



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

15 July 2015*

(Competition — Agreements, decisions and concerted practices — European prestressing steel market — Price fixing, market sharing and exchanging of sensitive commercial information —

Decision finding an infringement of Article 101 TFEU — Single, complex and continuous infringement — Limitation — 2006 Guidelines on the method of setting fines — Imputation of liability for the infringement to the parent company — Proportionality — Principle that penalties must be specific to the individual and to the offence — Unlimited jurisdiction)

In Cases T-389/10 and T-419/10,

Siderurgica Latina Martin SpA (SLM), established in Ceprano (Italy), represented by G. Belotti and F. Covone, lawyers,

applicant in Case T-389/10,

Ori Martin SA, established in Luxembourg (Luxembourg), represented by P. Ziotti, lawyer,

applicant in Case T-419/10,

v

European Commission, represented, in Case T-389/10, initially by B. Gencarelli, V. Bottka and P. Rossi, and subsequently by V. Bottka, P. Rossi et G. Conte, acting as Agents, and, in Case T-419/10, initially by B. Gencarelli, V. Bottka and G. Rossi, and subsequently by V. Bottka, P. Rossi and G. Conte, acting as Agents,

defendant,

APPLICATION for annulment and alteration of Commission Decision C(2010) 4387 final of 30 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (case COMP/38344 — Prestressing Steel), amended by Commission Decision C(2010) 6676 final of 30 September 2010, and by Commission Decision C(2011) 2269 final of 4 April 2011,

THE GENERAL COURT (Sixth Chamber),

composed of S. Frimodt Nielsen (Rapporteur), President, F. Dehousse and A.M. Collins, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearings on 30 June 2014,

gives the following

* Language of the case: Italian.

Judgment¹ ...

Procedure and forms of order sought

- 44 By application lodged at the Registry of the Court on 13 September 2010, SLM brought its action in Case T-389/10.
- 45 By application lodged at the Court Registry on 14 September 2010, Ori Martin brought its action in Case T-419/10.
- 46 By decision of 29 October 2010, the Court (First Chamber) informed the applicants that they could adapt their pleas and the form of order sought in order to take account of the amendments made by the first amending decision. SLM and Ori Martin did not make use of that possibility.
- 47 By decision of 6 June 2011, the Court requested the Commission to supply it with the second amending decision.
- 48 On 22 June 2011, the Commission notified the second amending decision.
- 49 By decision of 30 June 2011, the Court (First Chamber) informed the applicants that they could adapt their pleas and the form of order sought in order to take account of the amendments made by the second amending decision.
- 50 SLM and Ori Martin submitted their observations on the second amending decision, which was addressed to them, in their replies lodged on 13 April 2011.
- 51 On 20 October 2011, the Commission lodged the original of its rejoinders in the language of the case, as well as its comments on the observations submitted by SLM and by Ori Martin on the second amending decision, and the written procedure was therefore closed.
- 52 The composition of the Chambers of the Court having been altered as from 23 September 2013, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present cases were therefore assigned.
- 53 The preliminary report referred to in Article 52(2) of the Rules of Procedure of the General Court of 2 May 1991 was communicated to the Sixth Chamber on 8 November 2013.
- 54 In Case T-389/10, by decision of 17 December 2013, the Court asked the parties to respond to a series of measures of organisation of procedure.
- 55 By letters of 28 January and 28 February 2014, respectively, SLM and the Commission responded to those measures. However, the Commission stated in its response that it could not entirely comply with some of the requests for the production of documents because the documents requested had been sent to it in the context of dealing with leniency applications. SLM submitted its observations on that remark by the Commission.
- 56 On 16 May 2014, in the context of measures of inquiry adopted pursuant to Article 65 of its Rules of Procedure of 2 May 1991, the Court ordered the Commission to produce the documents which it had refused to produce in response to the measures of organisation of procedure adopted on 17 December 2013.

1 — Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

- 57 On the same day, by way of a measure of organisation of procedure, the General Court asked the Commission to produce certain documents relating to the investigation or proceedings in respect of the infringement during the administrative procedure.
- 58 On 27 May and 6 June 2014, respectively, the Commission produced the requested documents.
- 59 In Case T-419/10, by decision of 17 December 2013, the Court asked the parties to respond to a series of measures of organisation of procedure.
- 60 By letters of 28 and 30 January 2014, respectively, Ori Martin and the Commission responded to those measures.
- 61 The parties presented oral argument and answered the written and oral questions put by the Court at the hearings on 30 June 2014. In addition, the parties were asked to submit their observations on a possible joinder of the present cases T-389/10 and T-419/10 for the purpose of the judgment, in accordance with Article 50(1) of the Rules of Procedure of 2 May 1991.
- 62 In Case T-389/10, SLM claims that the Court should:
- annul [Commission Decision C(2010) 4387 final of 30 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (case COMP/38344 — Prestressing Steel) ('the initial decision'), as amended by Commission Decision C(2010) 6676 final of 30 September 2010 ('the first amending decision'), and by Commission Decision C(2011) 2269 final of 4 April 2011 ('the second amending decision'), ('the contested decision')];
 - redetermine, in the light of the second amending decision, the amount of the fine that was imposed on it jointly and severally with Ori Martin;
 - by way of measures of inquiry, order, in accordance with Article 65(c) and Article 68 et seq. of the Rules of Procedure of 2 May 1991, the questioning or oral testimony of the representatives of Redaelli and ITC on the following question: 'Is it true that SLM did not participate in the meetings concerning the cartel at issue before the end of 1999?', and request the Commission to provide a list indicating the number of officials, including directors and heads of unit, who dealt with the file between the beginning of 2002 and June 2010;
 - order the Commission to reimburse the interest due on the sum already paid;
 - order the Commission to pay the costs.
- 63 The Commission contends that the Court should:
- dismiss the action and the applications for measures of inquiry;
 - order SLM to pay the costs.
- 64 In Case T-419/10, Ori Martin claims that the Court should:
- annul the contested decision, in so far as it attributes liability for the conduct penalised to Ori Martin;
 - cancel or reduce the amount of the fine imposed on it;
 - order the Commission to pay the costs.

65 The Commission contends that the Court should:

- dismiss the action;
- order Ori Martin to pay the costs.

Law

66 After hearing the parties in that regard (paragraph 61 above), the Court decided to join the present cases for the purposes of the judgment, pursuant to Article 50 of the Rules of Procedure of 2 May 1991.

67 In support of its action, SLM puts forward several pleas in law.

68 The first two pleas in law are aimed at the annulment of the contested decision in so far as it relates to SLM and concern, first, the infringement of the reasonable time principle and, secondly, the infringement of the principle of sound administration.

69 The other pleas in law raised are aimed at the reduction of the amount of the fine at issue. Those pleas in law concern (i) the erroneous application of the [Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, ‘the 2006 Guidelines’)] instead of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, ‘the 1998 Guidelines’); (ii) breach of the legal limit of 10% of turnover and of the obligation to state reasons in that respect; (iii) infringement of the obligation to state reasons as regards the determination of the gravity of the infringement and the determination of the increase for deterrence; (iv) infringement of the principle of proportionality; (v) erroneous assessment of the duration of SLM’s participation in the cartel; (vi) failure to take into consideration the mitigating circumstances as regards SLM; (vii) failure to take into consideration SLM’s statements; (viii) failure to take into consideration SLM’s inability to pay and (ix) the allegation that the limitation period in respect of the infringement had expired.

70 Following the second amending decision, SLM adapted its pleas in law in order to invoke a new aspect of the case, relating to the calculation errors allegedly committed by the Commission in determining the part of the fine for which SLM would be solely liable and the part for which SLM and Ori Martin would be jointly and severally liable.

71 It appears from SLM’s response to the measures of organisation of procedure that it is no longer necessary to rule on the pleas in law initially put forward concerning, first, the breach of the legal limit of 10% of turnover and of the obligation to state reasons in that respect — except in order to determine the consequences that the arguments put forward in that respect may have on the allocation of costs in SLM’s favour — and, secondly, the failure to take into consideration SLM’s inability to pay. Formal note of this was taken at the hearing.

72 Ori Martin puts forward three pleas in law in support of its action. The first plea in law alleges that the limitation period in respect of the infringement had expired. The second plea in law concerns the breach of several rules applicable to the attribution of liability for an infringement to Ori Martin as the almost exclusive owner of SLM. The third plea in law criticises certain aspects of the calculation of the fine and expresses doubts as to the possibility of applying the 2006 Guidelines instead of the 1998 Guidelines.

73 The arguments of SLM and Ori Martin overlap as regards the allegation that the limitation period in respect of the infringement had expired, the possibility of applying the 2006 Guidelines instead of the 1998 Guidelines, and certain aspects regarding the calculation of the fine. Those arguments will be examined together.

A – Whether the limitation period in respect of the infringement had expired

1. Arguments of the parties

74 SLM and Ori Martin submit that the Commission's power to impose fines is time barred in the present case. The limitation period started running on 19 September 2002, the date on which the infringement ceased, and expired on 19 September 2007. None of the activities carried out by the Commission after that date and before the notification of the statement of objections — namely the requests concerning undertakings' turnover, its positions taken on the leniency applications and an inspection carried out on 7 and 8 June 2006 on the premises of a chartered accountant — were necessary for the investigation of the case or the proceedings in respect of the infringement. The notification of the statement of objections, on 30 September 2008, therefore occurred after the end of the period of five years from the day on which the infringement ceases laid down in Article 25 of Regulation No 1/2003.

75 The Commission disputes those arguments.

2. Assessment of the Court

76 Article 25 of Regulation No 1/2003 provides that the Commission's power to impose fines is subject to a five-year limitation period in respect of infringements of Article 101 TFEU. That limitation period begins to run on the day on which the infringement is committed.

77 However, any action taken by the Commission for the purpose of the investigation or proceedings in respect of the infringement interrupts that limitation period. Written requests for information by the Commission and written authorisations to conduct inspections issued to its officials by the Commission are listed, by way of examples, among the actions which interrupt the running of the limitation period.

78 In that respect, Article 25 of Regulation No 1/2003 clearly states that the limitation period is to be interrupted with effect from the date on which the action is notified to at least one undertaking or association of undertakings which has participated in the infringement, and that that interruption is to apply for all the undertakings or associations of undertakings which have participated in the infringement.

79 In the present case, it must be noted that, in the period of five years from 19 September 2002, the date on which the infringement ceased, the Commission notified several requests for information for the purpose of the investigation or proceedings in respect of the infringement to various undertakings that had participated in the infringement.

80 By way of examples mentioned by the Commission in its response to the Court's questions on this point, it can be seen from the file that, on 19 April 2006, it sent a request for information to ITC relating, inter alia, to an Italian chartered accountant's role in the cartel. Likewise, it is not disputed that, on 7 and 8 June 2006, the Commission carried out an inspection, during which it seized numerous documents, listed in Annex 5 to the contested decision, which allowed it to corroborate important evidence relating to Club Italia.

- 81 In doing so, the Commission validly interrupted the limitation period before 19 September 2007 as regards all the undertakings that had participated in the infringement. Accordingly, the Commission's power to impose fines was not time barred when it adopted the statement of objections, on 30 September 2008, or when it adopted the initial decision, on 30 June 2010.
- 82 The pleas in law relating to the limitation period must therefore be rejected as unfounded.

B – The application of the 2006 Guidelines instead of the 1998 Guidelines

1. Arguments of the parties

- 83 SLM and Ori Martin take issue with the Commission for having applied the 2006 Guidelines in order to penalise acts committed prior to the publication of those guidelines. In particular, SLM submits that the retroactive application of an unfavourable criminal law infringes the principle that penalties must be provided for by law and the principle of the non-retroactivity of criminal law. The Commission cannot, *inter alia*, rely, as against third parties, on the rule set out in point 38 of the 2006 Guidelines concerning the temporal scope of those guidelines, since that new guidance was not adopted with the involvement of other institutions or of Member States. The application of the 2006 Guidelines to SLM's situation is also characterised by unequal treatment, since most undertakings penalised under the 2006 Guidelines for acts similar to those which SLM is alleged to have committed received a more limited fine, amounting to 1 to 5% of their turnover. The amount of the fine should be reviewed by the Court in the light of the 1998 Guidelines in force at the material time and at the initiation of the administrative procedure.
- 84 The Commission disputes those arguments.

2. Assessment of the Court

- 85 Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, entitled 'No punishment without law', provides:
- 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'
- 86 There is a similar provision in the Charter of Fundamental Rights of the European Union, Article 49(1) of which provides:
- 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.'
- 87 In that respect, Article 53 of the Charter of Fundamental Rights provides that the abovementioned provision is not to be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, *inter alia*, by international agreements to which the European Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.

88 In that context, it must be recalled that Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [101 TFEU] and [102 TFEU] (OJ, English Special Edition 1959-1962, p. 87) provided:

‘2. The Commission may by decision impose on undertakings or associations of undertakings fines of from [EUR] 1 000 to [EUR] 1 000 000, or a sum in excess thereof but not exceeding 10% of turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [101(1) TFEU] or Article [102 TFEU] ...

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.’

89 That provision was repealed with effect from 1 May 2004, pursuant to Article 43 of Regulation No 1/2003, and replaced by Article 23(2) and (3) of that regulation, which provides:

‘2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101 TFEU] or Article [102 TFEU]...

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

...

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.’

90 Subsequently, on 1 September 2006, the Commission published the 2006 Guidelines in the Official Journal. That document sets out the method which the Commission intends to follow when it sets the amount of a fine imposed on undertakings that have committed infringements of the provisions of Article 81 EC (now Article 101 TFEU). Point 38 of the 2006 Guidelines is worded as follows:

‘[The 2006 Guidelines] will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62.’

91 The 2006 Guidelines therefore replace the 1998 Guidelines.

92 In that regard, it is settled case-law that although internal rules of conduct intended to produce legal effects vis-à-vis third parties, such as traders liable to commit infringements of Article 101 TFEU, may not be regarded as rules of law which the administration is always bound to observe by reason of their intrinsic nature, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (judgment of 28 June 2005 in *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:408, paragraphs 209 and 210).

93 It follows that the 2006 Guidelines, which constitute such rules of conduct, fall within the scope of the concept of ‘law’ for the purposes of Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 49(1) of the Charter of Fundamental Rights (see, to that effect

and by analogy, judgments in *Dansk Rørindustri and Others v Commission*, cited in paragraph 92 above, EU:C:2005:408, paragraph 216, and of 18 May 2006 in *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, C-397/03 P, ECR, EU:C:2006:328, paragraph 20).

- 94 Although those provisions cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, they may however preclude the retroactive application of a new interpretation of a rule establishing an offence (see, to that effect and by analogy, judgment in *Dansk Rørindustri and Others v Commission*, cited in paragraph 92 above, EU:C:2005:408, paragraph 217, and the case-law of the European Court of Human Rights cited in paragraph 215 of that judgment).
- 95 It follows that, contrary to the Commission's contention, the fact that the 2006 Guidelines maintain the maximum of 10% of the turnover of the penalised undertakings laid down in Article 15(2) of Regulation No 17, applicable as regards the facts that gave rise to the present dispute, is not enough to establish that the application of the 2006 Guidelines does not breach the principle of non-retroactivity in criminal law.
- 96 That principle could be breached by the application of a judicial interpretation which was not reasonably foreseeable at the time when the offence was committed (judgment in *Dansk Rørindustri and Others v Commission*, cited in paragraph 92 above, EU:C:2005:408, paragraph 218).
- 97 It follows from the foregoing that the guidelines must be regarded as an interpretation, issued by the Commission, relating to the conduct which it intends to adopt when it imposes fines and it is apparent from the case-law that the amendments made by the Commission to such interpretations are compatible with the principle of non-retroactivity in criminal law and the principle of legal certainty provided that those amendments may be regarded as reasonably foreseeable.
- 98 It can also be seen from the case-law that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it covers and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. That is particularly true in relation to professionals used to having to proceed with a high degree of caution when pursuing their occupation, who can be expected to take special care in assessing the risks that their infringing actions entail (see, to that effect, judgment in *Dansk Rørindustri and Others v Commission*, cited in paragraph 92 above, EU:C:2005:408, paragraph 219 and the case-law cited).
- 99 However, the proper application of the competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy. It follows that undertakings involved in an administrative procedure in which fines may be imposed cannot acquire a legitimate expectation in the fact that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines (see judgment in *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, cited in paragraph 93 above, EU:C:2006:328, paragraphs 21 and 22 and the case-law cited).
- 100 Consequently, in the present case, the undertakings concerned must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. That is true not only where the Commission raises the level of the amount of fines in imposing fines in individual decisions but also if that increase takes effect by the application, in particular cases, of rules of conduct of general application, such as the guidelines (see judgment in *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission*, cited in paragraph 93 above, EU:C:2006:328, paragraphs 23 and 24 and the case-law cited).

- 101 Those undertakings are therefore not justified in arguing that, after having adopted the 1998 Guidelines, the Commission could in no case apply the new guidance to ongoing procedures without breaching the legitimate expectations of the undertakings in question. It must be examined, however, whether the circumstances in which the 2006 Guidelines were applied in the present case meet the requirements of legal certainty and of foreseeability laid down in the case-law.
- 102 In that respect, it must be recalled that, under Article 38 thereof, the 2006 Guidelines are applicable in all cases where a statement of objections is notified after their date of publication in the Official Journal. Since that publication occurred on 1 September 2006 and the statement of objections in the present case was notified on 30 September 2008 at the earliest, the amount of the fine imposed was therefore calculated in accordance with the methodology laid down in the 2006 Guidelines.
- 103 First, it is necessary to reject the argument raised by SLM alleging that the Commission was not competent to adopt, and rely upon vis-à-vis third parties, the rule on temporal scope set out in point 38 of those guidelines. The enforceability of that rule vis-à-vis third parties, which contributes to the respect for the principle of legal certainty by stating, clearly and objectively, the temporal scope of the 2006 Guidelines, derives from the power, which the Commission is recognised as having by the case-law, to impose a limit on itself by specifying the criteria which it intends to apply in the exercise of the discretion granted to it by Regulation No 1/2003, which constitutes the legal basis for the contested decision (see, to that effect, judgments in *Dansk Rørindustri and Others v Commission*, cited in paragraph 92 above, EU:C:2005:408, paragraphs 211 and 213, and of 2 February 2012 in *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, EU:T:2012:48, paragraph 108).
- 104 Secondly, it must be examined whether the adoption of the 2006 Guidelines was sufficiently foreseeable for the purpose of the case-law cited in paragraphs 96 to 100 above.
- 105 In that regard, the main innovation in the 2006 Guidelines, as is apparent from points 5 to 7 thereof, consists in taking as a starting point for the calculation of the fine a basic amount, determined according to the value of the sales of goods or services to which the infringement relates and the duration and gravity of that infringement, and including a specific amount in order to deter companies from entering into illegal practices. It must therefore be found that the 2006 Guidelines are based on the criteria of gravity and duration defined in Regulation No 17 and reiterated in Regulation No 1/2003, which were already taken into account in the 1998 Guidelines (see, to that effect, judgment in *Denki Kagaku Kogyo and Denka Chemicals v Commission*, cited in paragraph 103 above, EU:T:2012:48, paragraph 114).
- 106 Moreover, the possibility that a prudent trader may not know in advance the precise level of the fines which the Commission will impose in each individual case is not in itself contrary to the requirement of foreseeability inherent to the principle of the non-retroactivity of criminal law. The objectives of punishment and deterrence pursued by competition policy may justify preventing undertakings from being in a position to assess precisely the advantages and disadvantages which they would derive from their participation in an infringement. It is sufficient that those undertakings are able, if need be by taking legal advice, to foresee in a sufficiently precise manner the criteria and the order of magnitude of the fines which they incur. As the Court noted above, the criteria taken into account in the 2006 Guidelines are based on the criteria referred to in Regulation No 17, which were already taken into account in the 1998 Guidelines (see, to that effect, judgments of 22 May 2008 in *Evonik Degussa v Commission*, C-266/06 P, EU:C:2008:295, paragraph 55, and *Denki Kagaku Kogyo and Denka Chemicals v Commission*, cited in paragraph 103 above, EU:T:2012:48, paragraph 118).
- 107 It must therefore be concluded that the 2006 Guidelines and the new method of calculating fines embodied therein, even though it may have had an aggravating effect regarding the level of the fines imposed, was reasonably foreseeable for undertakings such as SLM at the time when the infringement in question was committed. Accordingly, by applying the 2006 Guidelines in the contested decision to calculate the fine to be imposed in respect of an infringement committed before those guidelines were

adopted, the Commission did not infringe the principle of non-retroactivity (see, to that effect, judgment in *Denki Kagaku Kogyo and Denka Chemicals v Commission*, cited in paragraph 103 above, EU:T:2012:48, paragraphs 117 and 124).

- 108 It follows that the plea in law relating to the application of the 2006 Guidelines instead of the 1998 Guidelines must be rejected, without it being necessary to rule on whether SLM is justified in submitting that the application of the 2006 Guidelines gave rise to a larger fine than would have been imposed if it had been calculated in accordance with the 1998 Guidelines.
- 109 As noted in paragraphs 99 and 100 above, the principles invoked by SLM do not preclude the application of guidelines which, *ex hypothesi*, have the effect of increasing the level of the fines imposed for infringements, on condition that the policy which they implement was reasonably foreseeable at the time when the infringements concerned were committed (see judgments of 12 December 2007 in *BASF and UCB v Commission*, T-101/05 and T-111/05, ECR, EU:T:2007:380, paragraphs 233 and 234 and the case-law cited, and *Denki Kagaku Kogyo and Denka Chemicals v Commission*, cited in paragraph 103 above, EU:T:2012:48, paragraph 126 and the case-law cited).
- 110 In any event, it must be observed that, by merely summarising the factors taken into account by the Commission in its calculation in the contested decision, SLM failed to establish that the amount of the fine that might have been imposed on it in accordance with the methodology set out in the 1998 Guidelines would necessarily have been lower. In the present case, SLM merely pointed to certain differences between the 2006 Guidelines and the 1998 Guidelines (the additional amount, the method of taking into account the duration of the infringement, the nature of the mitigating circumstances) without indicating what result the Commission might have arrived at by applying the 1998 Guidelines, in which the starting point for the calculation also differs from that used in the 2006 Guidelines.
- 111 Likewise, as regards SLM's argument challenging the rigorous application of the 2006 Guidelines to which it claims it was subject, submitting that that application infringed the principle of equal treatment, it suffices to note that that question is irrelevant to the conformity of the application of the 2006 Guidelines with the principle of non-retroactivity. The arguments raised by SLM in that regard will be examined subsequently in relation to its arguments submitted as regards the factors taken into consideration by the Commission in using those guidelines to determine the amount of the fine at issue.
- 112 The plea in law relating to the erroneous application of the 2006 Guidelines instead of the 1998 Guidelines must therefore be rejected as unfounded.

C – The factors taken into account in calculating the amount of the fine and the treatment of evidence adduced before the Commission

- 113 Several pleas put forward by SLM concern the factors taken into account by the Commission in order to determine the amount of the fine. Those pleas relate to the 'failure to state reasons in determining the penalty'; the use, after 2000, of SLM's European turnover in order to set the basic amount of the fine; the 'failure to state reasons in determining the gravity common to the undertakings in order to determine the basic amount', the 'failure to state reasons in determining the additional amount provided for in point 25 of the guidelines' and the breach, in that respect, of the *ne bis in idem* principle; the breach of the principle of proportionality and of the principle of equal treatment on the ground that the penalty does not take sufficient account of the 'alleged gravity of the infringement', of 'its effect', 'of the economic context of the sector', of the Commission's previous practice, or of the 'acts which SLM and the other undertakings concerned are alleged to have committed'; an erroneous assessment of the duration of SLM's participation in the infringement; the failure to taken into

consideration mitigating circumstances relating to its low market shares, to the cooperation with the Commission and to SLM's 'minor role' in the infringement; and the failure to take into consideration statements made in the context of the leniency application.

- 114 In order to facilitate the examination of those pleas, the Court has proposed — and SLM has accepted — to organise them on the basis of the various steps taken by the Commission in order to determine the amount of the fine, namely, first, the factors taken into account in order to determine the basic amount (value of sales, gravity, duration, additional amount) and, secondly, the factors that may be taken into account in order to adjust that amount (mitigating circumstances and leniency notice, ability to pay). Account will also be taken of the cross-cutting complaints made by SLM regarding the breach of the obligation to state reasons and of the principles of proportionality and equal treatment.
- 115 In addition, under the guise of a plea alleging breach of the principle of sound administration, SLM refers to four aspects of the case, which, in its submission, show that the Commission, in a biased and unfair manner, dismissed the evidence adduced by SLM so as to favour other elements available to it. Those aspects concern the treatment given to invoices adduced by SLM during the administrative procedure, the importance accorded to meetings of Club Italia which it has not been proved that SLM attended; the potential impact of the dates on which the technical authorisations necessary for the sale of [prestressing steel ('PS')] in various EU Member States were obtained and the date on which the checks of the person to whom that task was assigned by the members of Club Italia began.
- 116 In that respect, it must be noted that the four aspects referred to above by SLM are also invoked in the context of the various pleas relating to the factors taken into account in calculating the amount of the fine, and they will therefore be examined together.
- 117 Taken together, those arguments are intended, in essence, to criticise the Commission's decision finding that SLM participated in a complex of agreements and concerted practices in the PS sector from 10 February 1997 to 19 September 2002 without taking into account the nature and duration of the participation invoked or acknowledged by SLM which submits, first, that it did not participate in the infringement before the end of 1999 and, secondly, that its participation was then limited to Italy, and only later was its participation in other territories envisaged.
- 118 Ori Martin, by its plea relating to certain aspects of the calculation of the fine, alleges several errors of assessment committed by the Commission in the application of the 2006 Guidelines, the infringement of Article 23 of Regulation No 1/2003, the breach of the principles of proportionality and of equal treatment, the breach of the principle that penalties should be applied only to the offender and the principle that penalties must be provided for by law. In essence, Ori Martin puts forward three complaints in that plea in law: the first concerns an erroneous assessment of the gravity of the infringement SLM is alleged to have committed; the second relates to an unlawful application of the additional amount provided for in point 25 of the 2006 Guidelines and the third concerns a failure to take into account certain mitigating circumstances.
- 119 Those complaints will be examined at the same time as those made by SLM in relation to the same issues.
- 120 In essence, it must be pointed out that, under the guise of a criticism of the result of the assessments made by the Commission on the basis of the methodology set out in the 2006 Guidelines for determining the amount of the fine, the applicants submit that due account was not taken of the specific circumstances of SLM's participation in the infringement, which was both belated and limited.

1. Preliminary observations

a) Content of the contested decision

¹²¹ It is apparent from Article 1 of the contested decision that SLM and Ori Martin infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating, from 10 February 1997 to 19 September 2002 as regards SLM and from 1 January 1999 to 19 September 2002 as regards Ori Martin, in a ‘continuing agreement and/or a concerted practice in the prestressing steel sector in the internal market and, as of 1 January 1994, within the EEA’ (‘the cartel’ or ‘the single infringement’, the latter also being complex and continuous according to the terminology normally used).

Components of the cartel and characterisation of the single infringement

¹²² In recital 122 of the contested decision, the cartel is described as ‘a pan-European arrangement, consisting of a Zurich and a European phase, and/or, as the case may be, in national/regional arrangements’. Recitals 123 to 135 of the contested decision set out briefly those various agreements and concerted practices, which are subsequently described in detail and assessed under Article 101 TFEU and Article 53 of the EEA Agreement.

¹²³ Put simply, the cartel was composed of the following arrangements:

- the Zurich Club, or the first phase of the pan-European agreement. That agreement lasted from 1 January 1984 until 9 January 1996 and concerned quota-fixing by country (Germany, Austria, Benelux, France, Italy and Spain), customer-sharing, prices and the exchange of commercially sensitive information. Its members were Tréfileurope, Nedri, WDI, DWK and Redaelli, which represented several Italian undertakings at least from 1993 and 1995, subsequently joined by Emesa in 1992 and Tycsa in 1993.
- Club Italia, a national arrangement that lasted from 5 December 1995 to 19 September 2002. That agreement concerned the fixing of quotas for Italy and also exports from Italy to the rest of Europe. Its members were the Italian undertakings Redaelli, ITC, CB and Itas, subsequently joined by Tréfileurope and Tréfileurope Italia (on 3 April 1995), SLM (on 10 February 1997), Trame (on 4 March 1997), Tycsa (on 17 December 1996), DWK (on 24 February 1997) and Austria Draht (on 15 April 1997).
- The Southern Agreement, a regional arrangement negotiated and concluded in 1996 by the Italian undertakings Redaelli, ITC, CB and Itas, with Tycsa and Tréfileurope in order to determine the penetration rate of each of the participants in the Southern countries (Spain, Italy, France, Belgium and Luxembourg) and to undertake to negotiate quotas jointly with the other Northern European producers.
- Club Europe, or the second phase of the pan-European agreement. That agreement was concluded in May 1997 by Tréfileurope, Nedri, WDI, DWK, Tycsa and Emesa (‘the permanent members’ or ‘the six producers’) and ended in September 2002. The agreement was intended to overcome the crisis in the Zurich Club, to share new quotas (calculated over the period from the third quarter of 1995 to the first quarter of 1997), to share customers and fix prices. The six producers agreed on coordination rules, including the appointment of coordinators responsible for the implementation of the arrangements in the individual countries and for coordination with other interested companies active in the same countries or in respect of the same customers. In addition, their representatives regularly met at different levels in order to monitor the implementation of the arrangements. They exchanged sensitive commercial information. In the case of discrepancy with the agreed trade behaviour, an appropriate compensation scheme was applied.

- The coordination in respect of the customer Addtek. In the context of that pan-European arrangement, the ‘six producers’, joined occasionally by the Italian producers and Fundia, also maintained bilateral (or multilateral) contacts and participated in price-fixing and customer-sharing on an ad hoc basis, if it was in their interest to do so. For example, Tréfileurope, Nedri, WDI, Tycsa, Emesa, CB and Fundia coordinated together on prices and volumes for the customer Addtek. Those projects related mainly to Finland, Sweden and Norway, but also the Netherlands, Germany, the Baltic States and Central and Eastern Europe. The coordination in respect of Addtek already took place during the Zurich Club phase of the pan-European arrangement and continued at least until the end of 2001.
- The discussions between Club Europe and Club Italia. During the period between at least September 2000 and September 2002, the six producers, and also ITC, CB, Redaelli, Itas and SLM met regularly with the aim of integrating the Italian companies into Club Europe as permanent members. The Italian undertakings wished to increase the Italian quota in Europe, while Club European maintained the status quo. To that end, meetings were held within Club Italia in order to define a uniform position, meetings were held within Club Europe in order to examine that position and/or define its own position, and meetings were held between participants in Club Europe and Italian representatives in order to agree on the allocation of the Italian quota on a specific market. The undertakings involved exchanged commercially sensitive information. For the purposes of redistributing the European quota with the aim of including the Italian producers, those undertakings agreed to use a new reference period (from 30 June 2000 to 30 June 2001). Those undertakings also reached an understanding on the overall volume of exports to Europe by the Italian undertakings, which the Italian undertakings shared among themselves for each country. At the same time, they discussed prices, as the members of Club Europe sought to adopt, on a Europe-wide scale, the price-fixing mechanism applied by the Italian producers within Club Italia.
- Club España. Alongside the pan-European arrangement and Club Italia, five Spanish undertakings (Trefilerías Quijano, Tycsa, Emesa, Galycas and Proderac, the latter from May 1994) and two Portuguese undertakings (Socitrel, from April 1994, and Fapricela, from December 1998) agreed, for Spain and Portugal, and for a period from at least December 1992 until September 2002, to keep their market shares stable and to fix quotas, to allocate customers, including for public works contracts, and to fix prices and payment conditions. In addition, they exchanged commercially sensitive information.

¹²⁴ In the Commission’s view, all of the arrangements described above present the characteristics of a single infringement of Article 101 TFEU and Article 53 of the EEA Agreement (contested decision, recitals 135 and 609 and section 12.2.2).

¹²⁵ In particular, the Commission considered that the abovementioned arrangements were part of an overall scheme which laid down the lines of action of the cartel members in all the geographic areas: ‘they restricted their individual commercial conduct in order to pursue an identical anticompetitive object and a single identical anticompetitive economic aim, namely to distort or eliminate normal competitive conditions for PS in the EEA and to establish an overall equilibrium, notably by fixing quotas and prices, allocating customers and exchanging sensitive commercial information’ (contested decision, recital 610, see also section 9.3)

¹²⁶ The Commission stated in that respect:

‘The plan, which was subscribed to by DWK, WDI, Tréfileurope, Nedri, Tycsa, Emesa, Fundia, Austria Draht, Redaelli, CB, ITC, Itas, SLM, Trame, Proderac, Fapricela, Socitrel, Galycas and Trefilerías Quijano (not all at the same time), was developed and implemented over a period that lasted at least 18 years, through a complex of collusive arrangements, specific agreements and/or concerted practices, pursuing the same common purpose of restricting competition between them and using

similar mechanisms to pursue this common purpose (see section 9.3.1). Even at times when an arrangement did not work smoothly, other arrangements continued to function normally' (contested decision, recital 612).

Factors taken into account as regards SLM

¹²⁷ In the contested decision, the Commission found that SLM had directly participated in the cartel and in particular in Club Italia and the integration of the Italian producers into Club Europe from 10 February 1997 until 19 September 2002 (contested decision, recital 862).

¹²⁸ The Commission referred in that respect to the following factors, set out in recitals 474 to 478 of the contested decision in a section relating to SLM's individual participation in Club Italia.

'(474) As regards SLM, there are ample indications that it was aware of the Italian agreement since 18.12.1995 where it was decided to inform amongst others SLM of the new prices to be applied in 1996 ... Further, at the meeting of 17.12.1996 ..., a table was circulated indicating the allocation of tons per client and the appointment of lead suppliers for a number of clients on the Italian market for 1997. Despite the fact that the columns for SLM were left blank, the fact that SLM was already considered in the table is an indication that discussions between parties must have taken place or were at least envisaged. SLM's case was again discussed at the meetings of 19.01.1997 and 27.01.1997. The first concrete proven quota allocation to SLM occurred at the meeting of 10.02.1997, which the Commission therefore considers as the starting date of SLM's involvement in the Italian arrangement. Indeed, the handwritten notes from ITC ... on that meeting show a list of volumes (to be) supplied to certain customers between SLM, on the one hand, and Redaelli, CB, Tyrsa, ITC ..., on the other hand. The ITC notes expressly state that CB and ITC had obtained the sale information on SLM from [a representative of SLM]. Also on 07.04.1997, SLM's case was discussed. Furthermore, there is clear evidence of SLM's presence at over 100 meetings relating to the Italian market between 15.04.1997 and September 2002. Where it was not present, SLM's case was discussed amongst the other Club Italia members thus showing its continued contribution and participation in Club Italia.

(475) SLM itself confirms its participation in Club Italia from late 1999 to 2002, through [two representatives of SLM] and that at company management level, it also took part in a few meetings between European producers at the Hotel Villa Malpensa in 2001. SLM finally also states that at a meeting at the registered offices of Redaelli in late 1998 or early 1999, it was asked to participate in periodical meetings and to discuss limits on output. First, it claims that it refused but then decided to take part.

(476) SLM, however, contests the Commission's findings concerning its starting date in the cartel, claiming that it only participated in Club Italia as of the end of 1999. First, SLM argues that it would not have been present in the meeting of 10.02.1997. The Commission notes, however, that the available documentary evidence on the meeting of 10.02.1997 (handwritten notes from ITC) shows detailed quota allocation concerning certain customers to amongst others SLM. As explained before, the data had been communicated by ... SLM's representative [himself], showing that SLM had shared its information prior to the meeting. Its alleged absence at that meeting is therefore irrelevant.

(477) Even if on 04.03.1997 SLM showed some doubts regarding its future position in the cartel, SLM continued participating in cartel meetings already the next month, i.e. at the meeting of 15.04.1997, at which prices for raw material and sales prices were fixed for France, Spain and Germany and at which there were discussions on sales made by Redaelli to a number of customers and on offers made to customers by SLM and CB. It continued to regularly

participate in Club Italia meetings and discuss with the other cartel participants until the date of the Commission's inspections. The 'doubts' of SLM can therefore not be interpreted as an interruption of its cartel participation, as SLM claims.

(478) Although, according to Redaelli, SLM did not join the agreement on the sharing of the Italian market from the start, ITC, Tréfileurope and CB confirm SLM's participation in the Club Italia meetings. Whilst being aware of the Italian agreement since the start (decision of the members to inform SLM), the Commission considers, based on the documentary evidence ... that SLM's continued participation started on 10.02.1997 and ended on 19.09.2002.'

¹²⁹ In recitals 649 and 650 of the contested decision, in the section relating to the single, complex and continuous nature of the infringement, the Commission states as follows:

'(649) As regards SLM, besides participating in Club Italia as of 10.02.1997 ..., it also participated in the Club Europe's expansion discussions as of 11.09.2000 ... SLM does not contest its presence in the meeting of 11.09.2000. However, even before that date, SLM was or should have been aware that Club Italia, in which it participated, was part of a larger scheme with also a pan-European-level. First, the Commission has proof that SLM, at an early stage of its participation in Club Italia, met with companies that participated in the other Clubs, like DWK, Tréfileurope (that participated in the pan-European arrangement) and Tycsa (that participated in the pan-European arrangement and in Club España), and it discussed with them the conditions on the European market. For example, at a meeting between these companies on 15.04.1997, prices in several European countries (France, Spain and Germany) and imports and exports were discussed ... Further, on 29.11.1999 ..., SLM had a meeting with Redaelli, Austria Draht, Tréfileurope, Tycsa and DWK at which not only the prices applied in Spain and Portugal by two of the companies participating in Club España, i.e. Emesa and Fapricela were discussed, but also Addtek, the biggest client in the Scandinavian market around whom the 'Scandinavian Club' was organised ... SLM also participated in a discussion on the situation and the problems inherent to the European market on 18.01.2000 (with Redaelli, ITC, Itas, AFT/Tréfileurope Italia, CB, Nedri, Tycsa and Tréfileurope) On 21.02.2000, SLM met with Redaelli, ITC, Itas, Tréfileurope Italia, CB, Tréfileurope, DWK and Tycsa (the latter over the phone) and discussed amongst others volume in Spain and a price increase in Germany ... At a meeting on 13.03.2000 between SLM, Redaelli, ITC, Itas, CB, Tréfileurope Italia, DWK, Tycsa and Trame the situation in the Netherlands and Switzerland was discussed. On 15.05.2000, in the presence of SLM, ITC, Itas, Tréfileurope Italia, CB, SLM, Trame and DWK, Tréfileurope stated that Club Europe and Club Italia were both in crisis. Finally, on 12.06.2000, SLM attended a meeting with Redaelli, ITC, Itas, Tréfileurope Italia CB, Trame, Tycsa and DWK, at which it was mentioned that Club Europe is complaining about Tycsa ...

(650) It is therefore sufficiently established that at least as of 29.11.1999 SLM was aware or should reasonably have been aware that while participating in Club Italia, it was part of a larger scheme with several levels.'

¹³⁰ In addition, in response to SLM's observations regarding its participation in Club Italia before the end of 1999, the Commission stated that:

'(863)

SLM contests its participation in the cartel and in particular in Club Italia until the end of 1999. Its participation in Club Italia as of 10.02.1997, however, is clearly established on the basis of documentary evidence and several leniency statements of ITC, Tréfileurope and CB ... SLM also invokes that, despite its participation in certain Club Italia meetings, it adopted an aggressive commercial policy, it did not agree to any illicit agreement and that when it shared data with competitors, these data, although credible, were never real or true. In this respect, it is sufficient to repeat that any direct or indirect contact between competitors the object or effect whereof is either to

influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market is prohibited ... The mere participation in meetings with an anticompetitive content is therefore sufficient to trigger liability. The fact that SLM would not have respected the cartel arrangements is irrelevant. Indeed, cheating is an inherent element to any cartel, in particular of long duration ... Moreover, SLM itself admits that its objective in participating in the meetings was to increase its clients or at least maintain them.'

131 In response to SLM's observations regarding Club Europe, the Commission notes the following:

'(864)

SLM further contests that it participated in the integration of Italian producers in Club Europe from 11.09.2000 to 19.09.2002. In this respect, SLM submits that it participated only in nine of the 51 Club Europe meetings, at a very late stage and only at the insistent request of the other Italian producers. SLM also claims that it had no interest in participating in Club Europe as it did not have the required certifications for most of the countries involved. Finally, its participation in Club Europe meetings was the result of negligence.

(865)

Over a period of only two years (between 11.09.2000 and 19.09.2002) SLM participated at regular intervals in 9 Club Europe meetings ... SLM's presence was moreover expected in 2 more meetings (23.07.2001 and 25.07.2001). Hence it is established that SLM was a regular participant in Club Europe as of its expansion phase. In those circumstances, the reasons why SLM joined the cartel meetings, or the fact that it would not have had certifications for some or most of the countries, are not relevant. Even if SLM did not have certification for all countries covered in the cartel, it can be presumed that participation in the meetings has influenced its behaviour ... in deciding for which countries it would apply for a certificate ... In any event Club Europe covered Italy and several other countries where SLM sold so that SLM certainly had an interest in the discussions. Finally, alleged negligence does not allow an undertaking to escape liability for participation in a cartel. The Commission therefore concludes that SLM participated in Club Europe from 11.09.2000 until 19.09.2002.

(866)

In any event, it is also established that as of 10.02.1997 SLM participated in Club Italia ... SLM should therefore be held liable for its cartel participation from 10.02.1997 to 19.09.2002.'

Ori Martin's situation

132 After indicating in recital 866 of the contested decision that SLM was to be held liable for its participation in the cartel from 10 February 1997 to 19 September 2002, the Commission described the situation of Ori Martin as follows:

'(867) Since 01.01.1999 SLM has been controlled 100% by Ori Martin S.A. (which ceded 2% to Ori Martin Lux SA on 31.10.2001).

(868) On the basis of the (almost) 100% ownership of SLM by Ori Martin ... from 01.01.1999 to 19.09.2002), the Commission considers that Ori Martin ... exercised decisive influence on [SLM].

(869) Ori Martin ..., in its reply to the SO, does not contest the facts assessed by the Commission, but claims that it cannot be held jointly and severally liable with SLM. In particular, it holds that the Commission did not sufficiently show that it exercised a decisive influence on SLM. It claims

that such a presumption would breach the principle of personal liability and argues that the Commission did not prove any direct or indirect involvement of Ori Martin ... in the infringement.

- (870) It is established case-law, as recently confirmed by the Court of Justice, that the Commission can presume that parent companies exercise decisive influence on their wholly-owned subsidiary. Where such a presumption applies it is for the parent company to rebut it, by adducing evidence demonstrating that its subsidiary decided independently on its conduct on the market. Failure to provide sufficient evidence on the part of the parent company amounts to a confirmation of the presumption and provides a sufficient basis for the imputation of liability.
- (871) The claim of absence of direct involvement of the parent company in the anticompetitive conduct and their alleged lack of awareness is therefore irrelevant. Attribution of liability to a parent company for the infringement committed by its subsidiary flows from the fact that the two entities constitute a single undertaking for the purposes of EU rules on competition and not from proof of the parent's participation in or awareness of the infringement.
- (872) Finally, in relation to the principle of personal liability, Article 101 of the TFEU is addressed to 'undertakings' which may comprise several legal entities. In this context the principle of personal liability is not breached as long as different legal entities are held liable on the basis of circumstances which pertain to their own role and their conduct within the same undertaking. In the case of parent companies, liability is established on the basis of their effective control on the commercial policy of the subsidiaries which are materially implicated by the facts (see section 13).
- (873) Ori Martin ... further claims that it did not exercise decisive influence on SLM, which always carried out autonomously its activity in the PS sector. This was proven by the fact that it had no obligation to report to Ori Martin ..., which was moreover a financial holding company and therefore did not decide on its commercial policy.
- (874) The Commission observes that the mere fact that a company is a financial holding does not exclude that it exercises a decisive influence on its subsidiaries. Ori Martin ... also had an interest and role over its subsidiary SLM as a shareholder to protect its financial ownership interest. Finally, while Ori Martin ... claims that it was not active in the sector covered by the cartel, the Commission notes that its subsidiary, Ori Martin SpA, was active in the steel business itself, thus SLM's commercial activities were related to the group's business. In those circumstances, Ori Martin ... cannot be qualified as a pure holding company and in any event should not escape liability.
- (875) Consequently, the Decision should be addressed to [SLM] and Ori Martin ... [SLM] should be held liable for the period from 10.02.1997 until 19.09.2002. Ori Martin ... should be held jointly and severally liable for the infringing behaviour of [SLM] for the period from 01.01.1999 until 19.09.2002.'

Calculation of the amount of the fine imposed on SLM and Ori Martin

- ¹³³ The amount of the fine imposed on SLM and Ori Martin was calculated by the Commission in accordance with the methodology contained in the 2006 Guidelines (contested decision, recitals 920 to 926).

134 The calculation factors taken into account by the Commission were the following:

- the value of sales was set at EUR 15.86 million (first amending decision, recital 5);
- the proportion of the value of SLM's sales taken into account in calculating the basic amount was 19% (contested decision, recital 953);
- the duration of participation in the infringement, 5 years and 7 months for SLM and 3 years and 8 months for Ori Martin, resulted in a multiplying factor of 5.58 for SLM and of 3.66 for Ori Martin (first amending decision, recital 7);
- the Commission used a coefficient of 19% to determine the additional amount (contested decision, recital 962);
- the value of sales was set at EUR 19.8 million (first amending decision, recital 9);
- no aggravating or mitigating circumstance was found;
- The amount of the fine before the application of the ceiling of 10% of turnover was set at EUR 19.8 million (first amending decision, recital 10);
- SLM's request for a reduction of the fine on the basis of the leniency notice was rejected (contested decision, recitals 1126 to 1129);
- after the ceiling of 10% was taken into account, the amount of the fine was reduced to EUR 15.965 million, in order to ensure that fine for which SLM is solely liable complies with the limit of 10% of that company's turnover (second amending decision, recitals 17 and 19);
- SLM's request for a reduction of the fine in the light of its ability to pay was rejected ...
- the final amount of the fine imposed on SLM is EUR 15.956 million for its participation in the cartel for the period from 1 January 1999 to 19 September 2002, in respect of which Ori Martin is held jointly and severally liable for the amount of EUR 14 million (contested decision, Articles 1 and 2, and second amending decision, recital 21 and Article 1(2)), SLM being solely liable for the payment of EUR 1.956 million for its participation in the cartel for the period from 10 February 1997 to 31 December 1998 (contested decision, Articles 1 and 2, and second amending decision, Article 1(2)).

b) Outline of principles

135 It follows from Article 49 of the Charter of Fundamental Rights that the severity of penalties must not be disproportionate to the offence.

136 In that regard, Article 101(1) TFEU and Article 53(1) of the EEA Agreement expressly state that agreements and concerted practices which directly or indirectly fix purchase or selling prices or any other trading conditions or limit or control production or markets are incompatible with the internal market. Infringements of that type, in particular where they involve horizontal cartels, are characterised in the case-law as particularly serious since they have a direct impact on the essential parameters of competition on the market in question (judgment of 11 March 1999 in *Thyssen Stahl v Commission*, T-141/94, ECR, EU:T:1999:48, paragraph 675).

- 137 Under Article 23(2) of Regulation No 1/2003, the Commission may impose fines on undertakings which participate in such an infringement, provided that, for each undertaking participating in the infringement, the fine does not exceed 10% of its total turnover in the preceding business year. Article 23(3) of that regulation also provides that, in fixing the amount of the fine to be imposed, regard is to be had both to the gravity and to the duration of the infringement.
- 138 In that connection, it is settled case-law that, in fixing the amount of the fines, regard must be had to all the factors capable of affecting the assessment of the gravity of the infringements, such as, in particular, the role played by each of the parties to the infringement and the threat that infringements of this type pose to the objectives of the EU. Where an infringement has been committed by several undertakings, the relative gravity of the participation of each undertaking must be examined (see judgment of 8 July 1999 in *Hercules Chemicals v Commission*, C-51/92 P, ECR, EU:C:1999:357, paragraph 110 and the case-law cited).
- 139 Likewise, the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played a minor role in the aspects in which it did participate must be taken into consideration when the gravity of the infringement is assessed and, where appropriate, when the fine is determined (judgments of 8 July 1999 in *Commission v Anic Partecipazioni*, C-49/92 P, ECR, EU:C:1999:356, paragraph 90, and 7 January 2004 in *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, ECR, EU:C:2004:6, paragraph 86).
- 140 Where there has been, in particular, a single infringement, in the sense of a complex infringement, combining a number of agreements and concerted practices on separate markets, where the offending undertakings are not all present or may have only partial knowledge of the overall plan, the penalties must be made to fit the individual conduct and specific characteristics of the undertakings concerned (see, by analogy, judgment of 7 June 2007 in *Britannia Alloys & Chemicals v Commission*, C-76/06 P, ECR, EU:C:2007:326, paragraph 44).
- 141 In that context, the principle of proportionality requires that the fine must be fixed proportionately to the factors to be taken into account both in assessing the objective gravity of the infringement, as such, and in assessing the relative gravity of the participation in the infringement of the undertaking on which the penalty is to be imposed (see, to that effect, and in consideration of the distinction between the objective gravity of the infringement, within the meaning of points 22 and 23 of the 2006 Guidelines, and the relative gravity of the participation in the infringement of the undertaking on which the penalty is to be imposed, within the meaning of point 27 et seq. of those guidelines, judgment of 27 September 2006 in *Jungbunzlauer v Commission*, T-43/02, ECR, EU:T:2006:270, paragraphs 226 to 228 and the case-law cited).
- 142 Thus, as regards a penalty imposed for infringement of competition law applicable to cartels, the Commission must ensure that it fits the penalties to the infringement, taking account of the particular situation of each offender (see, to that effect, judgments of 15 September 2011 in *Lucite International and Lucite International UK v Commission*, T-216/06, EU:T:2011:475, paragraphs 87 and 88; and of 14 May 2014 in *Donau Chemie v Commission*, T-406/09, ECR, EU:T:2014:254, paragraph 92). Accordingly, a contravener which is not held responsible for certain aspects of a single infringement cannot have had a role in the implementation of those components. Owing to the limited extent of the infringement in which he is found to have been involved, the infringement of competition law is necessarily less serious than that imputed to the offenders who participated in all the parts of the infringement.
- 143 In practice, the penalty may be made to fit the particular infringement at various stages of the determination of the amount of the fine, as was done in the contested decision.

- 144 First, the Commission may recognise the particularity of an undertaking's participation in the infringement at the stage of assessing the objective gravity of the single infringement. In the present case, the factors which it took into consideration at that stage were, on the one hand, the material limitation (as in the case of Fundia, which participated only in the coordination concerning Addtek) or geographic limitation (as in the case of Socitrel, Fapricela and Proderac, which participated only in Club España, which affected only Spain and Portugal) of the undertaking's participation in the single infringement and, on the other, belated awareness of its pan-European dimension (May 2001 for the abovementioned undertakings).
- 145 Secondly, the Commission may recognise the particularity of an undertaking's participation in the infringement at the stage of assessing the mitigating circumstances referred to in point 29 of the 2006 Guidelines in the context of an overall assessment of all the relevant circumstances (see point 27 of the 2006 Guidelines). Although no undertaking was able to prove that the infringement had been committed negligently, the Commission acknowledged that the role of Proderac and Trame (Emme) was significantly more limited than that of the other participants in the cartel and that they should therefore be granted a reduction of the amount of the fine (5%).
- 146 Thirdly, the Commission may recognise the particularity of an undertaking's participation in the infringement at a later stage than that of the assessment of the objective gravity of the infringement or the mitigating circumstances put forward by the undertakings concerned. Point 36 of the 2006 Guidelines thus states that the Commission may, in certain cases, impose a symbolic fine and, as indicated in point 37 of those Guidelines, it may also depart from the general methodology laid down for the setting of fines, in the light, *inter alia*, of the particularities of a given situation.
- 147 In the present case, the Commission did not — either at the initial stage of the assessment of the gravity of the infringement as such, or at the later stage of the discussion of the mitigating circumstances, or at any other stage — take account of the specific situation alleged by the applicants when it determined the amount of the fine.
- 148 Consequently, in the absence of the slightest mitigating circumstance or particular circumstance, the Commission applied to the applicants the same formula as that used in order to penalise the undertakings that participated in all the components of the overall cartel, and not just in some of them. That formula is as follows: 19% of the total PS sales of the undertaking concerned in the EEA (to take account of the gravity of the infringement as such) multiplied by the number of years and months of participation in the infringement (to take account of the period of SLM's individual participation in the infringement, or of the period for which Ori Martin is presumed to have exercised a decisive influence over SLM), plus 19% of the value of the PS sales of the undertaking concerned in the EEA (the additional amount).
- 149 In the applicants' case, the result of that formula, a fine of EUR 19.8 million, was reduced to EUR 15.956 million in order to ensure that the amount of the fine for which SLM is held solely liable complies with the limit of 10% of that company's turnover.
- 150 In the light of the foregoing observations, it is appropriate to examine the complaints of SLM and Ori Martin, according to which the Commission failed to take due account of the specific circumstances of SLM's participation in the infringement when it determined the amount of the fine.

2. The general failure to state reasons and the general complaint of bias

- 151 As a preliminary point, SLM submits that it does not understand how the Commission determined the amount of the fine, or how it divided that fine between SLM and Ori Martin. Such a breach of the obligation to state reasons must, according to SLM, give rise to the annulment of the contested decision and its alteration.

152 Nevertheless, the information provided by the Commission in the contested decision and summarised in paragraphs 133 and 134 above are such as to enable SLM to understand the various factors taken into account in order to determine the amount of the fine. It is also apparent from the contested decision that the Commission set out in that decision the reasons that enabled it to find SLM and Ori Martin jointly and severally liable for payment of a part of the fine, which penalises SLM's participation in the infringement for the period from 1 January 1999 to 19 September 2002 (contested decision, recitals 867 to 875, and paragraph 132 above).

153 Moreover, SLM argues that the Commission always decided against SLM when the evidence before it was not consistent with its accusations.

154 In that respect, in view of the information provided in the contested decision and, inter alia, in Annexes 2 and 3 thereto, which set out the various evidence gathered by the Commission as regards the Zurich/Europe clubs and Club Italia, it is not sufficient to allege biased or unfair conduct by the Commission merely because it favoured one explanation over another proposed by SLM. Bias cannot be inferred from the mere fact that the administrative procedure resulted in an outcome unfavourable to SLM.

155 The pleas put forward by SLM in relation to the general failure to state reasons and the general complaint of bias must therefore be rejected as unfounded.

3. The factors taken into account in order to determine the basic amount of the fine (value of sales, gravity, duration, additional amount)

156 As regards the factors taken into account in order to determine the basic amount of the fine, it is necessary to examine the following complaints: the complaint made by SLM in the context of its fourth plea in law, regarding the value of sales to which the infringement relates; the fifth plea in law raised by SLM and the first and second pleas in law raised by Ori Martin, relating to the assessment of the gravity of the infringement and the determination of an additional amount; the sixth plea in law raised by SLM, relating, also — under the guise of an allegation of a breach of the principle of proportionality and of the principle of equal treatment — to the assessment of the gravity of the infringement and the seventh plea in law raised by SLM, relating to the assessment of the duration of the infringement.

a) The value of sales to which the infringement relates

Arguments of the parties

157 SLM submits that it apparent from recital 865 of the contested decision that it participated in Club Europe only as from September 2000. Sales made outside Italy prior to that time should therefore not have been taken into account in determining the amount of the fine. The contested decision should be amended so as to take into account only the value of sales made outside Italy during the period when SLM participated in Club Europe.

158 The Commission contends that, from at least 1995 and until September 2002, in parallel to the pan-European arrangements, SLM participated in anti-competitive meetings concerning both Italy and exports from Italy to the rest of Europe. It is therefore objectively justified to determine the basic amount on the basis of the value of SLM's European sales.

Assessment of the Court

- 159 Point 13 of the 2006 Guidelines states that, '[i]n determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA'. In the same point, the Commission stated that it 'will normally take the sales made by the undertaking during the last full business year of its participation in the infringement'. As can be seen from point 37 of the 2006 Guidelines, 'although these Guidelines present the general methodology for the setting of fines, the particularities of a given case ... may justify departing from such methodology'.
- 160 In the present case, first, it must be pointed out that, in order to define the relevant geographic area for determining the value of sales, the Commission referred mainly to the geographic area covered by Club Zurich and then by Club Europe.
- 161 Thus, in recital 932 of the contested decision, the Commission indicated that, 'from 1984 to 1995 (Zurich Club period), [that area] included Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Spain and Austria', that 'it also included Portugal as from 1992 (under the Club España arrangements)' and that, 'from 1996 to 2002 (Zurich Club crisis period (when the Club Europe quota arrangement was prepared), Club Europe period and expansion period), the geographic area covered the same countries as during the Zurich Club period, including Portugal, and in addition Denmark, Sweden, Finland and Norway'.
- 162 Nevertheless, in order to take account of the development over time of the geographic area concerned, the Commission stated that it excluded sales in Portugal before 15 December 1992 and sales in Denmark, Sweden, Finland and Norway before 9 January 1996 from the value of sales taken into account. Likewise, in order to take account of EU accession and the entry into force of the EEA Agreement, the Commission also stated that it would not take account of sales in Spain before 1 January 1986 or sales in Austria, Finland, Sweden and Norway before 1 January 1994. In addition, as regards Fundia, whose participation in the cartel was limited to co-ordination regarding Addtek, the Commission indicated that it would take into account only the sales made by Fundia to that customer (contested decision, recitals 932, 933 and 935).
- 163 In the contested decision, the Commission therefore took account of certain factors relating to the cartel's development over time, to the alteration of the scope of the applicable rules and to the manner in which an undertaking participated in the infringement in order to distinguish between two or more situations in determining the value of sales to be taken into consideration. Such an exercise is particularly necessary in the context of a single infringement, of a complex nature, such as that penalised in the contested decision, which covers a 'continuing agreement and/or a concerted practice in the prestressing steel sector in the internal market and, as of 1 January 1994, within the EEA' from 1 January 1984 to 19 September 2002.
- 164 Secondly, it can be seen from the file that the value of sales used as a starting point by the Commission in order to determine the amount of the fine, namely EUR 15.863 million, corresponds to the values of sales of PS made by SLM in 2001 in the various Member States in respect of which it was asked to provide information (that is to say, Germany, France, Italy, Belgium, the Netherlands, Luxembourg, Spain, Portugal, Denmark, Austria, Sweden, Finland and Norway).
- 165 Geographically, almost all (approximately 96.5%) of SLM's sales were made in Italy, the rest (approximately 3.5%) being made in Austria, Germany or France.

- 166 It can also be seen from the file that SLM obtained the technical approvals necessary to sell PS in Europe outside of Italy only as from August 2000 as regards Germany and France, from July 2001 as regards Austria and from January 2002 as regards the Netherlands. It was only after the end of the infringement, namely in July 2006 for Spain and in April 2007 for Belgium, that SLM obtained the technical approvals necessary for those countries.
- 167 In its reply of 9 September 2009 to a request for information from the Commission, SLM also indicated that the sales made in Austria before the approval of its products in July 2001 were made to 'Austrian commercial customers who resold those products in countries other than Austria'. It is indeed clear from the information sent to the Commission that SLM made some sales in Austria in 1999 and 2000.
- 168 Thirdly, as SLM submits, it must be noted that, in the present case, the Commission considered that, although SLM participated in Club Italia from 10 January 1997 to 19 September 2002 and that, from 29 November 1999, it was or ought to have been aware that, by participating in Club Italia, it was taking part in larger scheme, it was only held to have participated in Club Europe as from 11 September 2000 (contested decision, recitals 650, 865 and 866).
- 169 Two periods must therefore be distinguished in order to take account of the manner in which SLM participated in the infringement: a first period, from 10 February 1997 to 10 September 2000, corresponding to SLM's participation in Club Italia, and a second period, from 11 September 2000 to 19 September 2002, during which participated SLM participated in both Club Italia and Club Europe.
- 170 As regards the second period, given the geographical area concerned by SLM's participation in Club Italia and Club Europe, it is objectively justified to determine the amount of the fine on the basis of the value of SLM's European sales. It is thus apparent that, during that period, SLM indeed made sales in Italy, but also in Austria, Germany and France.
- 171 As regards the first period, however, it must be examined whether the geographic area concerned by SLM's participation in Club Italy indicates that it is objectively justified to determine the amount of the fine on the basis of the value of SLM's European sales.
- 172 That question does not arise in relation to the sales made in Italy, which represent 96.5% of the value of SLM's sales taken into account in determining the amount of the fine, since those sales were clearly the subject of Club Italia during the first period.
- 173 As regards Austria, which represents approximately 2% of the value of SLM's sales taken into account in order to determine the amount of the fine, it must be noted that there is not evidence in the present case that Austria was the subject of discussions within Club Italia in the presence of SLM from 10 February 1997 to 10 September 2000. At the hearing, when asked by the Court to identify the evidence that, during SLM's participation in the infringement, quotas on exports from Italy to Austria or commercially sensitive information concerning PS sales in Austria were discussed in the present of representatives of SLM, the Commission replied that it was not able to produce such evidence.
- 174 In that context, in order to determine the amount of the fine on the basis of the gravity and duration of the infringement committed by SLM, account cannot be taken, in relation to the entire duration of its participation in the cartel, of the value of sales made in a Member State which was not the subject of discussions in SLM's presence within Club Italia. The value of SLM's sales in Austria can therefore be taken into account only in relation to the period when SLM participated in Club Europe.
- 175 As regards Germany and France, which represent approximately 1.5% of the value of SLM's sales taken into account in order to determine the amount of the fine, the Commission rightly submits that Club Italia had not only a domestic dimension, but also an external dimension in that, on several occasions,

discussions occurred, with or without a representative of SLM being present, aimed at fixing quotas on exports from Italy or exchanging commercially sensitive information on the situation in Germany or in France, or in other States.

176 Thus, for the period from 10 February 1997 to 10 September 2000, it appears, according to the information on the Club Italia meetings set out in Annex 3 to the contested decision, that, on 15 April 1997, in the presence of a representative of SLM, the discussions were aimed, *inter alia*, at ‘fixing raw material prices and sales prices in France, Spain and Germany (in the latter as from September 1997 and January 1998)’. Likewise, the participants in the meeting of 22 October 1997 — in the absence, on that occasion, of a representative of SLM — exchanged ‘information on prices in Germany, Belgium and the Netherlands’, and the participants in the meeting of 29 November 1999 ‘discuss[ed] the[ir] needs[,] the Spanish market [and] the prices applied in Spain and Portugal’. In addition, at the meeting of 21 February 2000, at which a representative of SLM was present, ‘an increase of price of “+40%” in Germany was also discussed’.

177 However, even though during the period from 10 February 1997 to 10 September 2000, the situation in Germany and France was sporadically mentioned, it also appears that SLM could make sales in those States only as from August 2000 and that, in view of the data communicated in that respect by SLM to the Commission in its reply of 9 September 2009 to a request for information, those sales were made only in the course of 2000 as regards Germany and 2001 as regards France.

178 In that context, in fixing the amount of the fine in view of the gravity and duration of the infringement committed by SLM, account cannot be taken, in relation to the entire duration of its participation in the cartel, of the value of sales made in States where SLM was not initially present since, *inter alia*, it was not authorised to sell its products there. The value of SLM’s sales in Germany and in France can therefore be taken into account only as from the date when those sales began, namely in the course of 2000 as regards Germany and, in any event, in the course of 2001 as regards France.

179 In conclusion, given the complex nature of the infringement at issue, which has several different components, including Club Italia and Club Europe, and in order to take account of the specific manner in which SLM participated in the infringement, it is not objectively justified to take all of SLM’s European sales as a starting point for determining the amount of the fine in view of the gravity and duration of the infringement committed by SLM.

180 The consequences of the foregoing on the determination of the amount of the fine will be assessed below in the context of the Court’s use of its unlimited jurisdiction.

b) The proportion of the value of sales determined on the basis of the degree of gravity of the infringement

Arguments of the parties

181 SLM and Ori Martin submit that the Commission’s decision to set the proportion of the value of sales taken into account in order to assess the degree of gravity of the infringement at 19% is not supported by a sufficient statement of reasons and breaches the principle of proportionality, the principle of equal treatment and the principle that penalties must be specific to the offender. First, SLM’s lack of involvement in the European dimension of the cartel, at least until September 2000, should have been taken into account in that respect. SLM did not participate in Club Zurich, Club España, the Southern Agreement, the Northern Agreement on the Scandinavian market, or Addtek’s tenders procedures. It also was not one of the permanent members of Club Europe and it never played a coordinating role within the cartel. A level of 19% should have been set only for the undertakings which initiated the cartel and were heavily involved in its implementation. Secondly, the Commission should also have taken into account the concrete effects of the infringement in order to assess its gravity. Thirdly, aside

from the fact that the amount of the fines imposed to penalise the infringement are much higher than that of fines imposed to penalise cartels in the past, and that that amount is greater than the turnover of the sector in 2001, SLM was penalised three and a half times more than Redaelli, which participated in the cartel since 1984 at the European and Italian levels; six times more than Emme, whose participation in the infringement was of a nature and duration similar to that of SLM; seven times more than CB and four times more than ITC, which were more involved than SLM. The Court should therefore reduce considerably the amount of the fine in order to take account of SLM's actual role in the infringement, as well as the absence of concrete effects on the market of its participation in the cartel, and to ensure equal treatment between SLM and the other penalised undertakings.

182 The Commission disputes those arguments.

Assessment of the Court

183 The various complaints set out above criticise the result of the assessment of the gravity of the infringement carried out by the Commission on the basis of the general methodology set out in the 2006 Guidelines.

184 In that respect, points 19 to 23 of the 2006 Guidelines state:

‘(19) The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

(20) The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

(21) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.

(22) In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

(23) Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.’

185 In recital 953 of the contested decision, the Commission concluded that, on a scale of up to 30%, the proportion of the value of SLM's sales to be taken into account in order to assess the gravity of the infringement should be 19%.

186 According to the contested decision, that proportion was determined on the basis of the four factors mentioned as examples in point 22 of the 2006 Guidelines.

187 First, as regards the nature of the infringement, the Commission noted that ‘all undertakings except Fundia were involved in market sharing (quota fixing), customer allocation and horizontal price fixing’ and that ‘these arrangements are among the most harmful restrictions of competition, distorting the main parameters of competition’ (contested decision, recital 939).

- 188 Secondly, the Commission found that the combined market share of the undertakings for which the infringement was established was ‘estimated to be around 80%’ (contested decision, recital 946).
- 189 Thirdly, the Commission indicated that the geographic scope of the infringement ‘evolved over time’, that ‘from 1984 to 1995, it included Germany, France, Italy, the Netherlands, Belgium, Luxembourg, Spain and Austria’, and that, ‘from 1996 to 2002, the infringement covered the same countries and Portugal, Denmark, Sweden, Finland and Norway’ (contested decision, recital 947).
- 190 Fourthly, as regards the implementation of the arrangements, the Commission considered that ‘although not always completely successful or effective, the arrangements were implemented’ (contested decision, recital 950).
- 191 The applicants’ arguments must be examined in the light of those findings.
- 192 In the first place, SLM and Ori Martin submit that, in order to determine the proportion of the value of sales, the Commission should have taken account of SLM’s lesser responsibility in the infringement in comparison with other undertakings, which were far more involved or were involved for a longer period. Thus, the applicants argue that the Commission did not sufficiently individualise its reasoning in order to take account of the particularities of SLM’s participation in the infringement.
- 193 However, in view of the general methodology set out in the 2006 Guidelines, it appears that the Commission generally carries out such an individualisation of the penalty not at the initial stage of determining the basic amount of the fine, but at the later stage of adjusting that amount, or even at a yet later stage if necessary.
- 194 At the stage of determining the basic amount, the Commission did not treat the undertakings that acted as leaders or coordinators of various aspects of the single infringement differently from undertakings which were only associates. Likewise, the Commission did not deem it useful to distinguish between the undertakings which participated, at first, in Club Italia alone, and those which participated simultaneously in Club Italia and Club Zurich or Club Europe, since, according to the Commission, ‘the geographic scope of Club Italia largely overlaps with that of the pan-European arrangements’ (contested decision, recital 949).
- 195 In the present case, none of the four findings made by the Commission in order to justify its decision to set the proportion of the value of sales taken into account in order to assess the degree of gravity of the infringement at 19% is called into question, as such, by the applicants. Those findings are all objectively established in view of the elements of the file invoked in that respect in the contested decision and apply to the infringement in general and not to SLM in particular.
- 196 In addition, as regards the setting of the proportion of the value of sales taken into account in order to assess the degree of gravity of the infringement, it cannot be argued that the Commission failed to consider the fact that SLM did not participate in Club Zurich or in other aspects of the infringement, since that proportion was used only from the time when SLM participated in the infringement and applies only to SLM’s sales in relation to the infringement.
- 197 The first complaint must therefore be rejected as unfounded.
- 198 In the second place, as regards the potential impact of the argument that the cartel did not have the expected effects on the market, it must be pointed out that, in the present case, the Commission indicated that where an agreement or concerted practice has as its object the restriction of competition, there is no need to take into account its actual effects on the market. In the present case, the Commission indicated, however, that such effects could be presumed, since it was established that the cartel decisions had been at least partly implemented (contested decision, recitals 676 to 681).

- 199 In any event, when it determined the proportion of the value of sales taken into account in order to assess the degree of gravity of the infringement, the Commission did not invoke the effects of the infringement on the market, only the fact that it had been implemented.
- 200 It must be found that, in the present case, the proportion of the value of sales taken into account by the Commission is on the low end of the scale (15% to 30%), even though, in the 2006 Guidelines, after indicating that a cartel of the type at issue in the present case is among the most harmful restrictions of competition and must be heavily fined, the Commission stated that, in such as case, the proportion of the value of sales to be taken into account will generally be set at the higher end of the scale.
- 201 In those circumstances, it may be considered that, if concrete effects had actually been found by the Commission, it would have taken into account a proportion higher than 19%.
- 202 The second complaint must therefore be rejected in view of the level of gravity chosen by the Commission in the present case and the reasons stated to justify that choice.
- 203 In the third place, it is necessary at the outset to reject the complaint based on the generally disproportionate character of the fines imposed in order to penalise the infringement in view of the Commission's previous practice or of the value of the PS sector in Europe. That issue, which concerns the competition policy practised by the Commission in order to punish cartels, exceeds the Court's powers of review of the contested decision. In the present case, it is not necessary to adjudicate on the total amount of fines imposed by Commission over time, or to consider the value, in absolute terms, of the total amount of the penalties imposed in relation to the PS cartel.
- 204 Likewise, as regards the complaint based on the alleged differences between SLM and other undertakings penalised in the contested decision, it must be noted that the Court's review at this stage concerns the assessment made by the Commission in the contested decision when it set the proportion of the value of sales taken into account in order to assess the degree of gravity of the infringement at 19%. That assessment was made not in the light of the final outcome, the amount of the fine finally imposed after possibly being adjusted in order to take account of certain circumstances, but at an earlier stage, that of the determination of the proportion of the value of sales to be taken into account in order to determine the basic amount of the fine. The final amount of the fine therefore depends on factors specific to each of those undertakings, such as, for example, the cooperation under the leniency notice or the legal maximum limit of 10% of total turnover. In the present case, in the absence of arguments to support the view that the situation of Redaelli, CB or ITC is comparable to that of SLM as regards all of the factors taken into account by the Commission in order to assess the situation of those undertakings, that complaint must be rejected as unfounded.
- 205 In the fourth and last place, as regards the complaint alleging a failure to state reasons, it must be observed that the decision sets out to the requisite legal standard the factors considered in order to determine the proportion of the value of SLM's sales taken into account in order to assess the gravity of the infringement (contested decision, recitals 963 to 953).
- 206 Moreover, Article 296 TFEU cannot be interpreted as requiring the Commission to explain in its decisions the reasons why, in relation to calculation of the amount of the fine, it did not adopt alternative approaches to the one in fact adopted in the contested decision (see to that effect, judgment of 19 May 2010 in *IMI and Others v Commission*, T-18/05, ECR, EU:T:2010:202, paragraph 153 and the case-law cited).
- 207 It follows from the foregoing that the applicants' complaints concerning the proportion of the value of sales determined on the basis of the degree of gravity of the infringement must be rejected.

c) The duration of SLM's participation in the cartel

Arguments of the parties

- 208 SLM claims that the contested should be annulled in that it states that SLM participated in Club Italia as from February 1997 rather than the end of 1999. In particular, the Commission did not take account of several fundamental circumstances capable of refuting the date on which SLM's participation in Club Italia began. First, no representative of SLM was present at the meeting of 10 February 1997. Secondly, during the following meeting of 4 March 1997, it was reported that SLM had not yet decided to join Club Italia and Redaelli also declared that SLM had not joined the Italian market sharing agreement. Thirdly, at a meeting held in April 1998, it was indicated that SLM, which was again absent, had an aggressive policy. Fourthly, it appears from Redaelli's leniency application, of 20 March 2003, that SLM did not begin participating in the meetings until the end of 1999, which was confirmed by Tréfileurope. Fifthly, the only invoices issued by the person charged with performing checks which were found as regards SLM concern checks carried out as from March 2000 and not the earlier period.
- 209 The Commission disputes those arguments. It refers to the nature and content of the single infringement, which existed since the establishment of Club Zurich in 1984, and in which SLM participated as from 10 February 1997 by adhering to a plan which had already been implemented. The meeting of 10 February 1997 was SLM's first direct participation in the cartel, as can be seen from the allocation of quotas and the communication of data provided by a representative of SLM.

Assessment of the Court

- 210 SLM does not dispute that it participated in Club Italia as from the end of 1999. It acknowledged this soon after the inspections carried out by the Commission in September 2002. Before the Court, SLM also does not dispute that it participated in the last phase of Club Europe, that of its integration with Club Italia, which took place between September 2000 and 19 September 2002.
- 211 However, SLM denies having participated in Club Italia in the period from 10 February 1997 until the end of 1999. It submits that it cannot be held to have participated in the cartel during that period.
- 212 As noted above, under Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement.
- 213 In that respect, in point 24 of the 2006 Guidelines, the Commission indicated that, 'in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales ... will be multiplied by the number of years of participation in the infringement'. In the same point, the Commission stated that 'periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year'.
- 214 In the present case, however, as indicated in recital 956 of the contested decision, rather than rounding up periods as suggested in the guidelines, the Commission decided to take into account the actual duration of participation in the infringement, expressed in years and full months, rounding down on the month.
- 215 In addition, as is clear from the case-law, it is incumbent on the Commission to prove not only the existence of the agreement but also its duration. In particular, as regards proof of an infringement of Article 101(1) TFEU, the Commission must prove the infringements which it has found and adduce

evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement (see judgment of 17 May 2013 in *Trelleborg Industrie and Trelleborg v Commission*, T-147/09 and T-148/09, ECR, EU:T:2013:259, paragraph 50 and the case-law cited).

- 216 Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding the infringement was addressed. The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in proceedings for annulment and/or alteration of a decision imposing a fine. In the latter situation, it is necessary to take account of the principle of the presumption of innocence, which is one of the fundamental rights which are protected in the European Union legal order and has been affirmed by Article 48(1) of the Charter of Fundamental Rights. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies *inter alia* to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments. It is accordingly necessary for the Commission to produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see judgment in *Trelleborg Industrie and Trelleborg v Commission*, cited in paragraph 215 above, EU:T:2013:259, paragraph 50 and the case-law cited).
- 217 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 institution, viewed as a whole, meets that requirement (see judgment in *Trelleborg Industrie and Trelleborg v Commission*, cited in paragraph 215 above, EU:T:2013:259, paragraph 51 and the case-law cited).
- 218 Furthermore, it is normal for the activities which anti-competitive agreements entail to take place clandestinely, for meetings to be held in secret, and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of meetings, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and *indicia* which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see judgment in *Trelleborg Industrie and Trelleborg v Commission*, cited in paragraph 215 above, EU:T:2013:259, paragraph 52 and the case-law cited).
- 219 Lastly, according to the case-law, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (see judgment in *Trelleborg Industrie and Trelleborg v Commission*, cited in paragraph 215 above, EU:T:2013:259, paragraph 53 and the case-law cited).
- 220 In the present case, the Commission considered that SLM had participated in the infringement from 10 February 1997 to 19 September 2002 (contested decision, Article 1 and recitals 862 and 899, and paragraphs 127 to 131 above).
- 221 According to the Commission, the manner in which SLM participated in the cartel was as follows:
- SLM participated in Club Italia from 10 February 1997 to 19 September 2002 (contested decision, recital 866, and paragraphs 127, 128 and 130 above);
 - SLM was aware or ought to have been aware, from at least 29 November 1999, that, by participating in Club Italia, it was taking part in a larger scheme, with several levels, the objective of which was to stabilise the PS market at pan-European level in order to avoid a fall in prices

(contested decision, recitals 649 and 650, and paragraph 129 above), an awareness which covered the various aspects of the single and continuous infringement, including the Scandinavian aspect discussed at the meeting of 29 November 1999;

— SLM must be held liable for its participation in Club Europe from 11 September 2000 to 19 September 2002 (contested decision, recital 865, and paragraph 131 above).

– The evidence prior to the meeting of 10 February 1997

222 Before even referring to the meeting of 10 February 1997, the Commission indicated in the contested decision that there were ample indications that SLM was aware of Club Italia (contested decision, recital 474, and paragraph 128 above).

223 However, none of the evidence relied on in that respect by the Commission — as such or taken as a whole — are convincing.

224 The first piece of evidence cited by the Commission in recital 474 of the contested decision concerns two indications in a document setting out the handwritten notes of ITC in relation to the Club Italia meeting of 18 December 1995, where Redaelli, CB, Itas and ITC set the prices to be applied as of 1996 for each quarter. According to that document, and the Commission's interpretation of it, third-party undertakings had to be informed of those new prices. The document mentions 'the foreigners/Trame/SLM' and '[representatives of Tréfileurope, Trame, DWK]/SLM' (contested decision, recital 429). Although that document may serve to establish the intention of the four principal members of Club Italia (Redaelli, CB, Itas and ITC) to widen the scope of their agreement, other evidence is necessary to establish that that declaration of intent was actually put into practice and therefore that, at the very least SLM was aware of the new prices determined by Redaelli, Itas, CB and ITC. There is no such evidence in the present case.

225 The second piece of evidence relied on by the Commission concerns the tables circulated at the Club Italia meeting of 17 December 1996 indicating the allocation of tons per customer and the appointment of lead suppliers for a number of customers on the Italian market for 1997. In recital 417 of the contested decision, the Commission indicated that 'the companies Austria Draht, Trame, SLM and DWK were also foreseen in the excel tables but the columns with the identity of their customers and the allowed sales were left blank'. In recital 474 of the contested decision, the Commission also noted that 'despite the fact that the columns for SLM were left blank, the fact that SLM was already considered in the table is an indication that discussions between parties must have taken place or were at least envisaged'. Here, too, in the absence of evidence that SLM was actually involved in the discussions concerning it, the abovementioned document cannot be interpreted as meaning that such was indeed the case.

226 The third piece of evidence cited by the Commission in recital 474 of the contested decision concerns the references to SLM's case in the handwritten notes of ITC relating to the Club Italia meetings of 17 (actually 19) and 27 January 1997. Those references do not prove that SLM was aware of Club Italia before it began participating in it. The mere mention of a competing undertaking by members of a cartel at a meeting or in notes taken is not sufficient to make that undertaking a participant in the cartel. In the present case, moreover, it is not clear to what the mentions of SLM refer. As regards the notes relating to the meeting of 19 January 1997 — which are, as ITC acknowledges, partly illegible — it appears that the mention of 'SLM/Trame' was made in reference to an attempt to identify a customer's suppliers, but that mention is immediately followed by a question mark. As regards the notes relating to the meeting of 27 January 1997, several references are made to SLM, but they are not all comprehensible. The clearest seems to be that SLM proposed '920' to a customer and that another offer had been made by Trame. In that respect, it must however be noted that, in other handwritten notes of ITC relating to January 1997 (which also refer to the aforementioned '920'), it is stated that the customer San Michele indicated that 'SLM sent it a written offer of 940'. That reference

illustrates the assertion made by SLM in its pleadings, according to which its competitors were able to obtain, through common customers, a great deal of information on SLM's prices and quantities sold. In addition, it must be noted that the price proposed seems to be much lower than the price desired by the members of Club Italia (at the meeting of 18 December 1995, the prices envisaged were between 1300 and 1400, the handwritten notes of ITC of 27 January 1997 show offers of Redaelli at 1090).

227 It follows from the foregoing that the various evidence prior to the meeting of 10 February 1997 invoked in recital 474 of the contested decision does not establish that 'there are ample indications that it was aware of the Italian agreement since 18.12.1995'. In any event, the Commission did not hold SLM liable for the period prior to 10 February 1997.

– The evidence relating to the meeting of 10 February 1997

228 In order to establish the beginning of SLM's participation in Club Italia, the Commission considered that 'the first concrete proven quota allocation to SLM occurred at the meeting of 10.02.1997' (contested decision, recital 474, and paragraph 128 above).

229 In the section relating to that meeting in Annex 3 to the contested decision, the Commission indicated that the meeting had probably been held on Redaelli's premises in the presence of representatives of Redaelli, CB, Itas and ITC. SLM is not mentioned among the participants in that meeting.

230 In addition, according to the evidence to which the Commission refers in the abovementioned section, the Club Italia meeting of 10 February 1997 concerned the following points:

- 'ITC. Handwritten notes from Mr. [A.] on the meeting concerning information exchange on purchases by major customers and prices applied' ('the references to exchanges of information');
- 'Also notes on quota allocation to certain customers (named) between SLM, on the one hand, and Redaelli, CB, Tycsa, ITC/[A.], on the other hand' and the fact that 'this information was provided by CB (Mr. [C.]) and Itas (Mr. [Am.]), who had themselves obtained the data on SLM from Mr. [Ch.] himself, SLM's representative' ('the references relating to the allocation of "quotas"');
- 'A reference to [the person charged with performing checks] is also made: [Pr.]: n°1 Redaelli-n°2 Tréfileurope-n°3 ITAS-n°4 CB-n°5 Italcables' ('the reference to the person charged with performing checks');
- 'A reference is further made to the fact that Trame ... would sell 930 tons over sea ...' (that indication has no bearing on the present case);
- 'Mr [A. (ITC)] also noted down the telephone numbers of Messrs. [K. (Tréfileurope)], [T. (DWK)], [Ch. (SLM)], [C. (CB)] and [Pr.]. Next meeting 17.02.1997' ('the reference to the telephone number of the representative of SLM').

231 That information comes, on the one hand, from a document containing the handwritten notes of ITC relating to the meeting in question in the present case and, on the other, from the leniency application submitted by ITC on 21 September 2002. The Commission therefore has, in that respect, only one source of information, ITC, as it stated in reply to a question put to it by the Court by way of a measure of organisation of procedure.

232 The assertion made by the Commission in the contested decision, according to which '[SLM's] participation in Club Italia as of 10.02.1997, however, is clearly established on the basis of documentary evidence and several leniency statements of ITC, Tréfileurope and CB (contested decision, recital 863, and paragraph 130 above) may therefore appear misleading, since that

participation appears only from the leniency application submitted by ITC. The statements made in the context of the leniency applications of Tréfileurope and of CB as regards SLM do not, in fact, concern the date on which SLM's participation in Club Italia began; they indicate only that SLM participated in Club Italia. Moreover, it is clear from the leniency applications of Redaelli and of Tréfileurope that Club Italia had two periods, a first period during which only a core group composed of Redaelli, CB, Itas, ITC and Tréfileurope met, and a second period during which those undertakings were joined by others, including SLM.

233 Likewise, the interpretation given by the Commission, in recital 474 of the contested decision, of the evidence that it relies on in relation to the Club Italia meeting of 10 February 1997 is not capable of eliminating all doubt in the mind of the Court.

234 First, as regards the terms of the references to exchanges of information, it must be noted that the expression 'quota allocation' used by the Commission is ambiguous, since it is unclear whether the volumes mentioned in the hand written notes of ITC in relation to SLM and other suppliers refer to volumes which were already delivered or volumes to be delivered. In ITC's leniency application, it is indicated in that respect that they were consignments dispatched by SLM.

235 In the present case, it cannot be excluded that the discussion at the meeting of 10 February 1997 between representatives of Redaelli, CB, Itas and ITC was not intended to guarantee the sales of SLM, an undertaking which was not present at the meeting, but rather to identify SLM's customers and to evaluate its relative importance as a supplier to its customers compared to that of the members of Club Italia. Moreover, that hypothesis would also explain why the references relating to the allocation of quotas are divided into two columns, one for SLM and another for Redaelli, CB, Tycsa and ITC.

236 Secondly, as regards the origin of the information concerning SLM in the references relating to the allocation of quotas, it is apparent from recital 474 of the contested decision that 'the ITC notes expressly state that CB and ITC had obtained the sale information on SLM from [a representative of SLM]'. However, from a reading of ITC's notes, which were probably written at the material time, such a statement does not seem so evident. It can only be found that those notes begin with a reference to 'SLM', along with the name of one of its representatives written in capital letters, followed by the references relating to the allocation of quotas. In its leniency application ITC stated that the information relating to SLM had been supplied by representatives of CB and Itas who had indicated that they had obtained that information from the aforementioned representative of SLM.

237 The implication of SLM is therefore indirect, since it based on what was indicated to the representative of ITC by the representatives of CB and Itas. In order to establish whether that implication was justified, the Commission could have verified with CB and Itas whether the information indicated by ITC, more than five years after the material time, indeed corresponded to the content of that meeting. The evidence available to the Commission in the present case is not enough to render entirely implausible SLM's contention that it was not at the origin of the information in question and that the information could easily have been obtained from customers or competitors (as, in another case, it has been found in paragraph 226 above).

238 Thirdly, in view of the other information in the handwritten notes of ITC, it might also appear inconsistent to allocate quotas to SLM without, at the same time — as was done as regards Redaelli, Tréfileurope, CB, Itas and ITC — ensuring that those quotas would be verified by the person charged with performing checks. Likewise, although the reference to the telephone number of a representative of SLM seems to indicate that he could have been contacted following that meeting, it does not prove that such was the case, and it may also be explained by the possible intention of the members of Club Italia to involve SLM in the future, when those members were better able to evaluate its role on the Italian market.

239 Lastly, and in any event, it must also be pointed out that, as was the case for the evidence prior to the meeting of 10 February 1997, the Commission is unable to produce any evidence capable of proving to the requisite legal standard that SLM was aware that it was participating in Club Italia given the discussions between the members of that group in relation to its situation.

240 It follows from the foregoing that, in the absence of any evidence capable of corroborating their content, the evidence relating to the meeting of 10 February 1997 is not sufficient to establish that SLM's participation in Club Italia began as from that date.

– The evidence subsequent to the meeting of 10 February 1997

241 The Commission also referred to evidence subsequent to the meeting of 10 February 1997 in order to support its assessment as regards the beginning and the duration of SLM's participation in Club Italia (contested decision, recital 474, and paragraph 128 above).

242 More specifically, in the contested decision the Commission rejected several arguments which SLM has repeated before the Court. Those arguments, thus, relate to the reported indication that SLM still had doubts, which ITC mentioned in its leniency application, regarding the handwritten notes relating to the Club Italia meeting of 4 March 1997, the argument concerning the lack of invoices prepared by the person charged with performing checks as regards SLM before 2000, and the content of the statement made by Redaelli in its leniency application of 20 March 2003 (contested decision, recitals 477 and 478, and paragraph 128 above).

243 As regards ITC's assertions in relation to the handwritten notes concerning the Club Italia meeting of 4 March 1997, at which Redaelli, CB, Itas, ITC, Tréfileurope and a person employed by the person charged with performing checks were represented, ITC indicated that 'during the meeting the producers were informed that ... Trame and DWK want to participate and will join the next time, whereas SLM still has doubts' (*Durante l'incontro i produttori vengono informati che ... Trame et DWK vogliono partecipare ed interverranno la prossima volta, mentre la SLM è ancora in dubbio*). In the Commission's view, SLM's doubts can certainly not be interpreted as an interruption of its participation in Club Italia.

244 However, the Commission's interpretation does not satisfy the Court, since the Commission is not yet able, at this stage, to establish to the requisite legal standard that SLM was participating at that time in Club Italia. On the contrary, ITC's abovementioned assertion suggests that, in March 1997, SLM had not yet agreed to join Club Italia.

245 Nevertheless, SLM's participation in Club Italia is clear from what is reported of the meeting of 15 April 1997, in which a representative of SLM participated and at which a 'discussion on sales made by Redaelli to a number of customers and on offers made to customers by SLM and CB, customers and sales quotas', a 'detailed overview of sales made by ... SLM ...' and a 'discussion on quota allocation (with indication of a concrete percentage) for the same companies' took place (contested decision, Annex 3).

246 Similarly, it can be seen from what is reported in the contested decision of the Club Italia meeting of 30 September 1997, in the presence of a representative of SLM, that the 'definition of sales quotas, minimum prices and the criteria to fix those quotas' were discussed. The meeting of 22 December 1997, in which it is not specified whether SLM participated, concerned similar elements concerning SLM, as did the meetings of 11 January 1998, 29 January 1998, 1 February 1998, 5 March 1998, 12 April 1998, 19 April 1998, 21 June 1998, 3 September 1998, 27 September 1998, 15 November 1998, 29 November 1998, 14 December 1998, 20 January 1999, 6 February 1999, 24 February 1999, 11 March 1999, 30 March 1999, 18 May 1999, 15 June 1999, 30 June 1999, 16 July 1999, 7 September 1999, 5 October 1999, 19 October 1999, 29 November 1999, 4 December 1999, 14 December 1999 and 18 January 2000, all of which SLM is recorded as having attended.

247 Other meetings which took place subsequently, until that of 16 September 2002 in Milan (Italy), were attended by a representative of SLM and concerned discussions relating inter alia to quotas and prices.

248 In that context, the fact that, on an unspecified date in 1998, a table in the possession of Tréfileurope showed the allocation of customers in 1998, mentioning SLM, but without setting out information concerning it, as is duly reported in Annex 3 of the contested decision, does not call into question what can be inferred from all of the foregoing evidence, namely that the Commission established — in a sufficiently probative manner for the Court — that as from 15 April 1997, SLM participated in discussions in Club Italia whose purpose was clearly anticompetitive.

249 Similarly, the fact that the person charged with performing checks did not produce invoices concerning SLM before 2000 is — like the content of the statement made by Redaelli in its leniency application, according to which SLM did not participate Club Italia from the beginning of that club's operation — not sufficient to call into question the above conclusion.

250 In addition, and incidentally, it must be noted, as SLM submits, that the latter was found by the Commission to have participated in Club Europe only for the period from 11 September 2000 to 19 September 2002 (contested decision, recital 865, and paragraph 131 above) and that the Commission established that it was only from 29 November 1999 that SLM knew or ought to have known that, by participating in Club Italia, it was taking part in a larger scheme, with different levels, the objective of which was to stabilise the PS market at pan-European level in order to avoid a fall in prices (contested decision, recital 650, and paragraph 129 above). Those are elements which enable the identification of the specific nature of SLM's participation in the infringement, which is not identical to that of other undertakings, such as Redaelli or Tréfileurope, which participated for longer or more fully in the various components of the single infringement.

– Conclusion

251 It follows from the foregoing that, rather than beginning on 10 February 1997, SLM's participation in Club Italia can be established to the requisite legal standard only from 15 April 1997, that participation also being subsequently established until September 2002.

252 Consequently, it is necessary to annul the contested decision in that respect and to subtract a period of two months, from 10 February to 14 April 1997, from the duration of the infringement for which SLM is held liable. That period does not affect the period for which Ori Martin is held liable, since liability for the infringement committed by SLM is attributed to Ori Martin only as from 1 January 1999.

253 Likewise, as regards SLM, the following must be noted:

- it was found by the Commission to have participated in Club Europe only for the period from 11 September 2000 to 19 September 2002 (contested decision, recital 865, and paragraph 131 above);
- as from 29 November 1999, it was aware or ought to have been aware that, by participating in Club Italia, it was taking part in a larger scheme, with different levels, the objective of which was to stabilise the PS market at the pan-European level in order to avoid a fall in prices (contested decision, recital 650, and paragraph 129 above).

254 Those facts must also be taken into account in the calculation of the fine imposed on SLM, since the Commission did not distinguish between the different manners in which SLM participated in the cartel: solely within Club Italia from April 1997 to the end of November 1999, and then at the pan-European level from December 1999 to September 2002.

255 The consequences of the foregoing on the determination of the amount of the fine will be assessed below in the context of the Court's use of its unlimited jurisdiction.

d) The proportion of the value of sales chosen as the additional amount

Arguments of the parties

256 SLM and Ori Martin put forward the same arguments as set out in the context of the assessment of the gravity as regards the imposition of the additional amount provided for in point 25 of the 2006 Guidelines. They submit that no criterion enables them to understand the choice to increase the amount of the fine by 19% of the value of SLM's sales. That choice must be criticised, particularly in view of SLM's limited role. In general, an aggravating circumstance based on the deterrent effect alone is unfair and similar to a second penalty for the same acts. In addition, setting an identical percentage for all the addressees of the decision, with the exception of Fundia, Socitrel, Faipricela and Proderac, irrespective of their involvement and of their specific roles, is contrary to the principle of equal treatment.

257 The Commission disputes those arguments. It contends that, in the present case, it merely adapted the basic amount of the fine in view of the horizontal nature of the cartel and therefore of its specific gravity, irrespective of the size of the unlawful advantage obtained. No double penalty was applied.

Assessment of the Court

258 Point 25 of the 2006 Guidelines states:

'Irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales ..., in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22 [of the 2006 Guidelines].'

259 In the present case, it is apparent from the contested decision that, after referring to the abovementioned provision in recital 957, the Commission found, in recital 962, that 'taking into account the circumstances of the case and, in particular, the factors discussed in section 19.1.3 [relating to the gravity], it is concluded that an additional amount of 16% of the value of sales is appropriate for the Fundia undertaking, 18% for the undertakings Socitrel, Faipricela and Proderac and 19% for all other undertakings [including SLM]'.

260 In that respect, it must be found that the infringement in which SLM participated was characterised by horizontal price-fixing, market-sharing and output limitation agreements, which are the most harmful to competition within the European Union. In such cases, the Commission has indicated that, in order to deter undertakings from even entering into unlawful practices, it will include in the basic amount an amount of between 15% and 25% of the value of sales, which it did in the present case by setting the amount at 19% for SLM.

261 That reasoning, explained in advance, cannot be regarded as unfair or as similar to a second penalty, since it merely describes the factors that the Commission intends to take into consideration when it determines the amount of the fine. In that respect, the Commission did not go beyond the limits laid down by the rules of competition applicable to undertakings set out in Article 101 TFEU and in Article 23 of Regulation No 1/2003 relating to their implementation, in indicating that, in order to

determine the basic amount of the fine, it considered it appropriate to include in the fine a specific amount, irrespective of the duration of the infringement, in order to deter undertakings from even entering into unlawful practices.

- 262 Similarly to the assessment of the degree of gravity of the infringement in the determination of the basic amount of the fine, the factors taken into consideration by the Commission at this stage of its analysis concern the infringement in general. It is only at a later stage that the Commission adjusts the basic amount of the fine in order to take account of any mitigating circumstances, such as the limited role alleged by the applicants.
- 263 Since SLM has not presented any evidence capable of calling into question the Commission's reasoning as regards the nature of the infringement, the combined market share of the undertakings concerned, the geographical scope and the implementation of the infringement, which constitute the various factors taken into account in that respect in the contested decision, it must be held that the Commission cannot be criticised when it deems it appropriate to include a specific amount, irrespective of the duration of the infringement, in the basic amount of the fine.
- 264 Moreover, even if the Commission does not set out a specific statement of reasons as regards the proportion of the value of sales used as the additional amount, the mere reference to the analysis of the factors used in order to assess the gravity of the infringement suffices in that respect. The considerations relating to the examination of the statement of reasons for the proportion used to determine the value of sales intended to assess the gravity of the infringement are equally valid as regards the assessment of the statement of reasons set out to justify the proportion used to determine the additional amount applied as a deterrent (see, to that effect and by analogy, judgment of 11 July 2013 in *Ziegler v Commission*, C-439/11 P, ECR, EU:C:2013:513, paragraph 124).
- 265 It follows from the foregoing that the applicants' complaints as regards the Commission's use of an additional amount in determining the basic amount of the fine pursuant to the 2006 Guidelines must be rejected.

4. The factors taken into account in order to adjust the basic amount

- 266 As regards the factors taken into account in order to adjust the basic amount of the fine, it is necessary to examine the following complaints: first, the arguments relating to the mitigating circumstances which were invoked by SLM and Ori Martin and, secondly, the arguments relating to leniency invoked by SLM.

a) The mitigating circumstances

Arguments of the parties

- 267 SLM and Ori Martin claim that the Commission erred in not recognising mitigating circumstances under point 29 of the 2006 Guidelines. In the regard, SLM refers to its low market shares in Europe and Italy (3% and 10% respectively), its belated and limited participation in the infringement and its acknowledgement of many of the acts imputed to it a few days after the inspection. SLM was always seen as an 'outsider' by the other participants in the infringement because of its aggressive commercial practices. Moreover, SLM did not take part in most of the collusive meetings and it recorded considerable losses as a result of its conduct and the punishment that it received from the undertakings that participated in the infringement as from 1995. For its part, Ori Martin considers that the Commission did not take into account the solely belated and limited participation of SLM in the infringement.

268 The Commission disputes those arguments.

Findings of the Court

269 Point 29 of the 2006 Guidelines provides as follows:

‘The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

- where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);
- where the undertaking provides evidence that the infringement has been committed as a result of negligence;
- where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;
- where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;
- where the anticompetitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation.’

270 In the present case, SLM relies on three types of arguments in order to claim that the Commission should have taken into account one or more mitigating circumstances in determining the amount of the fine. The first concerns its low market shares in Europe and Italy, the second its cooperation with the Commission and the third its marginal role within the cartel both in terms of the duration of its participation and with regard to the content thereof. The latter argument is also relied on by Ori Martin.

271 As regards the argument concerning SLM’s low market shares in respect of the various European states affected by the infringement (estimated at less than 3%) and Italy (estimated at less than 10%), it must be noted that the fact that such an argument is not expressly listed among the mitigating circumstances capable of being taken into consideration in order to determine the amount of the fine is not sufficient to rule out its possible relevance. Point 29 of the Guidelines, merely contains an indicative and non-exhaustive list of certain mitigating circumstances which may be taken into account, as is apparent from the expression ‘such as’ which is used (see, to that effect, judgment of 25 October 2011 in *Aragonesas Industrias y Energía v Commission*, T-348/08, ECR, EU:T:2011:621, paragraphs 279 and 280).

272 In the present case, however, the Commission cannot be criticised for not having taken into account the low market shares of SLM in order to grant a reduction in the amount of the fine in respect of mitigating circumstances.

273 In terms of methodology, it must be stressed, first, that the Commission took into consideration the relative weight of SLM in the PS sector in order to determine the amount of the fine, since it took as its starting point its calculation of the value of sales made by the undertaking in relation to the infringement in question.

- 274 Furthermore, the level of the market shares indicated by SLM is not insignificant as such. That level must also be compared with the level of market shares of all the participants in the infringement, which amounted to approximately 80% of PS sales in the EEA, with Italy being the country where PS consumption was the highest, and the demand structure which is very heterogeneous and made up of a very small number of large customers (contested decision, recitals 98 to 102 and paragraphs 14 to 16 above).
- 275 Moreover, it must be observed that SLM adduces no evidence capable of establishing how the level of its market shares in Europe and Italy justify, as such, a reduction in the basic amount of the fine in respect of mitigating circumstances.
- 276 In the absence of any reasoning to that effect, the Commission cannot be criticised for not having asked itself whether the fact that SLM's market shares were low was capable of justifying that being taken into account, as a mitigating circumstance, in determining the amount of the fine.
- 277 The argument alleging that it is necessary to take into account the fact that SLM's market shares were low as a mitigating circumstance that the Commission should have noted when applying point 29 of the 2006 Guidelines must therefore be rejected as unfounded.
- 278 As regards the argument alleging cooperation with the Commission, SLM recalls having acknowledged its participation in a significant number of acts imputed to it several days after the inspection, which the Commission does not dispute.
- 279 In that regard, it must be observed that, as noted in the contested decision, the Commission takes the view that not challenging the acts is not, in itself, sufficient to justify a reduction of the fine in respect of mitigating circumstances. The Commission maintained in that regard that it is no longer bound by its earlier practice in that respect and that the reduction for not contesting the facts which was provided for in its notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) has subsequently been abandoned (contested decision, recital 1009).
- 280 It must be observed that, in any event, SLM's admission of some of the facts imputed to it was not capable of facilitating the work of the Commission in respect of establishing the infringement, because the part concerned corresponds to the period between 1999 and 2002, for which the Commission already had several sources of information and a great deal of evidence, seized, *inter alia*, during the inspections carried out in September 2002. The admission of the facts at issue by SLM therefore had no effect on the finding of the infringement in respect either of SLM or of other undertakings involved in the infringement.
- 281 The argument alleging the need to take into account SLM's admission of part of the facts imputed to it as a mitigating circumstance that the Commission should have noted when applying point 29 of the 2006 Guidelines must therefore be rejected as unfounded.
- 282 In that regard, it is clear from the file that the evidence submitted by SLM to the Commission in its letter of 25 October 2002 or subsequently in its reply to the statement of objections had no effect on the finding of the infringement. Accordingly, the information relating to the expansion of Club Europe between September 2000 and September 2002 is mainly derived from other sources.
- 283 As regards the argument alleging SLM's marginal role as regards the infringement, both in terms of its duration and content, it must be noted at the outset, in so far as concerns the limited duration of SLM's participation in the infringement, that that factor is already taken into account when the basic amount of the fine, which takes into account the duration of the participation of each undertaking in the infringement, is determined.

- 284 In the Commission's 2006 Guidelines, the Commission therefore considered that 'the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount'.
- 285 While it cannot be excluded that, in certain situations, a significant difference in the length of participation of the various undertakings concerned can be taken into consideration in respect of mitigating circumstances, that is not so in the present case. In the present case, SLM's participation in Club Italia lasted several years and took place with knowledge of the facts. That participation is sufficiently significant to establish that there is no need for the Commission to taken into account the duration of SLM's participation in the infringement in respect of mitigating circumstances.
- 286 As regards the allegedly limited content of SLM's participation in the infringement and the effect that that should have on the determination of the amount of the fine imposed on that undertaking, the parties disagree on the significance to be accorded to the evidence submitted in that regard.
- 287 In that regard, it follows from point 29 of the 2006 Guidelines that, in principle, in order to find that such a mitigating circumstance exists, the Commission asks the undertaking in question to '[provide] evidence that its involvement in the infringement is substantially limited and thus [demonstrate] that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market'.
- 288 In the past, the Commission considered that an undertaking which played an 'exclusively passive or "follow-my-leader" role in the infringement' could benefit from a reduction in the basic fine in respect of mitigating circumstances (see point B.3 of the 1998 Guidelines).
- 289 According to SLM, its participation in the cartel complies with those definitions. In the present case, it relies on its aggressive commercial practices; the losses due to its conduct on account of punishments received; the fact that other undertakings participating in the infringement did not perceive it, at least until 2000, as a member of the cartel and the fact that it did not participate in most of the collusive meetings.
- 290 According to the Commission, its participation does not comply with any of the abovementioned definitions.
- 291 Accordingly the Commission noted in recital 990 of the contested decision, when examining the argument relating to the 'passive or minor role' as follows:
- 'SLM continuously and regularly participated in and contributed to the quota fixing, client allocation and price fixing and exchange of sensitive commercial information in over 100 Club Italia meetings between 1997 and 2002 Furthermore, contrary to SLM's allegation, ITC and Tréfileurope, and CB, confirm SLM's participation in the cartel SLM's role in the cartel can therefore not be qualified as substantially limited, exclusively passive or minor.'
- 292 The examination of the various pieces of evidence relied on by the Commission and, in particular, the evidence set out in annex 3 to the contested decision in so far as concerns the meeting of 15 April 1997, which took place in the presence of a representative of SLM and whose content was reported by ITC and Tréfileurope shows that SLM was perceived as a cartel player well before 2000.
- 293 Furthermore, it is the case, as is also apparent from the contested decision, that SLM participated in a significant number of collusive meetings, which is sufficient to find that its participation may not be considered exclusively passive and minor or substantially limited.

294 Moreover, the Commission notes in recitals 1015 to 1022 of the contested decision, when examining the arguments concerning ‘non-implementation/substantially limited role’ that SLM, like other undertakings, had claimed not to have implemented collusive agreements or to have disrupted the cartel by adopting competitive conduct in the market. In support of that claim, it is indicated that SLM submitted different invoices and increased its turnover.

295 In reply, the Commission noted that:

- ‘most of the evidence submitted consists mainly of data certified only by the submitting company itself’ (contested decision, recital 1018);
- ‘In any event, occasional cheating regarding fixed prices and/or quotas or clients allocation does not in itself prove that a party has not implemented the cartel agreements. Internal conflicts, rivalries and cheating are typical of any cartel, in particular if they have a long duration The circumstance that a company would not have respected certain of the agreements does therefore not mean that it did not implement of the cartel agreements and adopted a fully competitive behaviour on the market (contested decision, recital 1018); and
- ‘the implementation of the cartel agreements was ensured through the monitoring scheme ... and the very frequent cartel meetings among competitors at which confidential information was regularly exchanged, allowing the parties to compare their figures and/or revise quotas, prices and the allocation of customers. It is established that ... SLM ..., like of the addressees of this Decision, participated regularly in meetings at which prices, quotas and clients were discussed and monitored Moreover, for ... SLM ..., reference is made to the verification of their sales made by [an] external auditor, ...’. (contested decision, recital 1019).

296 Furthermore, in the Commission’s view, no undertaking had proved that it had actually avoided implementing the offending agreements by adopting competitive conduct on the market or that at least it had clearly and substantially breached the obligations relating to the implementation of the cartel to the point of having disrupted its very operation. It followed that no mitigating circumstance could be applied on the ground of non-implementation or a substantially limited role’ (recital 1022).

297 However, it must be pointed out that, while it is clear from the file that SLM regularly attended collusive meetings and that it was subject to a control mechanism, it is not irrelevant to know whether or not, following those meetings and in spite of the control mechanism, SLM adopted competitive conduct in the market as it claims. The Commission therefore fails to convince when it rejects SLM’s line of argument on the ground that it is clear from the file that it participated in the infringement.

298 Likewise, the argument alleging that there was no ‘certification’ of the information submitted by SLM cannot suffice to reject its value entirely. If the Commission had the least doubt as to the authenticity or veracity of information that could be inferred from the invoices submitted by SLM or the claimed increase in turnover, it had the option to request further information from SLM or to carry out its own investigation in respect of that information.

299 Nevertheless, it must be observed that it is clear from the examination of those invoices and the observations of the parties in that regard at the hearing that the number of those invoices was not very high and they covered only a very short period — the start of November 2001. Accordingly, those documents have no relevance in order to claim that during the period in which SLM was party to infringing agreements, it actually avoided applying them by adopting competitive conduct in the market. In the present case, the Commission is correct in holding that, in general, ‘occasional cheating’ does not in itself prove that a party did not implement collusive agreements.

300 Moreover, SLM does not provide the least evidence in support of its claim that it was perceived as an ‘outsider’ by the other participants in the infringement on account of its aggressive commercial practices and accordingly was subject to retaliation on the part of the other participants in the cartel. Such claims may not therefore be taken into consideration.

301 The argument alleging that the Commission should have considered, with regard to the documents submitted during the administrative procedure, that SLM’s participation in the infringement is substantially limited for the purposes of point 29 of the 2006 Guidelines must therefore be rejected as unfounded.

302 It follows from the foregoing that the complaints of the applicants based on the various arguments relied on in order to establish mitigating circumstance within the meaning of point 29 of the 2006 Guidelines must be rejected.

b) Declarations made in the context of the leniency application

The contested decision

303 The Commission notes the following in the contested decision:

‘(1126)

SLM claims a reduction of the fine for the self-incriminating information it provided in its reply to the first request for information of the Commission, which goes beyond regular co-operation. It further claims that it could not deliver more information as it was not, at that point, able to identify which evidence was already in the possession of the Commission, and in view of its marginal role in the infringement. Finally, it submits that the Commission used its statements to strengthen its conclusions.

(1127)

In order to qualify for a reduction of the fine under the Leniency Notice, the information submitted should be of significant added value. The self-incriminating nature of the information or the fact that the Commission refers to the information in describing the cartel is thereby not decisive. When applying for leniency, the undertaking is moreover expected to provide the Commission all relevant information it possesses and is more likely to qualify for leniency if it acts promptly. The fact that SLM would not have been able to deliver more information because it was not able to identify which evidence was in the possession of the Commission is therefore irrelevant.

(1128)

On 30.10.2002, while replying to a request for information, SLM applied for a reduction of the fine. In this reply, SLM confirmed its own participation in four types of meetings: the ESIS [Eurostress Information Service, with its head office in Düsseldorf] meetings, the meetings between Italian producers at management level from 1999 until 2002, the meetings between European producers at management/business level in 2001 and the meetings between Italian producers at salesperson level from 1999 until 2002. However, regarding the question of the possible significant added value of SLM’s submission, its description of these meetings already followed from pre-existing evidence, and its statements were vague.

(1129)

Similarly, regarding the expansion of Club Europe, SLM explains that there were meetings in 2001 between European and Italian producers to negotiate a status quo of the Italian exports in the European market. It holds that it participated in three such meetings and provided minutes regarding two meetings, of which the meeting of 04.09.2001 (which shows the search for a status quo of the

Italian exports and for price stabilisation) is mentioned several times in the SO. However, there are several prior sources of evidence proving this and other meetings with a similar aim. The information provided by SLM therefore does not constitute significant added value.'

Arguments of the parties

- 304 SLM claim that the Commission erred in not granting it a reduction in the amount of the fine in respect of cooperation provided during the administrative procedure. In particular, SLM argues that, given its secondary role in the infringement, when it decided to cooperate, it was not in a position to know what elements were already in the Commission's possession in order to assess whether the replies submitted offered added value or not. The Commission would have been justified in replying to the undertaking that the facts and circumstances acknowledged has no added value if it could have been established that that undertaking was aware of facts and circumstances which, by other means, were added to the file by the Commission. That was not the case when SLM declared to the Commission that there were at least four types of meetings between PS producers: namely in the context of the Eurostress Information Service (ESIS, professional association of PS producers in Europe), between European producers, between the Italian producers alone, at management or salesperson level. It indicated the participants, the places, the origin of the invitations and the content (contested decision, recital 1128). Those declarations were used in the statement of objections to support certain findings (see statement of objections, points 191 and 242) which could not have taken place if those declarations were irrelevant.
- 305 The Commission contends that SLM did not deserve a reduction in the amount of the fine given that it provided no information of significant added value. Moreover, a reduction in the amount of the fine imposed on SLM would have been inappropriate in the light of its calculating conduct and the vague nature of the information provided.

Findings of the Court

- 306 In the present case, it should be noted that on 9 January 2002, the Bundeskartellamt submitted documents to the Commission concerning the existence of an infringement of Article 101 TFEU concerning PS.
- 307 Likewise, as from 19 July 2002, that is to say before the inspections were carried out on 19 and 20 September 2002, the Commission granted DWK conditional immunity in response to a request made to that effect on 18 June 2002. Following those inspections, several undertakings made requests seeking to obtain favourable treatment from the Commission in return for their cooperation with it, inter alia ITC, as from 21 September 2002, and also Redaelli, on 21 October 2002 and Nedri, on 23 October 2002.
- 308 In the contested decision, the Commission indicated that ITC received a reduction of the fine of 50% for having been the first undertaking to meet the requirements laid down in point 21 of the Leniency Notice of 2002. In particular, it is noted that ITC provided important indications concerning Club Italia and the pan-European arrangements. The Commission also noted that Nedri received a reduction of the fine of 25% for having been the second undertaking to meet the abovementioned requirements. Other undertakings, ArcelorMittal Wire France, ArcelorMittal, ArcelorMittal Fontaine, ArcelorMittal Verderio, ArcelorMittal España, Emesa/Galycas and WDI, received reductions in fines of 20% or 5%. The requests submitted by Tyrsa, Redaelli and SLM were rejected.
- 309 At the same time as SLM replied to the request for information made at the inspection, it submitted a request seeking to benefit from the Leniency Notice of 2002 on 25 October 2002, which was registered at the Commission on 30 October 2002. Subsequently, in its reply to the statement of objections, SLM provided further evidence to the Commission.

- 310 However, it is apparent that the information submitted by SLM was only relatively useful to the Commission, which already had, following the inspections or on account of the fact, in particular, of ITC's cooperation, several pieces of evidence to establish the different parties to the infringement concerning which SLM submitted information. Accordingly, the information relating to the expansion of Club Europe between September 2000 and September 2002 is mainly derived from undertakings other than SLM or, if SLM is cited, several other undertakings are also cited whose contributions pre-date those of SLM (contested decision, recitals 265 et seq.).
- 311 It follows from the foregoing that SLM's complaints relating to the need to grant it a reduction in the amount of the fine as reward it for its cooperation in establishing the infringement must be rejected.

5. Consideration of SLM's particular situation

- 312 On several occasions in the context of their arguments, SLM and Ori Martin claimed that the Commission did not properly take into consideration the specific nature of SLM's situation. According to the applicants, the participation in the cartel was not only belated but also limited, which the Commission should have taken into account, at one stage or another, in determining the amount of the fine. The Commission did not however adjust the penalty to the individual case, since the formula used to determine the amount of the fine was the same as that used to penalise the undertakings which, like Redaelli, participated in all aspects of the infringement for its full duration.
- 313 In the present case, the Court must examine whether, by imposing on SLM a fine in the amount of EUR 19.8 million before application of the legal maximum limit of 10%, calculated inter alia in consideration of all PS sales made in the EEA by SLM, the objective gravity of the infringement as such, the duration of SLM's participation in Club Italia as from a meeting at which SLM was not represented, and without noting the slightest mitigating circumstance (see paragraph 134 above), the Commission adequately assessed the circumstances of the present case.
- 314 As is apparent from the case-law and in accordance with the principle of effective judicial protection, which includes the principle of proportionality and the principle that penalties must be specific to the offender (see paragraphs 138 to 142 above), the fine must be set in consideration of factors relating, not only to the infringement itself, but also to the effective participation in that infringement of the undertaking which is penalised. The Commission, or by default the Court, must also ensure that the penalty fits the infringement taking account of the particular situation of SLM in the single infringement characterised by the Commission in the contested decision.

Modes of participation in club Italia

- 315 As regards the participation in Club Italia, three observations may be made in order to assess the penalty to be imposed on SLM in view of what has been set out above in respect of the evidence taken into consideration by the Commission in determining the amount of the fine.
- 316 First, as the Commission claims, the agreements concluded within Club Italia do have a geographic scope extending beyond Italy. Apart from the Italian aspect of that club, it also enabled a number of undertakings, namely the hard core composed of Redaelli, CB, ITC and Itas (present in Italy) and also Tréfileurope (present in Italy and in the rest of Europe), and also SLM, to coordinate the Italian producers' export efforts and, symmetrically, to define a common policy in reaction to the attempts by producers in other European countries (such as Tycsa, Nedri and DWK, who were sometimes involved in Club Italia) to limit those efforts by offering the Italian producers an export quota in the rest of Europe.

- 317 However it must be observed that, during the period in which SL only participated in that element of the infringement (from 10 February 1997 to 10 September 2000 for the Commission), the discussions which took place in its presence did not concern Austria and, if they concerned Germany and France, they did so at times when SLM was not selling or was yet to sell PS in those States. Those features must be taken into consideration when the amount of the fine to be imposed on SLM is assessed.
- 318 Secondly, the duration of SLM's participation in Club Italia may not be considered to have started on 10 February 1997, in accordance with the Commission's view, but must be moved to 15 April 1997 in order to satisfy the standard of proof required in order to establish participation in an infringement. That must also be taken into account when determining the amount of the fine.
- 319 Thirdly as regards the scope of SLM's participation in Club Italia, it must be noted that, in the contested decision, the Commission considered that, as from 29 November 1999, SLM was aware or should have been aware that, by participating in Club Italia, it was taking part in a larger scheme, at different levels, the objective of which was to stabilise the PS market at pan-European level in order to avoid a fall in prices (contested decision, recital 650 and paragraph 129 above). It was therefore only at a later stage than in the case of other undertakings, that SLM was aware of the single infringement imputed to it by the Commission.
- 320 That feature, relied on in the contested decision, must also be taken into consideration at the stage of determining the amount of the fine, since it distinguishes the SLM's situation from that of the other undertakings penalised in the present case, such as Redaelli, which participated in Club Italia from the start or were aware of all the aspects of the single infringement. Nevertheless, it must be noted that SLM's situation differs significantly from that of the three undertakings in respect of which the Commission took into account belated awareness of the pan-European dimension of the infringement. In that case, as regards Socitrel, Proderac and Fapricela, who acted in Club España, the awareness of the overall plan only took place in May 2001, and not as in the case of SLM November 1999. It must also be noted that SLM was not only aware of the pan-European dimension of the infringement but also participated fully in it subsequently.

Manner of participation in Club Europe and other arrangements

- 321 It is not disputed that SLM did not participate in the Southern Agreement, Club España, the coordination concerning Addtek or the Zurich Club which preceded Club Europe.
- 322 As regards Club Europe, it must be noted that SLM's participation in that aspect of the single infringement was only found in respect of the period from 11 September 2000 to 19 September 2002, which corresponds to a period in which SLM began to hold the necessary authorisations for the sale of PS to certain States which were the subject of Club Europe and in which discussions with Club Italia concerning the size of the quota which could be accorded to Italian exporters took place.
- 323 It is apparent from the foregoing that SLM's participation in the infringement was not uniform but progressive. SLM, for the first and only time, participated in Club Italia from April 1997 to the end of November 1999, was aware of the pan European dimension of the infringement as from December 1999, and then participated in Club Europe from September 2000 to September 2002.
- 324 That finding is a factor that should have been taken into consideration by the Commission when determining the penalty to be imposed on SLM.

325 Nevertheless, it must also be noted that should a finding does not mean that SLM's participation in the infringement is as limited as the applicants claim. It is apparent from the file that, as from 2000, SLM's role in Club Italia, in particular as regards the discussions which took place with Club Europe in order to set export quotas, is comparable to the role played by the main players in Club Italia, namely Redaelli, Itas, CB, ITC and Tréfileurope.

6. Conclusion

326 Consequently, it follows from the foregoing that the penalty imposed on SLM and in part on Ori Martin is disproportionate, in so far, inter alia, as it is not sufficiently individualised, since the Commission failed to take into account certain specific features of that undertaking's situation when it imposed a fine in the amount of EUR 19.8 million before application of the legal maximum limit of 10%.

327 In particular, the penalty imposed by the Commission does not take into account the fact that SLM participated only belatedly and progressively in the single infringement by restricting itself, in essence, initially, to arrangements concluded within Club Italia in respect of the Italian market. In the present case, the Commission should have taken into consideration, when calculating the amount of the fine, that there were no authorisations allowing SLM to sell in certain Member States before a certain date and no evidence to support the view that SLM could be involved in the cartel even before it participated in meetings of Club Italia.

328 Article 2(16) of the contested decision must therefore be annulled in so far as it imposes a disproportionate penalty on the applicants.

329 The conclusions to be drawn from the foregoing will be examined below in the context of the unlimited jurisdiction conferred on the Court, which it has been asked to exercise in the present case.

330 In those circumstances, there is no longer any need to examine the parties' complaints alleging breach of the principle of equal treatment or the complaints alleging breach of certain provisions of the 2006 Guidelines, which in the present case are not such as to call into question or to alter the outcome of the foregoing assessment.

D – *The length of the administrative procedure*

1. *Arguments of the parties*

331 SLM submits that the administrative procedure was excessively lengthy. In the present case, the administrative procedure lasted over eight years and six years passed between the inspections, performed on 19 September 2002, and the notification of the statement of objections on 30 September 2008. As from 2002, the Commission was aware of a great number of facts on which it subsequently based the contested decision and many undertakings were swift to cooperate. In respect of SLM, the procedure was concluded late on account of the considerable number of officials who handled the file in turn. That is the reason why SLM seeks that the Court order the Commission to provide it with a list showing the number of officials who handled the file between 2002 and 2010. After more than ten years, it is difficult for SLM to make a statement on the acts imputed to it, often indirectly, on the basis of documents handwritten by others. Likewise, the Commission took six years to decide whether it was necessary to accept or reject its leniency application, made on 30 October 2002 and rejected on 19 September 2008, which affected SLM's right to prepare in due time a line of defence capable of ensuring the best possible protection of its interests. Administrative delays meant that SLM was prevented from preparing an appropriate defence in respect of the early years of participation in the cartel in which it was found to have been involved (1997 and 1998).

332 The Commission disputes those arguments. As regards the application for a measure of inquiry, the Commission submits, inter alia, that owing to the complexity of the procedure, it is not relevant to know how many officials were in turn responsible for the file.

2. Findings of the Court

333 As a preliminary point, it must be noted that SLM acknowledges having participated in the infringement as from 1999. That factor must be taken into consideration when assessing the effects of any breach of the reasonable time principle.

334 Compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law whose observance the Courts of the European Union ensure (see judgment of 19 December 2012 in *Heineken Nederland and Heineken v Commission*, C-452/11 P, EU:C:2012:829, paragraph 97 and the case-law cited).

335 The principle that an administrative procedure must be conducted within a reasonable time has been reaffirmed by Article 41(1) of the Charter of Fundamental Rights, under which '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union' (judgment of 5 June 2012 in *Imperial Chemical Industries v Commission*, T-214/06, ECR, EU:T:2012:275, paragraph 284).

336 Second, whether the time taken for the procedure is reasonable must be assessed in relation to the individual circumstances of each case, and in particular its context, the conduct of the parties during the procedure, what is at stake for the various undertakings concerned and its complexity (see, to that effect, judgment of 20 April 1999 in *Limburgse Vinyl Maatschappij and Others v Commission*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECR, EU:T:1999:80, paragraph 126) and also, where relevant, to information or justification which the Commission may provide concerning the measures of investigation carried out during the administrative procedure.

337 The Court of Justice has held that the administrative procedure may give rise to the examination of two successive periods, each corresponding to its own internal logic. The first stage, covering the period up to notification of the statement of objections, begins on the date on which the Commission, exercising the powers conferred on it by the EU legislature, takes measures which imply an accusation of an infringement and must enable the Commission to adopt a position on the course which the procedure is to follow. The second stage covers the period from notification of the statement of objections to adoption of the final decision. It must enable the Commission to reach a final decision on the infringement concerned (judgment of 21 September 2006 in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, ECR, EU:C:2006:592, paragraph 38).

338 It follows from the case-law that breach of the reasonable time principle may have two types of consequences.

339 Where the failure to comply with the reasonable time requirement has affected the outcome of the proceedings, such a breach may entail annulment of the contested decision (see, to that effect, judgment of 21 September 2006 in *Technische Unie v Commission*, C-113/04 P, ECR, EU:C:2006:593, paragraph 48 and the case-law cited).

340 It should be pointed out that, for the purposes of the application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding infringements, where it has been proved that the breach of that principle has adversely affected the rights of defence of the undertakings concerned. Except in that specific circumstance,

failure to comply with the obligation to adopt a decision within a reasonable time cannot affect the validity of the administrative procedure under Regulation No 1/2003 (see judgment of 16 December 2003 in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie v Commission*, T-5/00 and T-6/00, ECR, EU:T:2003:342, paragraph 74 and the case-law cited, upheld on appeal on that point in the judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 337 above, EU:C:2006:592, paragraphs 42 and 43).

- 341 However, as respect for the rights of the defence, a principle whose fundamental nature has been emphasised on many occasions in the case-law of the Court of Justice (judgment of 9 November 1983 in *Nederlandsche Banden-Industrie-Michelin v Commission*, 322/81, ECR, EU:C:1983:313, paragraph 7), is of crucial importance in procedures such as that followed in the present case, it is essential to prevent those rights from being irremediably compromised on account of the excessive duration of the investigation phase and to ensure that the duration of that phase does not impede the establishment of evidence designed to refute the existence of conduct susceptible of rendering the undertakings concerned liable. For that reason, examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights are fully effective, that is to say, the second phase of the administrative procedure. The assessment of the source of any undermining of the effectiveness of the rights of the defence must extend to the entire procedure and be carried out by reference to its total duration (judgment in *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, cited in paragraph 337 above, EU:C:2006:592, paragraph 50).
- 342 Furthermore, where the breach of the reasonable time requirement does not affect the outcome of the procedure, such a breach may lead the Court, in the exercise of its unlimited jurisdiction, to provide an appropriate remedy for the breach resulting from failure to observe the reasonable time requirement by reducing, where appropriate, the amount of the fine imposed (see, to that effect, judgment in *Technische Unie v Commission*, cited in paragraph 339 above, EU:C:2006:593, paragraphs 202 to 204, and judgment of 16 June 2011 in *Heineken Nederland and Heineken v Commission*, T-240/07, ECR, EU:T:2011:284, paragraphs 429 and 434, upheld on appeal in the judgment in *Heineken Nederland and Heineken v Commission*, cited in paragraph 334 above, EU:C:2012:829, paragraph 100).
- 343 It follows from the foregoing that, in order for an administrative procedure of long duration to be capable of constituting a breach of the reasonable time principle, the duration of that procedure must be characterised as excessive.
- 344 In the present case, the administrative procedure consisted of four successive phases, the first preceding the statement of objections and the next three following the statement of objections.
- 345 The first phase began on 9 January 2002, with the communication by the Bundeskartellamt of the documents referred to in paragraph 23 above, and ended on 30 September 2008 with the adoption of the statement of objections.
- 346 The second phase was then opened (see paragraphs 33 to 39 above) and was completed by the adoption of the initial decision, on 30 June 2010.
- 347 Following the initiation of a first series of actions (referred to in paragraph 10 above), the Commission on 30 September 2010 adopted a first amending decision (see paragraph 4 above) in order to correct various mistakes which it had found in the initial decision; that marked the close of the third phase of the administrative procedure.

348 Last, on 4 April 2011, the fourth phase of the administrative procedure ended when the Commission adopted the second amending decision, whereby it granted a reduction of the amount of the fines imposed on (i) ArcelorMittal, ArcelorMittal Verderio, ArcelorMittal Fontaine and ArcelorMittal Wire France and (ii) SLM and Ori Martin (see paragraph 6 above).

349 It should be observed at the outset that the present plea relates only to the first two phases of the administrative procedure.

350 On 17 December 2013, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of 2 May 1991, the Court addressed a written question to the Commission, in order to obtain a detailed description of the steps which the Commission had carried out following the inspections, which took place on 19 and 20 September 2002, and up to the adoption of the initial decision.

351 The Commission complied with that request by letter lodged at the Court Registry on 28 February 2014.

352 A copy of the Commission's reply was communicated to the applicants by the Court Registry.

353 The Commission sets out in its reply, in detail and convincingly, the steps which it completed throughout the administrative procedure and the reasons why the procedure lasted from 2002 until 2010.

354 A number of factors explain the length of the administrative procedure in the present case.

355 It is appropriate, in that respect, to have regard to the duration of the cartel (more than 18 years), to its particularly wide geographic scope (the cartel concerned most of the Member States), to the organisation of the cartel at geographic level and over time (the different clubs), to the number of meetings held within the framework of the different clubs (more than 500), to the number of undertakings involved (17), to the number of leniency applications and to the particularly large volume of documents, supplied in connection with the leniency applications or obtained in the course of the inspections and in various languages, which had to be examined by the Commission, to the various requests for further information that had to be addressed by the Commission to the various companies involved, as understanding of the cartel developed, to the number of addressees of the statement of objections (more than 40), to the number of languages of the case (8) and also to the various applications relating to ability to pay (14).

356 In addition, it must also be noted that SLM does not establish how its rights of defence were breached on account of the duration of the procedure. The information provided in that regard is irrelevant. Accordingly, SLM's claim to the effect that it was prevented from preparing an appropriate defence in respect of the early years of participation in the cartel in which it was found to have been involved (1997 and 1998) may be attributed to SLM alone, since, as from autumn 2002, it was notified of the Commission's investigation concerning the cartel in which it was alleged to have participated. Likewise, as regards the circumstance relating to the lateness of the response to SLM's application for leniency, the time taken by the Commission to reply should have led it to take precautions and to prepare its line of defence as soon as possible after the investigation was launched in autumn 2002. As regards the claim that it was difficult for SLM to make a statement on the acts imputed to it owing to the lapse of time, this is situation which, contrary to SLM's claim, should have led it to act quickly and not to wait until the evidence and persons were dispersed.

357 On the basis of the information supplied by the Commission, which confirms the particular complexity of the case, it must be concluded that, in spite of the length of the procedure, it cannot be characterised as excessive. Consequently, the Commission did not fail to comply with the reasonable time requirement and that plea must therefore be rejected.

E – Imputation of liability for the infringement to the parent company

358 Ori Martin claims that the Commission erred in imputing joint and several liability to it for part of the infringement, as a result, in accordance with what is stated in recitals 862 to 875 of the contested decision, of the presumption of decisive influence arising from its virtually exclusive ownership of SLM between 1 January 1999 and 19 September 2002 (see paragraph 132 above).

1. Arguments of the parties

359 In the first place, Ori Martin maintains that, considering that the evidence put forward to rebut the presumption of the actual exercise of a decisive influence was irrelevant, the Commission turned a rebuttable presumption into an irrebuttable presumption. That infringes Article 101 TFEU, the principle of personal responsibility, the principle that penalties must be specific to the offender and the principle of limited liability which governs company law. Rebuttal of the presumption should not require proof that it was impossible for the parent company to exercise decisive influence on its subsidiary, but merely evidence that that influence was not exercised.

360 In the present case, the fact that Ori Martin had an interest and played a role in respect of SLM as a shareholder in order to protect its financial interest (contested decision, recital 874), is not sufficient for SLM's infringing conduct to be imputed to it. Such an interest is merely the normal consequence of a shareholding in a company, which, moreover, does not necessarily concern either the whole or the greater part of that shareholding. In principle, an infringement may not be imputed to a person who did not commit it or, in any event, that infringement may not be imputed to it unless a rule expressly and in advance provides as such. The Commission must prove that Ori Martin intended to contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk.

361 In the second place, Ori Martin submits that the evidence put forward to rebut the presumption is relevant in the present case. Ori Martin always acted as a holding company and its participation in SLM was merely financial. Ori Martin never directly performed activities in the PS sector. It is therefore not involved in SLM's infringing conduct. Ori Martin was not or could not have been aware of SLM's anticompetitive conduct. In particular, Ori Martin never intervened in SLM's strategic choices and investment decisions. It had no operational structure or employees. The three members of its board of directors had no knowledge of the steel sector. Ori Martin's lack of intervention in SLM is established by the minutes of the meetings of the board of directors and the general meeting of shareholders. SLM approached the Ori Martin group only occasionally in respect of purchases of wire rods (2% of purchases in the period 1995-2001). Furthermore, Ori Martin also relies on the absence of 'information flows' between it and SLM. Moreover, the individual concerned in the cartel on behalf of SLM, acted wholly independently on his own initiative. He never played the slightest role in Ori Martin.

362 In the third place, Ori Martin claims that the Commission did not explain in the contested decision the reasons why the fact that SLM was not required to submit accounts to Ori Martin was not a factor capable of demonstrating that its conduct was independent. Having regard to the evidence submitted during the administrative procedure, the Commission should have concluded that SLM's conduct could not be imputed to Ori Martin, excluding any influence on its part over the subsidiary. In the present case, that evidence was considered or disregarded without making an overall assessment or rejected in such general terms that that rejection may not be understood.

363 The Commission disputes those arguments. No evidence put forward by Ori Martin allows the presumption of the exercise of decisive influence to be rebutted. As regards the profile of the directors of Ori Martin and the content of the minutes of the board of directors and the general

meetings of Ori Martin, the Commission submits that, since that evidence was not relied on in reply to the statement of objections, but only in the application, Ori Martin may not rely on them to challenge the assessment made in the contested decision.

2. Findings of the Court

- 364 It is apparent from the file that Ori Martin had a 100% shareholding in its subsidiary SLM between 1 January 1999 and 31 October 2001. It is also apparent from the file that Ori Martin owned 98% of that subsidiary directly and 2% of that subsidiary indirectly through Ori Martin Lux SA between 1 November 2001 and 19 September 2002 (contested decision, recital 867).
- 365 Furthermore, it is clear from the contested decision that the Commission considered that Ori Martin exercised decisive influence on SLM from 1 January 1999 to 19 September 2002 on the basis of a 100% or virtually 100% shareholding in SLM by Ori Martin in that period (contested decision, recital 868).
- 366 Although the relationship between Ori Martin, the parent company, and SLM, its subsidiary, is not disputed in the present case, that is not the case in respect of the conclusion drawn by the Commission. Ori Martin seeks the annulment of the contested decision in so far as it imputes liability to it for the infringing conduct of SLM in respect of the abovementioned period. That imputation is incorrect for the following reasons.
- 367 As regards principles, Ori Martin claims that the Commission distorted the nature and scope of the presumption of actual exercise of decisive influence, enshrined in case-law, by considering that the establishment of a relationship of virtually exclusive ownership by the parent company of the subsidiary is sufficient not to need to prove actual exercise of such influence. The mere fact of being a shareholder was not sufficient for the Commission to impute the conduct of the subsidiary to its parent company. It ought to have proved that Ori Martin was also liable in some form by intending to contribute by its own conduct to the infringement or by failing to be aware of it.
- 368 On that basis, Ori Martin relies, first, on the infringement of Article 101 TFEU, the principle of personal responsibility and the principle that penalties must be specific to the offender, by virtue of which an act may not be imputed to a person who did not commit it and, secondly, infringement of the principles of legal personality and limited responsibility, recognised within the EU by company law, which aim to restrict liability to the company which performed the acts establishing that liability and not to the group of which it is a part.
- 369 From a practical perspective, Ori Martin maintains that the Commission did not correctly assess the various pieces of evidence relied on during the administrative procedure, which, if they had been duly assessed, would have shown that it could not have exercised decisive influence on SLM's conduct. That proof would, moreover, have been reinforced by the additional arguments presented before the Court in that respect.
- 370 In that context, Ori Martin claims that the Commission's assessment of the facts of the present case was incorrect and that it breached the obligation to state reasons, the principle of equal treatment and the principle of good administration.

a) The presumption of the actual exercise of a decisive influence

- 371 By claiming that, in order to establish the existence of an undertaking within the meaning of EU law, it is necessary for the Commission to establish that the parent company exercises the actual decisive influence which Ori Martin could have as a result of the size of its shareholding in its subsidiary and that it was sufficient for Ori Martin to prove that that influence was not exercised in order to rebut

the presumption without having to prove that it was impossible for it to exercise such an influence (see paragraph 359 above), Ori Martin misunderstands the nature and scope of the presumption derived from case-law under such circumstances.

- 372 It is settled case-law that the concept of ‘undertaking’ covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. On that point, the Court has stated that in this context the term ‘undertaking’ must be understood as designating an economic unit even if in law that economic unit consists of several natural or legal persons, and that if such an economic entity infringes the competition rules, it is for that entity, consistently with the principle of personal liability, to answer for that infringement (see judgments of 10 September 2009 in *Akzo Nobel and Others v Commission*, C-97/08 P, ECR, EU:C:2009:536, paragraphs 54 to 56 and the case-law cited; 29 September 2011 in *Elf Aquitaine v Commission*, C-521/09 P, ECR, EU:C:2011:620, paragraph 53 and the case-law cited, and 11 July 2013, in *Commission v Stichting Administratiekantoort Portielje*, C-440/11 P, ECR, EU:C:2013:514, paragraphs 36 and 37 and the case-law cited).
- 373 With regard to the circumstances in which a legal person who is not responsible for the infringement may, nevertheless, be subject to penalties, it is also established case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (judgments in *Akzo Nobel and Others v Commission*, cited in paragraph 372 above, EU:C:2009:536, paragraph 58; *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 54, and *Commission v Stichting Administratiekantoort Portielje and Gosselin Group*, cited in paragraph 372 above, EU:C:2013:514, paragraph 38).
- 374 In such a situation, since the parent company and its subsidiary are part of the same economic unit and therefore form a single undertaking for the purposes of Article 101 TFEU, the Commission may address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (judgments in *Akzo Nobel and Others v Commission*, cited in paragraph 372 above, EU:C:2009:536, paragraph 59; *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 55, and *Commission v Stichting Administratiekantoort Portielje and Gosselin Group*, cited in paragraph 372 above, EU:C:2013:514, paragraph 39).
- 375 The Court has made clear that, in the particular case of a parent company having a 100% or virtually 100% shareholding in a subsidiary which has infringed EU rules on competition, there is a rebuttable presumption that the parent company does in fact exercise decisive influence on its subsidiary (‘the presumption of actual exercise of decisive influence’) (judgments in *Akzo Nobel and Others v Commission*, cited in paragraph 372 above, EU:C:2009:536, paragraph 60; *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 56, and *Commission v Stichting Administratiekantoort Portielje and Gosselin Group*, cited in paragraph 372 above, EU:C:2013:514, paragraph 40).
- 376 In those circumstances, it is sufficient for the Commission to prove that the entire capital, or virtually the entire capital, of a subsidiary is held by the parent company in order for it to be presumed that the parent exercises a decisive influence on the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (judgments in *Akzo Nobel and Others v Commission*, cited in paragraph 372 above, EU:C:2009:536, paragraph 61; *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 57, and *Commission v Stichting Administratiekantoort Portielje and Gosselin Group*, cited in paragraph 372 above, EU:C:2013:514, paragraph 41).

- 377 The purpose of the presumption of actual exercise of decisive influence is, in particular, to strike a balance between, on the one hand, the importance of the objective of suppressing conduct contrary to the competition rules, in particular to Article 101 TFEU, and of preventing a repetition of such conduct, and, on the other hand, the importance of the requirements flowing from certain general principles of EU law such as the principle of the presumption of innocence, the principle that penalties must be specific to the offender, the principle of legal certainty and the principle of the rights of the defence, including the principle of equality of arms. It is for that reason, among others, that the presumption is rebuttable (judgment in *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 59).
- 378 It should be borne in mind, furthermore, that that presumption is based on the fact that, save in quite exceptional circumstances, a company holding all the capital of a subsidiary can, on the basis of that shareholding alone, exercise decisive influence on that subsidiary's conduct and, furthermore, that it is within the sphere of operations of those entities against whom the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found (judgment in *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 60).
- 379 In those circumstances, if, in order to rebut that presumption, it were sufficient for a party concerned to put forward mere unsubstantiated assertions, the presumption would be largely robbed of its usefulness (judgment in *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 61).
- 380 It also follows from the case-law that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (see judgment in *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 62 and the case-law cited).
- 381 It also follows from the case-law that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must also be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list (judgments in *Akzo Nobel and Others v Commission*, cited in paragraph 372 above, EU:C:2009:536, paragraph 74; *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 58, and *Commission v Stichting Administratiekantoort Portielje and Gosselin Group*, cited in paragraph 372 above, EU:C:2013:514, paragraph 60).
- 382 Consequently, as noted above, in the specific case where — as in the present case — a parent company has a 100% or virtually 100% shareholding in its subsidiary, which is deemed to have infringed the competition rules of the European Union, there is a rebuttable presumption to the effect that that parent company exercises an actual decisive influence on its subsidiary.
- 383 Accordingly, contrary to Ori Martin's claim (see paragraph 360 above), where a parent company and its subsidiary are part of a single undertaking for the purposes of Article 101 TFEU, the factor which entitles the Commission to address the decision imposing fines to the parent company is not necessarily a parent-subsidiary relationship in which the parent company instigates the infringement; nor, a fortiori, is it because of the parent company's involvement in the infringement; rather, it is because the companies concerned constitute a single undertaking for the purposes of Article 101 TFEU (judgment in *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 88, see also paragraph 374 above).
- 384 Likewise, the Commission is not required, in order to apply the presumption of actual exercise of decisive influence in a given case, to provide indicia over and above those demonstrating the applicability and operation of that presumption (see, to that effect, judgment in *Elf Aquitaine v Commission*, cited in paragraph 372 above, EU:C:2011:620, paragraph 80 and the case-law cited).

- 385 In the light of the abovementioned case-law, it must be observed that the Commission was entitled to rely on the presumption of actual exercise of decisive influence in view of the fact that Ori Martin had a 100% or virtually 100% shareholding in SLM between 1 January 1999 and 19 September 2002, without any need for it to rely on any other evidence in that regard.
- 386 Furthermore, it must be noted that, given its rebuttable nature, that presumption does not lead to the automatic attribution of liability to the parent company holding 100% of the capital of its subsidiary, which would be contrary to the principle of personal responsibility on which EU competition law is based (see, to that effect, judgment of 20 January 2011 in *General Química and Others v Commission*, C-90/09 P, ECR, EU:C:2011:21, paragraphs 51 and 52).
- 387 Moreover, nor can Ori Martin claim that the principle that penalties must be specific to the offender has been infringed in the present case. By virtue of that principle, which applies in any administrative procedure that may lead to the imposition of sanctions under the competition rules of EU law, an undertaking may be penalised only for acts imputed to it individually. However, that principle must coexist with the concept of ‘undertaking’. As set out in paragraph 383 above, it is not because the parent company instigated its subsidiary to commit the infringement or, a fortiori, because the parent company is involved in the infringement, but because they constitute a single undertaking for the purpose of Article 101 TFEU that the Commission is able to address the decision imposing fines to the parent company (see, to that effect, judgment of 13 July 2011 in *General Technic-Otis and Others v Commission*, T-141/07, T-142/07, T-145/07 and T-146/07, ECR, EU:T:2011:363, paragraphs 70 et seq., upheld on appeal).
- 388 Ori Martin’s argument that the Commission, by considering it to be jointly and severally liable, infringed the principle of limited liability arising under company law in the EU. Limited liability in respect of companies essentially seeks to establish a ceiling for their financial liability and not to prevent a company that has infringed competition law from being penalised through the legal entities that compose it, and, more particularly, through the company which committed the infringement and its parent company, in particular if the parent company has a 100% or virtually 100% shareholding in its subsidiary and if it cannot rebut the presumption of actual exercise of decisive influence on that subsidiary.
- 389 The objections put forward by Ori Martin on that point must therefore be rejected.
- 390 Accordingly, in the present case, given that Ori Martin had a 100% or virtually 100% shareholding in SLM, it is required, therefore, in order to rebut the presumption of actual exercise of decisive influence to adduce sufficient evidence to demonstrate that its subsidiary acted independently on the market. It is therefore necessary to examine whether the evidence adduced by Ori Martin in support of its contention is capable of rebutting that presumption.

b) Evidence relied on to rebut the presumption

- 391 As regards the right to effective judicial protection enshrined, inter alia, in the Charter of Fundamental Rights which, in accordance with the first subparagraph of Article 6(1) TEU has the same legal value as the Treaties, the General Court is required to ensure that the different pieces of evidence relied on by a person subject to a penalty in order to rebut the presumption of actual exercise of decisive influence are duly examined.
- 392 In that regard, in reply to the Commission, which states that, since the information on the profile of its directors and the content of the minutes of the board of directors and the general meetings of Ori Martin were not relied on in reply to the statement of objections but only in the application, Ori Martin may not rely on them in order to dispute the imputation of liability for the infringement made in the contested decision (see paragraph 363 above), there is no requirement under the law of the

European Union that the addressee of the statement of objections must challenge its various matters of fact or law during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings (judgment of 1 July 2010 in *Knauf Gips v Commission*, C-407/08 P, ECR, EU:C:2010:389, paragraph 89).

393 Although an undertaking's express or implicit acknowledgement of matters of fact or of law during the administrative procedure before the Commission may constitute additional evidence when determining whether an action is well founded, it cannot restrict the actual exercise of a natural or legal person's right to bring proceedings before the General Court under the fourth paragraph of Article 263 TFEU (judgment in *Knauf Gips v Commission*, cited in paragraph 392 above, EU:C:2010:389, paragraph 90).

394 It is in that context that the various pieces of evidence relied on by Ori Martin in order to rebut the presumption of actual exercise of decisive influence must be examined.

395 In the first place, Ori Martin claims that it always acted as a holding company and that its shareholding in SLM was merely financial in nature. However, this does not suffice to rebut the presumption arising from its 100% or virtually 100% shareholding in SLM.

396 In the context of a group of companies, a holding company that coordinates, inter alia, financial investments within the group is a company which is in a position to regroup shareholdings in various companies and whose function is to ensure that they are run as one (see, to that effect, judgments of 8 October 2008 in *Schunk and Schunk Kohlenstoff-Technik v Commission*, T-69/04, ECR, EU:T:2008:415, paragraph 63; 13 July 2011 in *Shell Petroleum and Others v Commission*, T-38/07, ECR, EU:T:2011:355, paragraph 70; and 29 June 2012 in *E.ON Ruhrgas and E.ON v Commission*, T-360/09, ECR, EU:T:2012:332, paragraph 283).

397 In the present case, in the first place, it is apparent from the extract from the Commercial and Companies Register in Luxembourg and the instrument of incorporation submitted by Ori Martin in support of its claims, that that company is a public limited liability company governed by Luxembourg law, established on 4 December 1998 with capital of EUR 44 million, which is a large sum (the minimum share capital for a public limited company in Luxembourg is EUR 31 000). That capital corresponds to the value placed on the contributions in kind made by the three shareholders when the company was established, that is to say the securities representing 90% of the capital of Ori Martin SpA and 100% of the capital of Finoger SpA (the two companies which own SLM).

398 Accordingly, even if Ori Martin had no operational structure or employees as its claims — although it did have a representative office in Lugano (Switzerland) (see annex 6, page 674) — the fact remains that this is not just a shell company but a company intended to play a specific role in the Ori Martin group of companies as a financial holding company under Luxembourg law.

399 Moreover, it is apparent from article 2 of the instrument of incorporation of the company that the business objective of Ori Martin is as follows: 'The objective of the company covers underwriting, equity investment, financing and financial interest, in any form, in any company, holding company, consortium or group of undertakings, whether Luxembourgish or foreign, and the management of funds made available to it, control, management and value maximisation of its shareholdings'.

400 Ori Martin relied on that company provision in its reply to the statement of objections and in its application in order to claim that was merely a 'financial holding company'. However it must be noted that its business objective not only involves equity investment and management of the funds available to it but also 'control, management and value maximisation of its shareholdings'. It is clear from that provision that Ori Martin's shareholding in a company is not therefore a dormant shareholding with a passive shareholder. On the contrary, by virtue of its articles of association, Ori Martin is required to control, manage and maximise the value of its shareholdings, which implies active and not passive involvement as regards the monitoring of those shareholdings.

- 401 Furthermore, Ori Martin claims that it is apparent from the profile of its three directors that they were appointed in order to provide the company with purely financial management, with no possibility of involvement in the management of subsidiaries. Nor were those directors familiar with the steel sector, which would have enabled them to intervene effectively. Examination of the minutes of the company's board meetings and those of the general meetings of shareholders are said to confirm this.
- 402 However, it is apparent from the resolutions of the initial shareholders' meeting of Ori Martin (annex 4 to the application, page 608), that the number of directors was set as three and that initially there were 'Mr [A], company director, residing [in] Italy; Mr [E], BA in business and finance, residing [in Luxembourg]; Ms [L], private-sector employee, residing [in Luxembourg]'. Mr E. is to be appointed Chairman of the Board of Directors on 21 December 1998.
- 403 According to the extract from the Commercial and Companies Register in Luxembourg, (annex 1 to the application) on 3 August 2010, those administrators were Mr [N.], domiciled in Luxembourg, Mr [W.], domiciled in Luxembourg and Mr [A.], also Chairman of the Board of Directors, domiciled in Italy.
- 404 It is therefore apparent that Mr [A.] is presented in the articles of association as a company director, meaning that he may be considered to have the skills required to run the company in the light, in particular, of its business objective.
- 405 It also follows from examination of the minutes of the board meetings of Ori Martin that, on several occasions, the board of directors granted full entitlement to Mr [A.] to represent the company or approved decisions adopted by that director. By way of example, it is clear from the minutes of the board meeting of 15 September 1999 that that board granted full entitlement to Mr [A.] to 'represent the company when signing the minutes of all the general meetings of subsidiaries held in 1999' (annex 6 to the application, page 661). Likewise, it is clear from the minutes of the board meeting of 3 May 2000 that that board granted full entitlement to Mr [A.] to 'represent the company at the ordinary and extraordinary general meetings of the following companies: ... SLM ...' (annex 6 to the application, page 670).
- 406 Moreover, examination of the minutes relating to the shareholder meetings of Ori Martin shows that the management relationship of the Board of Directors at the annual general meeting of shareholders held on 6 June 2002 states under the heading 'important events arising during the financial year' that 'the company reorganised its subsidiaries by sphere of activity' (annex 6 to the application, page 692).
- 407 Those pieces of evidence enable the view to be taken that, at the very least, Mr [A.], who took important decisions relating to the activities of Ori Martin, was on several occasions expressly authorised to monitor the activities of various subsidiaries of that company. It also follows that Ori Martin intervened in the group to reorganise it, which necessary implies that it knew of its activities, contrary to its suggestion.
- 408 In the second place, Ori Martin claims that there was no 'flow of information' between it and SLM and that it had no knowledge or could have no knowledge of SLM's infringing conduct.
- 409 As regards the latter point, it has already been noted that such evidence is not required in order to impute the infringement to the parent company. As regards the reference to the absence of a 'flow of information', no details are provided on that matter which was previously referred to in the statement of objections. However, that reference is irrelevant since it is clear from the foregoing that Mr [A.] was capable of controlling SLM on account of his skills, his role as a director under the articles of association and the fact that it is apparent from the file that his decisions were endorsed by the board of directors.

- 410 In the third place, in order for an infringement of Article 101 TFEU to be imputed to an undertaking, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking is sufficient (judgments of 7 June 1983 in *Musique Diffusion française and Others v Commission*, 100/80 to 103/80, ECR, EU:C:1983:158, paragraph 97, and 20 March 2002 *Brugg Rohrsysteme v Commission*, T-15/99, ECR, EU:T:2002:71, paragraph 58).
- 411 Ori Martin does not dispute that the representatives of SLM in the cartel had been validly authorised by SLM to bind the undertaking. The fact that those persons played no role in the parent company is irrelevant, since they were authorised to bind the subsidiary which participated in the infringement. The claims that those persons acted independently, in addition to the fact that they are not substantiated, are not consequently capable of releasing SLM, and as a consequence Ori Martin, from its liability.
- 412 Consequently, none of the evidence adduced by Ori Martin, considered in isolation or taken together, can rebut the presumption of actual exercise of decisive influence by Ori Martin on SLM.
- 413 As regards the complaint alleging failure to state reasons, it must be noted that the obligation to state reasons is a separate question from that of the merits of those reasons.
- 414 According to settled case-law, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. The requirement to state reasons must be assessed according to the circumstances of the case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned; rather, it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 4 March 2009 in *Associazione italiana del risparmio gestito and Fineco Asset Management v Commission*, T-445/05, ECR, EU:T:2009:50, paragraphs 66 and 67 and the case-law cited).
- 415 It is apparent to the requisite legal standard from recitals 862 to 875 of the contested decision that the Commission set out the reasons why it considered that the arguments put forward by Ori Martin were not capable of rebutting the presumption of actual exercise of decisive influence. The contested decision contains sufficient reasons in that regard and the complaint alleging failure to state reasons must therefore be rejected.
- 416 Moreover, in so far as the plea alleging infringement of the principle of good administration is a separate complaint from that alleging infringement of the obligation to state reasons, it too cannot be upheld.
- 417 Furthermore, it has consistently been held that the principle of sound administration is included among the guarantees conferred by the European Union legal order in administrative proceedings, that principle entailing the duty of the competent institution to examine carefully and impartially all the relevant aspects of the particular case (judgments of 21 November 1991, *Technische Universität München*, C-269/90, ECR, EU:C:1991:438, paragraph 14, and 29 March 2012, *Commission v Estonia*, C-505/09 P, ECR, EU:C:2012:179, paragraph 95).

- 418 It must be held that it follows from the contested decision that the Commission examined with care and impartiality the arguments put forward by Ori Martin seeking to rebut the presumption of actual exercise of decisive influence and that the fact that it rejected them may not be regarded as an infringement of the principle of sound administration.
- 419 Nor can the Commission be criticised for not having commented, both separately and overall, on the pieces of evidence submitted to it during the administrative procedure.
- 420 In response to the objection alleging infringement of the principle of equal treatment, it must be noted that Ori Martin claims in that regard that the Commission took into consideration, in respect of other companies involved in the cartel, the ‘existence of hierarchical links’ and ‘the obligation of the subsidiary to submit accounts to the parent company’, which was not the case in its situation. However, although Ori Martin noted in its reply to the statement of objections (annex 5 to the application, paragraph 62) that SLM had no ‘reporting obligations’ to it, taking into account that argument, even if it were upheld, is not capable of calling into question the abovementioned reasoning which leads to the conclusion that Ori Martin exercised decisive influence on its subsidiary, inter alia, in order to manage, control and maximise the value of its shareholding as is apparent from its business objective and the activities of its directors.
- 421 The various objections put forward in respect of rebuttal of the presumption of actual exercise of decisive influence must therefore be rejected.
- 422 Consequently, the plea concerning the imputation of liability for the infringement committed by SLM to Ori Martin must be rejected as entirely unfounded.
- 423 The Commission was entitled, first, to consider that Ori Martin and SLM were jointly and severally liable, from 1 January 1999 to 19 September 2002, on the basis of the presumption of actual exercise of decisive influence on account of Ori Martin’s 100% or virtually 100% shareholding in SLM and, secondly, that the Commission considered that Ori Martin had failed to rebut that presumption.
- 424 In that regard, it follows from the examination of the various pieces of evidence adduced before the Court that it may indeed be concluded that Ori Martin exercised decisive influence on its subsidiary, inter alia, in order to manage, control and maximise the value of its shareholding as is apparent from its business objective and the activities of its directors.

F – SLM’s request seeking payment of interest on the excess part of the fine already paid

- 425 In its reply, SLM provides its observations on the second amending decisions and requests that the Court order the Commission to reimburse the interest due on the sum already paid and reimbursed by the Commission following the amendments made by the second amending decision.
- 426 In the rejoinder, the Commission rejects that request on the ground that it is unreasonable, that the reduction of the amount of the fine made in the second amending decision in order to ensure that it is not disproportionate in relation to the size and volume of sales of the undertaking on which the penalty is imposed falls within the scope of the Commission’s discretionary power and that the payment of interest would be a further reduction in the amount of the fine, which would constitute a double benefit in favour of the addressees of the second amending decision.
- 427 As was stated at the hearing, none of the arguments put forward by the Commission is capable of proving that SLM is in a position in which it would be unjustly enriched.

- 428 In the present case, it must however be noted that the second amending decision, which reduced the amount of the fine imposed on SLM, does not address the issue of reimbursement of the overpayment with interest if requested by the party concerned.
- 429 Furthermore, it is not clear from the present proceedings that SLM made a request to the Commission to that effect, or that the Commission adopted a position in an act capable of adversely affecting SLM and, consequently, of being challenged before the Court.
- 430 Accordingly, in the absence of any adoption of a position by the Commission on such a request by SLM seeking payment of interest on the excess part of the fine that it had paid following the initial decision, before being reimbursed as a result of the second amending decision, the Court does not have jurisdiction to adjudicate on the claim for directions submitted by SLM in that regard in its observations on the second amending decision, since such jurisdiction does not arise, in particular, from Article 263 TFUE or Article 261 TFUE, read in conjunction with Article 31 of Regulation No 1/2003.
- 431 It follows from the foregoing that, in the present case, SLM's request seeking payment of interest on the excess part of the fine already paid must be rejected.

G – The claim concerning the penalty imposed for participation in the infringement, the Court's use of its unlimited jurisdiction and determination of the amount of the fine

- 432 The unlimited jurisdiction conferred on the Court, in application of Article 261 TFEU, by Article 31 of Regulation No 1/2003 empowers it, in addition to carrying out a mere review of the lawfulness of the penalty, which enables it only to dismiss the action for annulment or to annul the contested measure, to substitute its own appraisal for the Commission's and, consequently, to vary the contested measure, even without annulling it, taking into account all of the factual circumstances, by amending, in particular, the fine imposed where the question of the amount of the fine is before it (see, to that effect, judgments of 8 February 2007 in *Groupe Danone v Commission*, C-3/06 P, ECR, EU:C:2007:88, paragraphs 61 and 62, and 3 September 2009 in *Prym and Prym Consumer v Commission*, C-534/07 P, ECR, EU:C:2009:505, paragraph 86 and the case-law cited).
- 433 In their claims, the applicants claim that the Court should annul the contested decision, redetermine the amount of the fine imposed on SLM jointly and severally with Ori Martin or reduce the amount of the fine imposed jointly and severally with Ori Martin.
- 434 It follows from the foregoing that it is necessary to annul Article 1(16) of the contested decision, in so far as it finds that SLM participated in a series of agreements and commercial practices in the prestressing steel sector in the internal market and within the EEA from 10 February 1997 to 14 April 1997. Likewise, the Court must also annul Article 2(16) of the contested decision, in so far as it imposes a disproportionate fine to penalise SLM's participation in the single infringement between 15 April 1997 and 19 September 2002, as that fine was defined on the basis of SLM's participation in the infringement referred to in Article 1 of the contested decision.
- 435 It is also for the Court to determine the amount of the fine that should be imposed on SLM and, in part, jointly and severally on Ori Martin, in the light of SLM's participation in the single infringement.
- 436 In that regard, it should be observed that, by its nature, the fixing of a fine by the Court is not an arithmetically precise exercise. Furthermore, the Court is not bound by the Commission's calculations or by its Guidelines when it adjudicates in the exercise of its unlimited jurisdiction, but must make its own appraisal, taking account of all the circumstances of the case (see judgment of 5 October 2011 in *Romana Tabacchi v Commission*, T-11/06, ECR, EU:T:2011:560, paragraph 266 and the case-law cited).

- 437 In this case, in order to determine the amount of the fine intended to penalise SLM's participation in the single infringement, it follows from Article 23(3) of Regulation No 1/2003 that regard is to be had both to the gravity and to the duration of the infringement, and it follows from the principle that penalties must be specific to the offender that the penalty must take account of the situation of each offender with respect to the infringement. That is particularly so in the case of a complex infringement of long duration of the type defined by the Commission in the contested decision, which is characterised by the heterogeneity of the participants.
- 438 In the present case, the Court considers it appropriate to take the following circumstances into account.
- 439 In the first place, it is apparent to the requisite evidential standard from the file that SLM participated in several Club Italia meetings, which concerned quota-allocation and price-fixing on the Italian market. Such arrangements are by their very nature among the most serious restrictions of competition.
- 440 SLM's participation in Club Italia is an essential element for the appraisal of the penalty and that element is in itself significant given the anticompetitive purpose of the discussion which took place within that club, whether concerning, for SLM, discussions relating to the internal aspect of that agreement or, subsequently, discussions relating to its external aspect.
- 441 In that regard, in order to determine the amount of the fine, the Court considers that it is not necessary to take into account the value of the sales made in States which were not concerned by the cartel in which SLM actually and specifically participated from 15 April 1997 to 10 September 2000.
- 442 Likewise, given that the information which may be extracted from the handwritten notes of ITC relating to the meeting of 10 February 1997 in order to impute the infringement to SLM is not corroborated by other evidence, SLM's participation in Club Italia need not start on that date. However, such participation is clear to the requisite legal standard from evidence available concerning the meeting of 15 April 1997 and is also established, without interruption, up to 19 September 2002.
- 443 Secondly, it may be considered that, as from 29 November 1999, SLM was aware or should have been aware that, by participating in Club Italia, it was taking part in a larger scheme, at different levels, the objective of which was to stabilise the PS market at pan-European level in order to avoid a fall in prices (contested decision, recital 650 and paragraph 129 above).
- 444 It may also be considered that SLM participated in Club Europe in respect of the period from 11 September 2000 to 19 September 2002, which corresponds to a period in which SLM began to hold the necessary authorisations for the sale of PS to certain States which were the subject of Club Europe and in which discussions with Club Italia concerning the size of the quota which could be accorded to Italian exporters took place.
- 445 It is therefore the case that SLM became aware of the single infringement imputed to it by the Commission at a later stage than other undertakings and participated in an aspect of that infringement other than Club Italia. Nevertheless, that relatively belated awareness can have no significant effect on the determination of the amount of the fine for the reasons set out in paragraph 320 above.
- 446 At the same time, it must be pointed out that the Commission has not established that SLM had participated in the Southern Agreement, Club España, or the Addtek coordination, which are essential aspects of the single infringement.

- 447 Having taken those circumstances into account, the Court considers that a fine of an amount of EUR 19 million permits effective punishment for SLM's unlawful conduct in a manner which is not insignificant and remains sufficiently deterrent. Any fine above that amount would be disproportionate to the infringement which the applicants were found to have committed when assessed in the light of all the circumstances that characterise SLM's participation in the single infringement.
- 448 That fine takes into account the fact that, in respect of part of the infringement, SLM did not participate in the external aspect of Club Italia and takes as the starting date 15 April 1997. In such a way, the Court considers that it has sufficiently taken into consideration SLM's progressive participation in the cartel, with it being made clear that, from the start, SLM participated in a significant aspect of the single infringement and that, consequently, it participated fully in the cartel in a manner which may be compared with that of the main players in Club Italia.
- 449 For the reasons set out above, in response to the argument put forward by Ori Martin in that regard, it must be held that Ori Martin is jointly and severally liable for the payment of part of that fine. Given the duration of the period in which Ori Martin is presumed capable of exercising decisive influence on SLM, it must be held that Ori Martin is jointly and severally liable for the payment of the fine in the amount of EUR 13.3 million, in respect of the period from 1 January 1999 to 19 September 2002.
- 450 That fine reflects the fact, as noted by the Commission in the contested decision, that Ori Martin may not be considered to be liable for the whole of the fine imposed on SLM.
- 451 Moreover, on account of the legal maximum limit of 10% of total turnover provided for in Article 23(2) of Regulation (EC) No 1/2003, the final amount of the fine to be imposed individually on SLM may not exceed EUR 1.956 million.
- 452 In the light of the foregoing, it is necessary to reduce the amount of the fine imposed on SLM from EUR 19.8 million to EUR 19 million (period from 15 April 1997 to 19 September 2002) and to hold that Ori Martin is jointly and severally liable for the payment of that fine in the amount of EUR 13.3 million (period from 1 January 1999 to 19 September 2002). Furthermore, on account of the legal maximum limit of 10% of total turnover provided for in Article 23(2) of Regulation (EC) No 1/2003, the final amount of the fine imposed individually on SLM is set at EUR 1.956 million (period from 15 April 1997 to 31 December 1998).
- 453 Moreover, it is not necessary for the Court to allow the applications for measures of inquiry (evidence given by representatives of Redaelli and ITC; list of officials responsible for the file) proposed by SLM, since those measures do not appear to be necessary for the outcome of the dispute.
- 454 In addition, since the Court varied the contested measure in view of all the factual circumstances, by exercising full jurisdiction over the question of the amount of the fine before it, it is not necessary to adjudicate on the plea submitted by SLM following the second amending decision, in the context of which SLM claimed that the subdivision of the fine made in the initial decision was incorrect in the light of the methodology set out by the Commission in the 2006 Guidelines.
- 455 The actions are dismissed as to the remainder.

Costs

- 456 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order each party to bear its own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

⁴⁵⁷ In the circumstances of the present case, in the light of the reduction of the fine imposed on the applicants by the Commission and the fact that SLM's initial application relied on a plea relating to the infringement of the legal limit of 10%, which SLM withdrew following the adoption of the second amending decision, the Commission must be ordered to bear its own costs and to pay two thirds of the costs incurred by SLM and one third of the costs incurred by Ori Martin, which will therefore bear the rest of their own costs.

ON THOSE GROUNDS

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Joins Cases T-389/10 and T-419/10 for the purposes of judgment;
2. Annuls Article 1(16) of Commission Decision C(2010) 4387 final of 30 June 2010 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (case COMP/38344 — Prestressing Steel), amended by Commission Decision C(2010) 6676 final of 30 September 2010, and by Commission Decision C(2011) 2269 final of 4 April 2011, in so far as it finds that Siderurgica Latina Martin SpA (SLM) participated in a series of agreements and commercial practices in the prestressing steel sector in the internal market and within the European Economic Area (EEA) from 10 February 1997 to 14 April 1997;
3. Annuls Article 2(16) of Decision C(2010) 4387 final, as amended by Decision C(2010) 6676 final and by Decision C(2011) 2269 final;
4. Reduces the amount of the fine imposed on SLM from EUR 19.8 million to EUR 19 million, of which EUR 13.3 million is imposed on the basis of joint and several liability on Ori Martin SA; owing to the legal maximum limit of 10% of turnover provided for in Article 23(2) of Regulation (EC) No 1/2003, the final amount imposed on SLM in respect of individual liability is fixed at EUR 1.956 million;
5. The actions are dismissed as to the remainder;
6. Orders the Commission to bear its own costs and to pay two thirds of the costs of SLM and one third of the costs of Ori Martin;
7. Orders SLM to bear one third of its own costs;
8. Orders Ori Martin to bear two thirds of its own costs.

Frimodt Nielsen

Dehousse

Collins

Delivered in open court in Luxembourg on 15 July 2015.

[Signatures]