market.
- 336 In the second place, the statement of reasons for a decision imposing a fine for infringement of Article 101 TFEU must, in particular, enable the addressee undertakings to identify and understand the criteria actually used by the Commission in setting the fine and to check whether those criteria were applied in accordance with the principles of equal treatment and proportionality.
- 337 However, specifically as regards the exceptional adaptation of the basic amount of the fine, it must be recalled that under point 37 of the Guidelines on the method of setting fines, ‘the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from [the general] methodology’ for setting fines set out in those guidelines.
- 338 Therefore, when the Commission decides to depart from the general methodology set out in the Guidelines on the method of setting fines, the statement of reasons for the amount of that penalty must be all the more specific because point 37 of those guidelines simply makes a vague reference to ‘the particularities of a given case’ and thus leaves the Commission a broad discretion where it decides, as in the present case, to make an exceptional adaptation of the basic amount of the fines to be imposed on the undertakings concerned (see judgment of 13 December 2016, *Printeos and Others v Commission*, T-95/15, EU:T:2016:722, paragraph 48 and the case-law cited).
- 339 It is in precisely such circumstances that the statement of reasons for a legally binding measure, now the fundamental right enshrined in Article 41(2)(c) of the Charter, produces the full gamut of legal effects inherent in a legal requirement intended to safeguard the right of every person to good administration by the institutions, bodies, offices or agencies of the Union (see, to that effect, judgment of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14).
- 340 When determining the exceptional adaptation of the basic amount of the fine, the Commission is as a rule required to apply the same criteria and calculation method to all the parties to the cartel and to assess for each of them, in accordance with the principle of equal treatment, the factors on which it bases its decision.
- 341 Therefore, in the case of a hybrid procedure as in the instant case, the Commission’s duty to state reasons encompasses all the relevant factors necessary for determining whether or not the undertaking that refused to settle was in a comparable situation to that of its competitors to whom the settlement decision was addressed and whether any equal or different treatment of those situations was objectively justified (see, by analogy, judgment of 13 December 2016, *Printeos and Others v Commission*, T-95/15, EU:T:2016:722, paragraph 49).

- 342 In the present case, it is necessary to ascertain whether the calculation method and the criteria applied by the Commission in arriving at the adaptation carried out in respect of the applicant can be understood, to the requisite legal standard, from the statement of reasons for the contested decision and thereby to assess the proportionality of that exceptional adaptation and whether it is consistent with the principle of equal treatment.
- 343 The principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 14 May 2014, *Donau Chemie v Commission*, T-406/09, EU:T:2014:254, paragraph 238). The principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purposes of assessing the seriousness of the infringement and to apply those factors in a way which is consistent and objectively justified (judgments of 5 October 2011, *Romana Tabacchi v Commission*, T-11/06, EU:T:2011:560, paragraph 105, and of 20 May 2015, *Timab Industries and CFPR v Commission*, T-456/10, EU:T:2015:296, paragraph 161).
- 344 It follows that, when determining the amount of the fine, the Commission cannot discriminate between the parties to the same cartel with respect to the information and calculation methods which are not affected by the specific features of the settlement procedure, such as a 10% reduction in the event that a settlement is entered into in accordance with point 32 of the settlement notice (see judgment of 20 May 2015, *Timab Industries and CFPR v Commission*, T-456/10, EU:T:2015:296, paragraph 74 and the case-law cited).

(2) Statement of reasons for the exceptional adaptation of the fine in the contested decision

- 345 In recital 228 of the contested decision, under the heading ‘Adaptation of the adjusted basic amount’, the Commission first of all recalled that, in the settlement decision (recital 104), it had adapted, for all settling undertakings, the respective basic amounts for the following reasons. First, the adjusted basic amounts would have exceeded the legal threshold of 10% of the total turnover laid down in Article 23(2) of Regulation No 1/2003. Secondly, for each of those undertakings, ‘the value of sales of the cartelised product’ accounted for a high proportion of their total turnover. Thirdly, there were differences between the settling parties as regards their individual participation in the infringement.
- 346 Next, in recital 229 of the contested decision, the Commission essentially found that, in the specific circumstances of the case and in view of the need to ensure compliance with the principle of equal treatment, it was appropriate for it to exercise its discretion and to apply point 37 of the Guidelines on the method of setting fines also to Pometon, for the following reasons. First, the basic amount of the fine, adjusted on account of mitigating circumstances, would have exceeded the legal threshold of 10% of the total turnover laid down in Article 23(2) of Regulation No 1/2003. Secondly, there were differences between Pometon’s individual participation in the infringement and the individual participation of the other participants in the cartel. Thirdly, the fine had to be set at a level that was proportionate to the infringement committed by Pometon and had to have a sufficiently deterrent effect.
- 347 It is thus apparent from the contested decision that the Commission granted the applicant, under point 37 of the Guidelines on the method of setting fines, a specific reduction, as it had done in the settlement decision in respect of the other undertakings which had participated in the cartel, on the ground that, for Pometon as for the other cartel participants, the adjusted basic amount of the fine would have exceeded the legal maximum of 10% of the total turnover of the undertaking concerned.

- 348 The Commission therefore clearly justified the use of such an exceptional adaptation by the need to take account of, in accordance with the case-law, each party's different level of individual liability for participation in the cartel (see, to that effect, judgment of 16 June 2011, *Putters International v Commission*, T-211/08, EU:T:2011:289, paragraph 75).
- 349 On the other hand, the reasons for the contested decision do not provide sufficiently precise information on the calculation method used and the assessment criteria taken into account in order to differentiate the reduction granted to the applicant from the reductions applied to the other parties to the cartel on the basis of each undertaking's liability. In recital 229 of that decision, the Commission essentially referred, in general terms, to the existence of differences between the individual participation of Pometon and that of the other participants in the infringement, as well as the need to set the fine at a level that is proportionate to the infringement committed by that undertaking and which also achieves a sufficiently deterrent effect.
- 350 The only specific information arising in that regard from recitals 228 and 229 of the contested decision is that, with respect to the undertakings which were the subject of the settlement decision, one of the reasons mentioned by the Commission justifying such an exceptional adaptation was the fact that the value of specific sales accounted for a high proportion of the total turnover of each of them. Conversely, that factor is not listed as one of the reasons justifying the reduction granted to the applicant.
- 351 The mere absence of a reference to that factor, as regards the applicant, does not explain the difference between the reduction granted to it and the reductions applied to the other cartel participants.
- 352 Neither the content of the contested decision nor the content of the settlement decision shows that the Commission mainly relied, as it stated at the hearing, on the value of specific sales worldwide of each of the undertakings concerned expressed as a percentage of their total turnover in the last full year of their participation in the infringement.
- 353 The wording of recital 228 of the contested decision, stating that the 'value of sales of the cartelised product represented a high proportion of [the] total turnover [of the addressees of the settlement decision]' (see paragraph 345 above) is, at the very least, ambiguous.
- 354 In the absence of any explanation, that wording appears to refer, in the context of the contested decision and the settlement decision, to the value of specific sales of each of the addressees of the settlement decision at EEA level, corresponding to the geographic scope of the cartel. Nowhere do those decisions refer to the value of specific sales worldwide of the undertakings concerned, which, moreover, does not reflect their individual participation in the cartel, as mentioned in recital 229 of the contested decision (see paragraph 346 above).
- 355 The fact – which the Commission relied on at the hearing – that, in order to calculate the percentage in relation to the total turnover of the undertakings concerned, the Commission also took account, for the sake of consistency, of their specific sales worldwide, rather than in the EEA, is in no way apparent from the contested decision. Against the background described in paragraphs 353 and 354 above, the reference in recital 228 of that decision (see paragraph 345 above) to the total turnover of the undertakings to whom the settlement decision was addressed is not sufficient to comprehend that that institution relied on the specific sales figures worldwide of each of those undertakings.
- 356 Furthermore, in the rejoinder, the Commission itself conceded that, as regards the applicant, the correct figure was 23.7%, not 21%, being Pometon's specific sales in the EEA (recital 210 of the contested decision) expressed as a percentage of its total turnover in 2006. It was only at the hearing that the Commission stated that it had in actual fact relied on the value of specific sales worldwide of each of the undertakings concerned, in the last full year of their participation in the infringement, expressed as a percentage of their total turnover (see paragraphs 321 and 322 above).

- 357 In addition, the applicant also correctly points out that the statement of reasons for the contested decision does not make it possible to identify the calculation method used by the Commission to determine the adaptations and thus to assess, in the light of that method, whether the reduction granted to it was in line with the principles of proportionality and equal treatment.
- 358 Nothing in that decision explains why, despite there being no reference to that factor, the specific sales worldwide of the undertaking concerned expressed as a percentage of its total turnover was taken into account, as the Commission made clear at the hearing (see paragraph 375 above), to calculate the adaptation granted to the applicant, so as to ensure the proportionality of the fine. In particular, it is not apparent from that decision or the settlement decision that, for all the undertakings which participated in the infringement, the Commission relied on that percentage and adjusted it by applying to it, as appropriate, an additional reduction or a penalty, as that institution explained to the Court.
- 359 Finally, it is in no way apparent from the contested decision that, to avoid conferring an unreasonable advantage on the undertakings whose activities were concentrated, the Commission adjusted the abovementioned percentage on the basis of the three criteria mentioned in the table it produced at the hearing, relating to the diversification of the applicant's sales, its 'small size' and its 'limited role' in the second limb of the infringement.
- 360 Only the latter criterion, relating to the individual liability of the applicant for the infringement as compared with that of the other parties to the cartel, is mentioned in recital 228 of the contested decision. However, the statement of reasons for that decision does not disclose any of the other assessment criteria taken into account by the Commission to determine the exceptional adaptation in respect of the applicant, so as to ensure that the fine imposed on it was proportionate as compared with the fines imposed on the other undertakings.
- 361 Consequently, it follows from the foregoing that recitals 228 and 229 of the contested decision do not allow for an assessment, based on the statement of reasons they contain, as to whether the applicant was, in the light of the calculation method and the criteria applied by the Commission, in a comparable or different situation to that of the other undertakings concerned, and whether that institution treated it equally or differently.
- 362 Since the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him or her, the inadequate statement of reasons for the contested decision cannot be remedied by the explanations on the calculation method used and the criteria applied in this case by the Commission, which it provided during the proceedings before the Court (see, to that effect, judgment of 13 December 2016, *Printeos and Others v Commission*, T-95/15, EU:T:2016:722, paragraph 46 and the case-law cited).
- 363 In the light of all those considerations, it must therefore be held that the contested decision is vitiated by an infringement of the obligation to state reasons as regards the exceptional reduction granted to the applicant under point 37 of the Guidelines on the method of setting fines.
- 364 The Court therefore upholds the third head of claim in so far as it seeks the annulment of the amount of the fine and, therefore, annuls Article 2 of the contested decision.

(c) Application for variation of the amount of the fine

- 365 It should be noted that notwithstanding the annulment of Article 2 of the contested decision because the statement of reasons was inadequate, the Court is not deprived of the power to exercise its unlimited jurisdiction, since the applicant also seeks the variation of the amount of the fine.

- 366 Following the explanations provided by the Commission in its pleadings and, in particular, in view of the information deriving from the table on the respective adaptations to the basic amount of the fines carried out by the Commission, under point 37 of the Guidelines on the method of setting fines, in respect of the applicant and the four addressees of the settlement decision, the Court is able to determine the calculation method and the criteria applied by that institution, both in the contested decision and in the settlement decision, and therefore to assess, in the exercise of its unlimited jurisdiction, whether they are appropriate (see paragraphs 376 and 377 below).
- 367 It should be recalled that, when they exercise their unlimited jurisdiction, the EU Courts are empowered, in addition to the mere review of the legality of the penalty, to substitute, in relation to the determination of the amount of that penalty, their own assessment for that of the Commission, which adopted the measure in which that amount was initially fixed, to the exclusion, however, of any alteration of the constituent elements of the infringement lawfully determined by the Commission in the decision under examination by the General Court (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraphs 75 to 77).
- 368 Consequently, the EU Courts may vary the contested measure, even without annulling it, so as to cancel, reduce or increase the fine imposed, the exercise of that jurisdiction entailing the definitive transfer to the EU judicature of the power to impose penalties (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 692 and 693; of 26 September 2013, *Alliance One International v Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 104; and of 22 October 2015, *AC-Treuhand v Commission*, C-194/14 P, EU:C:2015:717, paragraph 74).
- 369 In the present case, in the exercise of its unlimited jurisdiction, it is therefore for the Court – in view of the Commission’s findings as to the applicant’s participation in the single and continuous infringement at issue, as confirmed in the examination of the first four pleas raised in support of this action – to determine the appropriate amount of the exceptional adaptation of the basic amount of the fine, having regard to all the circumstances of the case (see, to that effect, judgment of 26 September 2013, *Alliance One International v Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 104, and of 16 June 2011, *Putters International v Commission*, T-211/08, EU:T:2011:289, paragraph 75).
- 370 That exercise involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration the seriousness of the infringement committed by the applicant and its duration, in compliance with the principles of, inter alia, proportionality, the individualisation of penalties and equal treatment, without the Court being bound, however, by the indicative rules defined by the Commission in its Guidelines on the method of setting fines (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others v Commission*, C-603/13 P, EU:C:2016:38, paragraph 90 and the case-law cited), which that institution moreover rightly departed from in the contested decision under point 37 of those guidelines (see paragraph 348 above), or by the calculation method used by the Commission in the settlement decision.
- 371 It follows that, subject to the ceiling of 10% of the total turnover of the undertaking concerned in the preceding business year, the Court’s discretion is limited only by the criteria relating to seriousness and duration of the infringement, as set out in Article 23(3) of Regulation No 1/2003, which confers a broad discretion on the competent authority, provided, of course, that the principles referred to in paragraph 370 above are observed.
- 372 That being the case, as part of its duty to state reasons, the Court is required to set out in detail the factors which it takes into account in setting the amount of the fine (see, to that effect, judgment of 14 September 2016, *Trafilerie Meridionali v Commission*, C-519/15 P, EU:C:2016:682, paragraph 52).

- 373 Therefore, as regards the criterion relating to the duration of the applicant's participation in the single and continuous infringement in question, it should be pointed out that that condition was already duly taken into account, pursuant to point 24 of the Guidelines on the method of setting fines, when the Commission set the basic amount of the fine, which was not challenged by the applicant; all additional years of participation in the infringement thus resulted, for each of the parties to the cartel, in a 100% increase of that basic amount.
- 374 Next, concerning the application of the legal criterion of the seriousness of the infringement (see paragraph 371 above), it is settled case-law that the fixing of a fine by the Court is not an arithmetically precise exercise (judgments of 5 October 2011, *Romana Tabacchi v Commission*, T-11/06, EU:T:2011:560, paragraph 266, and of 15 July 2015, *SLM and Ori Martin v Commission*, T-389/10 and T-419/10, EU:T:2015:513, paragraph 436).
- 375 Nevertheless, it is for the Court to determine an adaptation of the basic amount of the fine which is proportionate, in the light of the criteria it considers relevant, to the seriousness of the infringement committed by the applicant and which also has a sufficiently deterrent effect.
- 376 In the instant case, the Court considers it appropriate to take into consideration, in the exercise of its unlimited jurisdiction, first, the individual liability of Pometon for participating in the cartel at issue, secondly, the capacity of that undertaking to undermine competition in the steel abrasives market by its unlawful conduct and, finally, its size, by comparing for each of those different factors the individual liability and situation of the applicant with the individual liability and situation of the other parties to the cartel.
- 377 In the circumstances of this case, the abovementioned factors – despite partially overlapping those taken into account by the Commission (see paragraph 325 above) – offer a better understanding of the seriousness of the infringement attributable to each of the parties to the cartel than that ultimately applied by the Commission, namely the value of specific sales worldwide of the undertaking concerned expressed as a percentage of its total turnover in the reference year, even though that figure was adjusted by the Commission so as not to 'confer an unreasonable advantage' on the undertakings whose concentration of sales worldwide was particularly high (see paragraphs 322 and 323 above).
- 378 Thus, first, as regards the factor relating to Pometon's individual liability for participating in the cartel in question, it is established that the applicant played an important role in the first limb of the cartel, particularly in the design and set-up of the scrap surcharge, which was of automatic application, as the Court found in paragraphs 129, 130 and 160 above.
- 379 However, the participation of Pometon in the second limb of the cartel was only occasional, as the Commission moreover acknowledged and as was noted in paragraph 175 above.
- 380 Due to the occasional nature of that participation, the unlawful conduct of the applicant thus differs from the unlawful conduct of Ervin and Winoia, to whom the Commission had ascribed, in recital 36 of the settlement decision, anticompetitive contacts that were 'more frequent than those involving the other three parties' to the cartel, specifically as regards coordination in respect of individual customers. Moreover, the assessments set out in that recital concerning the other addressees of the settlement decision also show that the applicant's participation in coordination as regards individual customers was comparable to the participation of MTS, to whom the Commission also attributes only occasional contacts, but was nonetheless greater than the participation of Würth, in respect of whom the Commission had far less evidence of participation in anticompetitive contacts.
- 381 Furthermore, it is common ground between the parties that, unlike the other four cartel participants, the applicant was in no way involved in the agreement concerning the energy surcharge, which was, by contrast, taken into account by the Commission in determining the amount of the fines imposed on the addressees of the settlement decision, as is apparent from recitals 51 and 52 of that decision.

- 382 In the light of all that information, it is necessary in the instant case to bear in mind that the applicant, unlike Ervin and Winoa, but like MTS and Würth, had a more limited role overall in the cartel, as the Commission moreover pointed out in the table it produced at the hearing.
- 383 Secondly, as regards the factor relating to the actual impact of Pometon's unlawful conduct on price competition and, accordingly, on the profits that undertaking earned because of the restriction of competition resulting from its infringement, account should be taken of the value of its specific sales in the EEA, which stood at EUR 23 686 000, compared to Ervin (EUR 13 974 000), Winoa (EUR 101 470 000), MTS (EUR 20 978 000) and Würth (EUR 3 603 000), during the last full year of the participation of each of those undertakings in the infringement.
- 384 Since the single and continuous infringement in question covered the whole of the EEA (see paragraphs 265 and 266 above), the value of specific sales of the undertaking concerned in that territory allows only sales made by that undertaking on the relevant market affected by the infringement to be taken into consideration, thus providing a more accurate reflection of the economic weight of that undertaking in the infringement and the harm it caused to competition than the value of its specific sales worldwide, which also include sales not directly linked to the infringement.
- 385 Therefore, since the percentage of specific sales worldwide of Pometon in 2009, taken into account by the Commission, is not a relevant factor for the purpose of applying the criteria used by the Court (see paragraph 376 above), there is no need to check the accuracy – contested by the applicant – of the figure of 21% mentioned in that regard in the table produced by the Commission and on which that institution relied in the contested decision (see paragraphs 319 and 323 above).
- 386 In the instant case, the comparison between the value of specific sales in the EEA of each of the five undertakings party to the cartel, mentioned in paragraph 383 above, shows that, if that criterion is taken as a basis, Pometon's weight in the infringement is four times less than that of Winoa, but is relatively close to that of MTS and far higher than that of Ervin and Würth.
- 387 However, the taking account of that factor, which is fully justified as regards the first limb of the cartel, in which the applicant played an important role, must be adapted to reflect the fact that the applicant implemented the second limb only occasionally and that it therefore played a more limited role in the cartel than Ervin or Winoa, as pointed out in paragraph 382 above.
- 388 Thirdly, in the interests of fairness, and while nevertheless ensuring the deterrent effect that fines must have, account should also be taken of the respective sizes of the undertakings concerned, as shown by their total turnover, which constitutes, according to the case-law, an indication, albeit approximate and imperfect, of the size and economic power of each of them (see, to that effect, judgment of 7 September 2016, *Pilkington Group and Others v Commission*, C-101/15 P, EU:C:2016:631, paragraph 17).
- 389 Since the applicant left the steel abrasives market in May 2007, by selling its business in that sector to Winoa, the total turnover of the applicant in 2006 should be compared with that of the other parties to the cartel in 2009, inasmuch as the total turnover of each of those five undertakings during the last full year of their participation in the infringement is an appropriate reflection of their economic situation during the period in which the infringement was committed.
- 390 In this case, it is apparent from the data provided by the Commission in response to a measure of inquiry (see paragraph 25 above), as well as the table it produced at the hearing, that the turnover of Pometon in 2006 (EUR 99 890 000) did not reach a third of that of Winoa (EUR 311 138 000), but was well above the turnover of Ervin (EUR 70 590 766), MTS (EUR 25 082 293) and Würth (EUR 11 760 787) in 2009.

- 391 Fourthly, the weighing-up, in the light of those different factors, of the applicant's situation against the situation of the addressees of the settlement decision shows, first, that while Ervin and Winoa, who had a significant role in the cartel, were given an exceptional reduction of 75%, MTS and Würth, who, like the applicant, had played a limited role in the cartel, obtained a reduction of 90% and 67% respectively. The size of the reduction granted to MTS may be accounted for, in particular, by the concentration of its business, as was taken into account by the Commission (see paragraphs 322 and 377 above). It is also apparent from the table produced by the Commission that the three undertakings with a very low level of diversification of sales, namely MTS, Ervin and Winoa, were given, because of that, much higher reductions than Pometon and Würth, whose business was more diversified.
- 392 In so far as the different adaptation percentages mentioned above, set by the Commission with respect to the addressees of the settlement decision, are the result of primary consideration being given, in the Commission's calculation method, to the percentage of specific sales worldwide of the undertaking concerned, the level of those adaptations is irrelevant in the instant case and cannot therefore serve as a point of reference in the setting by the Court of the adaptation to be applied to the applicant on the basis of the criteria it has used (see paragraphs 376 and 377 above).
- 393 Therefore, in the light of the material set out in paragraphs 378 to 392 above, the Court will make an equitable assessment of all the abovementioned circumstances of the case by granting Pometon an exceptional reduction of 75% of the basic amount of the fine adjusted on account of mitigating circumstances (see paragraph 19 above), as determined in the contested decision.
- 394 For all of those reasons, the fine imposed on the applicant is set at EUR 3 873 375.
- 395 Finally, the fourth head of claim of the action must be dismissed as the Court does not have jurisdiction to issue directions to the Commission.
- 396 It follows from all of the foregoing that it is necessary, first, to annul Article 2 of the contested decision, secondly, to set the amount of the fine imposed on the applicant at EUR 3 873 375 and, thirdly, to dismiss the action as to the remainder.

IV. Costs

- 397 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Pursuant to Article 134(3) of those rules, the parties are to bear their own costs where each party succeeds on some and fails on other heads.
- 398 In this case, since each party has been unsuccessful in part, they must be ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition)

hereby:

- 1. Annuls Article 2 of Commission Decision C(2016) 3121 final of 25 May 2016 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case AT.39792 – Steel Abrasives);**
- 2. Sets the amount of the fine imposed on Pometon SpA at EUR 3 873 375;**

3. Dismisses the action as to the remainder;

4. Orders each party to bear its own costs.

Frimodt Nielsen

Kreuschitz

Forrester

Póltorak

Perillo

Delivered in open court in Luxembourg on 28 March 2019.

[Signatures]

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