COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 16 December 2003
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COMMISSION DECISION

of 16 December 2003

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

(Case COMP/E-1/38.240 – Industrial tubes)

(Only the Finnish, French, German and Italian texts are authentic)

(Text with EEA relevance)

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(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty[1], and in particular Article 3 and Article15 (2) thereof,

Having regard to the Commission decision of 2 July 2003 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty[2],

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

Having regard to the final report of the Hearing Officer in this case[3],

WHEREAS:

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1 OJ 13, 21.2.1962, p. 204/62.Regulation as last amended by Regulation (EC) No 1216/1999, OJ L 148, 15.6.1999, p. 5.

2 OJ L 354, 30.12.1998, p. 18.

3 OJ …

A - INTRODUCTION

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

- Wieland Werke AG
- Outokumpu Oyj
- Outokumpu Copper Products OY
- KM Europa Metal AG
- Tréfimétaux SA
- Europa Metalli SpA.

(2) The addressees of the present Decision participated in a single, complex and continuous infringement contrary to Article 81 of the Treaty and Article 53 of the EEA Agreement, covering most of the EEA territory by which they agreed on price targets and other commercial terms for industrial tubes, coordinated price increases, allocated customers and market shares, as well as monitored implementation of their anti-competitive arrangements by a market leader arrangement and by exchanging information on sales, market shares and pricing within the framework of Cuproclima Quality Association from at least 3 May 1988 to 22 March 2001.

B - THE INDUSTRIAL COPPER TUBES INDUSTRY

1. THE PRODUCT

(3) Copper tubes are generally divided into two product groups: (i) sanitary tubes (also called plumbing, water or installation tubes) used for water, oil, gas and heating installations and (ii) industrial tubes which are divided into sub-groups based on the end use. The most important of the latter in terms of volume is air-conditioning and refrigeration (ACR) industry, the other industrial applications being fittings, refrigeration, gas heater, filter dryer and telecommunication tubes.

(4) Unlike sanitary tubes, industrial tubes are generally not sold to wholesalers of plumbing supplies but they are normally used by and supplied directly to industrial customers, original equipment manufacturers or part manufacturers. On average industrial tubes are higher added value products than sanitary tubes. Production costs of sanitary and industrial tubes differ also significantly from each other.

(5) Industrial tubes, ACR-tubes in particular, are typically supplied in annealed level wound coils (LWC) in lengths ranging up to several kilometers. LWCs were introduced in the 1980's as a substitute for straight length tubes, and they were specifically developed for automated manufacturing lines of air-conditioning producers. The two main types of LWCs are smooth tubes and inner grooved tubes

("IGT"). The price of IGT is typically significantly higher than that of smooth tubes. In addition to LWCs, some copper tubes for certain industrial end uses such as boilers, tabs and fittings, are also supplied in straight lengths or pancake coils (hereinafter referred to as "other industrial tubes").

(6) In the early 1980s, industrial copper tubes in LWC were a fairly new product in Europe. They were difficult to produce and had specific quality requirements. At that time no specification for these products existed, and a number of quality problems occurred. In order to produce a high quality product and to help the discussions between the customers and the producers with regard to these quality problems, the major producers decided to develop a specification and agree on certain technical standards within the framework of Cuproclima Quality Association for ACR Tubes (hereinafter « Cuproclima » or the «Association»).

2. CUPROCLIMA QUALITY ASSOCIATION

(7) Cuproclima Quality Association for ACR Tubes was established under Swiss law in Zürich on 27 September 1985, with the primary purpose of establishing and controlling a quality standard and label for these industrial tubes. Cuproclima was chosen as a trademark, as it was already registered by one of the founding members, Wieland Werke AG. The latter licensed it to the Association in 1986, thereby giving all the members the possibility to use the trademark. The trademark was subsequently registered in a number of countries worldwide.

(8) The founding members of the Association were Outokumpu Oy, Tréfimétaux S.A.(hereinafter “Tréfimétaux” or “TMX”), […] (later […]), R & G Schmöle Metallwerke GmbH & Co. KG ("Schmöle" or "RGS") and Wieland Werke AG. Schmöle was absorbed by Kabelmetal AG ("KM") in October 1988, and the latter replaced it as full member as of July 1989. Europa Metalli-LMI S.p.A (EM-LMI) became an official member in November 1993. No new members have entered the Association since 1993. […] withdrew from it in December 1993 whereafter it apparently disappeared also from the industrial tube market.

(9) After a number of corporate reorganisations within the KME-group, the individual membership of KM Europa Metal AG (“KME”), TMX and Europa Metalli S.p.A (hereinafter “Europa Metalli” or “EM”) was replaced by the KME group membership in the autumn meeting of 1999. Accordingly, the official number of members was reduced to three, including Wieland Werke, Outokumpu and KME.

(10) The quality standard for ACR copper tubes in LWC was defined by the Technical Committee of the Association. The first edition was published in 1987. As Cuproclima members and their products were subject to annual inspections by an independent third party and to stringent technical standards, consumers were expected to be willing to pay a slight premium for these quality tubes. Cuproclima tubes thus provided additional value to its customers due to their quality and guaranteed technical specifications. On the other hand, these obligations required additional investments in terms of technical know-how, qualified personnel and raw materials.

(11) The governing bodies of the Association were the General Meeting of the Members, the Board of Governors, the Chairman of the Board of Governors, the Secretary-

Treasurer and the Technical Committee. An Annual General Meeting, presided by the Chairman, was held at least once a year. The Board consisted of one representative of each official member nominated for a term of one year. Its meetings were called by the Chairman who also set the date and place. The Chairmanship rotated in two-year periods among the members.

(12) The members meetings were held at varying locations generally in the spring and the board meetings were normally held in Zürich in the autumn. The minutes of the official statutory meetings were kept by the secretary of the Association in Zürich. The agenda of the statutory meetings typically included, among others, registration matters, specification and quality inspection controls, technical issues, applications for membership, financial issues, statistics and evaluation of the market situation.

(13) The Technical Committee met once a year, mostly in Germany. Its agenda included items relating to the specification, national and international standards, internal and external technical audits, quality securing systems and questions of packing and weight. The participants in these meetings were normally different from those attending the other meetings.

(14) The Association produced also sales statistics. Each member communicated, first on a monthly and since 1999 on a quarterly basis its sales data in the Western and Eastern European markets to the Secretary of the Association. The data were officially presented in aggregated form, allowing each participant to assess its own market share only. In practice, however, the members exchanged also the company-specific data between each other.

(15) In addition to ACR-tubes, other types of industrial tubes in LWC were also included in the statistics. In 1998, Cuproclima members decided to split the statistics by end use as follows: ACR smooth, ACR IGT, fittings, gas boilers, electrical, redrawers and others.[4]

(16) In March 2001, the co-operation within Cuproclima was entirely suspended and the Association was put in the process of liquidation.

3. THE MARKET PLAYERS

3.1. Producers subject to the present proceedings

3.1.1. Outokumpu

(17) Outokumpu OYj is a publicly-owned Finnish corporation operating worldwide. It focuses on base metal production, stainless steel, copper products and technology. The copper tube business was originally carried out by Pori Tube Mill under Outokumpu Copper products-division. Neither Pori Tube Mill nor Outokumpu Copper was a separate legal entity but both were part of Outokumpu Oy. Outokumpu Copper OY was incorporated in 30 December 1988 as a separate legal entity. Its name was

[4] Official minutes of the Annual General Members meeting, held on May 14th, 1998 in Hattenheim, Germany, file p. 28780; for an example of the statistics, see file p. 29920-29952.

changed to Outokumpu Copper Products OY (OCP) in 1996. Outokumpu as undertaking will hereinafter be referred to as "OTK" or "Outokumpu".

(18) OCP has been wholly-owned by Outokumpu OYj for the whole period of its existence. OCP itself is divided into divisions, each with their own business lines and manufacturing units. The European industrial copper tube production is currently concentrated in Pori in Finland (Outokumpu Poricopper OY), Zaratamo in Spain (Outokumpu Copper Tubes SA) and a small facility in Västerås in Sweden (Outokumpu Copper Products Ab).

(19) Outokumpu participated in the activities of Cuproclima as a full member since the establishment of the Association in 1985 until the suspension of its activities in March 2001. The founding member of the Association was designated as "Outokumpu OY (Copper Products Division)". The Copper products division was subsequently incorporated as OCP, as described in recital (17).

3.1.2. Wieland Werke

(20) Wieland Werke AG ("WW", "Wieland" or "Wieland Werke") is a German company the main activity of which is in the production, sales and distribution of semi-finished and special products in copper and copper alloys. Apart from its own manufacturing activities, Wieland Werke AG is the holding company of 45 other corporate entities. Wieland has several plants in Ulm, Verbert-Langenberg, Villingen-Schwenningen and Vöhringen, all of them in Germany. The company's headquarters are in Ulm. The other companies of the group are in Austria, UK, Spain, and Belgium.

(21) There are currently three legal entities within Wieland group that sell industrial copper tubes. These are the mother company itself (Wieland Werke AG), Buntmetall Amtstetten Ges.m.b.H ("Buntmetall" or "BMA") and Nemco Metals International Ltd. ("Nemco"). Wieland has a number of trading and sales companies. As sales intermediaries there are marketing companies in Belgium/the Netherlands, Denmark/Finland/Norway/Sweden, France, Great Britain/Ireland, Italy, Austria, Portugal, Switzerland/Liechtenstein, Spain, Czech/Slovakia and Hungary.

(22) In July 1999, Wieland Werke AG acquired […]% of Austria Buntmetall AG which is the holding company of Buntmetall. The ownership was brought to […] % in October 1999 and to […] % in November 2000.

(23) Wieland Werke was actively involved in Cuproclima as a full member since the establishment of the Association in 1985, until the suspension of its activities in March 2001.

3.1.3. The KME group

3.1.3.1. The relevant entities

– Società Metallurgica Italiana

(24) Società Metallurgica Italiana S.p.A (hereinafter "SMI"), is the Italian holding company of the KME-group, to which Europa Metalli SpA and Tréfimétaux SA belong. As a holding company, its purpose is limited to acquisition of shareholdings and financial activities. SMI was never itself member of Cuproclima.

(25) To the extent relevant for industrial tubes, the SMI-group was formed in the following sequence: In 1976, SMI created EM which was held 84% by SMI and 16 % by Pechiney. In 1986, EM acquired - through SMI - 100 % control of TMX. In 1990, SMI acquired 76.9% of Kabelmetall AG ("KM") from M.A.N. On 19 June 1995, SMI-group was restructured and its shareholdings in TMX and EM were contributed to KM, whereby TMX and EM became wholly-owned subsidiaries of KM. The name of the latter was changed to KM Europa Metal AG (KME). In 1999, SMI increased its shareholding in KME to 98.6% and the management of KME, TMX and EM was centralised.

– KM Europa Metal

(26) KM Europa Metal AG, formerly Kabelmetall AG ("KM"), has currently four main operating companies, Europa Metalli SpA in Italy, Tréfimétaux SA in France, Sociedad Industrial Asturiana S.A. (SIA) in Spain and KME Metal GmbH in Germany. KME-group is the largest processor of copper and copper alloys in the world. In 2001, it had 7.891 employees.

(27) KM was not a founding member of the Association but it absorbed one of the founding members, Schmöle, in October 1988. For legal reasons related to the corporate structure of Schmöle, the operative business of the latter was not integrated into KM until 1 July 1989. Following the take-over, KM assumed Schmöle's membership in Cuproclima as of 1 July 1989. KM took over the key employees from Schmöle, who represented the latter in Cuproclima meetings. While these individuals still formally represented Schmöle from October 1988 to July 1989, they were in the process of being integrated into KM's operational business. Schmöle ceased to exist as a legal entity in August 1989.[5]

(28) The KME group membership was recognised by Cuproclima in the autumn meeting of 1999.[6] Until then, KME, EM and TMX were separate members in the Association. They sent their own representatives to Cuproclima meetings, paid separate membership fees and submitted separate data to the Association.[7]

– Europa Metalli

(29) Europa Metalli S.p.A is the Italian industrial company of KME. With its 2000 employees, Europa Metalli is the largest Italian producer of copper and copper alloy semi-finished products. EM has its headquarters in Florence. It runs three production plants in central and northern Italy. The Head Sales Office is located in Milan, and its commercial network of branch offices and warehouses covers the entire country.

(30) Europa Metalli was not an official member in Cuproclima until November 1993.[8] Prior to its full membership, EM-LMI participated in Cuproclima activities as an associate member at least since May 1988. As such, it did not use the trademark nor

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5 According to KME, Mr. […] acted in the name of Schmöle until 1 July 1989 regardless of the fact that the acquisition took effect in October 1988. KME does not, however, exclude that he "*may have acted at least implicitly also on behalf of KM*". File p. 29643 (KME Memorandum of 17.2.2003, p. 6, fn. 9).

6 File p. 29423, 29430 (KME Article 11 reply, Annex 20).

7 File p. 29579, 29582 (examples of KME data submission in January 1996).

8 File p. 23039-41 (Minutes of the Extraordinary Meeting held in Zürich on 3 November 1993).

was it entitled to vote in the Association, but it submitted information to the statistics and paid a reduced membership fee.

(31) The entity joining the Cuproclima association was Europa Metalli-LMI S.p.A (EM-LMI) which contributed its industrial operations to its newly founded subsidiary Europa Metalli S.p.A in 1995 and ceased to exist as a legal entity thereafter. EM participated individually in Cuproclima activities until the autumn of 1999, when its membership was replaced by the KME-group membership.

– Tréfimétaux

(32) Tréfimétaux SA of France was integrated into the SMI-group in 1986 through Europa Metalli, of which it was a wholly owned subsidiary until 1995. Upon restructuring of the SMI-group in 1995 it became a wholly-owned subsidiary of KME. It has four industrial production sites in France, employing around 2000 people.

(33) TMX is the only entity of the KME group that was a founding member of Cuproclima and participated individually in its activities since 1985. Its individual membership was replaced by the KME-group membership in 1999.

3.1.3.2. Legal and economic links within the SMI/KME group

(34) Both EM and TMX have belonged to the SMI group since 1976 and 1986, respectively. Within the SMI holding structure, TMX was a wholly owned subsidiary of EM during the period 1986-1995. In 1987, TMX business plan and commercial strategies were aligned with those of EM, and Italian managers were introduced to TMX organisation at board level. A common sales organization, EMT, was established for TMX and EM on 1 January 1993, and Mr. […] (TMX) was appointed EMT's commercial director for industrial tubes. From 1990 to 1995, the vice president of EM was also the managing director of the holding company SMI.[9]

(35) SMI acquired 76.9 % control of KM in 1990. Since then, KM, EM and TMX have thus all belonged to the same holding. As a result of the restructuring of the SMI-group in 1995, EM and TMX became KM's (whose name was changed to KME) wholly-owned subsidiaries. SMI's shareholding in KME was brought to 98.6 % in 1999. In 1999, the management of KME, TMX and EM was also centralised, and Mr. […] (KME) became responsible for the industrial tubes business unit.

(36) SMI's, EM's and TMX's board members were appointed by their shareholders in the general shareholders' meeting, as required by Italian and French law, respectively. KME's board members were appointed by its supervisory board.[10]

(37) During the period 1986-1995, while KM's management board was different from that of SMI, EM and TMX, there were partial overlaps and interlocking relationships between SMI, EM and TMX management boards as follows:

– Mr. […] was simultaneously SMI's president (1986-2001)[11] and EM's president (1986-1995)[12] .

[9] File p. 28178-28179 (KME Article 11 reply); p. 29641 (KME Memorandum of 17.2.2003, p.4).
[10] File p. 29679-29680 (KME Memorandum of 19.3.2003, p. 1-2).

– Mr. […] was simultaneously SMI's director-general (1986-1996) [13] and EM's board member (1986-1995) [14].

– Mr. […] was simultaneously SMI's board member (1986-1990) and vice-president (1991-1995) [15], EM's vice-president (1986-1990) and board member (1991-1995) [16], and TMX's board member (1987-1995) [17].

– Mr. […] was simultaneously EM's board member (1986-1995)[18] and TMX's board member (1986-1992) [19].

– Mr. […] was simultaneously EM's director-general (1986-1995) [20] and TMX's board member, vice-president and director-general (1987-1991) [21].

– Mr. […] was simultaneously EM's board member (1986-1989)[22] and TMX's president (1988- September 1990) [23].

– Mr. […] was simultaneously EM's board member (1988-1995)[24] and TMX's board member (1988-2000) [25].

(38) During the period 1995-2001 following the restructuring of the group, after which KME has controlled 100% of the capital of both EM and TMX, KME's management board was also interlocked to that of SMI, EM and TMX through the following links:

– Mr. […] was simultaneously SMI's director-general (until May 1996)[26], KME's board member (1995-2001)[27] and EM's vice-president (1995) and president (1996-2001) [28].

– Mr. […] was simultaneously KME's chairman (1995-2001)[29] and EM's board member (1996-2001) [30].

– Mr. […] was simultaneously KME's board member (June 1995 - December 1999)[31] and TMX's director-general (1995- March 2001) [32].

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11 File p. 29683-29688.
12 File p. 29762-29766.
13 File p. 29683-29688.
14 File p. 29762-29766.
15 File p. 29683-29688.
16 File p. 29762-29766.
17 File p. 29808-29816.
18 File p. 29762-29766.
19 File p. 29808-29816.
20 File p. 29762-29766.
21 File p. 29808-29816.
22 File p. 29762-29766.
23 File p. 29808-29816.
24 File p. 29762-29766.
25 File p. 29808-29816.
26 File p. 29683-29688.
27 File p. 29721-29723.
28 File p. 29762-29766.
29 File p. 29721-29723.
30 File p. 29808-29816.
31 File p. 29721-29723.

(39) During the latter period there were further links between SMI's, TMX's and EM's management boards as follows:

- Mr. […] was simultaneously SMI's board member (1996-2000) [33], EM's board member (1996-2001) [34] and TMX's president (1995- March 2000) [35].

- Mr. […] was simultaneously SMI's board member (1995-2001) [36] and EM's board member (1996-2001) [37].

(40) The members of the management boards did not normally attend Cuproclima meetings, but according to KME the management boards were occasionally informed of the outcome of the discussions.[38]

(41) The reporting structures within the group were organised so that certain participants of the subsidiaries in the Cuproclima meetings and other competitor contacts reported directly or indirectly to KME:

- Mr. […] (TMX) reported to the TMX managing director, Mr. […], who was at the same time head of tubes business of both TMX and EM as well as of KME Ibertubos. Mr. […] was a member of the KME board, which meant that Mr. […] reported indirectly to KME through Mr. […] during that period.[39]

- From 1993 to 1997 EM's representative in the Cuproclima meetings […] reported to TMX's commercial director […].[40]

(42) With regard to the operational management, KME "Business distribution plan" dated 25 June 1995, states that "*Mr* […] [Chairman of the KME board] *has the responsibility of the global business; Mr* […] [commercial manager of TMX] *will closely cooperate with Mr* […] *and will have the responsibility of managing the EMT division*."[41] Similar "Business distribution plan" dated 19 March 1997 confirms that "*Mr* […] *has the responsibility of the tubes division; Mr* […] *l cooperating with Mr* […] *will have the responsibility of managing the EM/TMX division.*"[42]

3.2.Other significant producers of LWC-tubes

3.2.1. Halcor

(43) Halcor SA ("Halcor") is a Greek company established in 1977. It manufactures and trades rolled and extruded copper and copper alloy (brass) products. The main extruded products are copper tubes and brass rods. Its registered office is in Athens

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32 File p. 29808-29816.
33 File p. 29683-29688.
34 File p. 29762-29766.
35 File p. 29808-29816.
36 File p. 29683-29688.
37 File p. 29762-29766.
38 File p. 28185 (KME Article 11 reply).
39 File p. 29640 (KME Memorandum of 17.2.2003, p. 3).
40 File p. 28182 (KME Article 11 reply).
41 File p. 25670 (KME Memorandum of 17.2.2003, Annex 4).
42 File p. 25671 (KME Memorandum of 17.2.2003, Annex 4).

and its casting facilities are located close to Athens. Halcor enjoys a leading position in the Greek market. Halcor sells copper tubes in the EEA where it has around […]% market share.

3.2.2. Feinrohren

(44) The Italian Feinrohren S.p.A ("Feinrohren") has been making copper capillary tubes and copper tubes since 1959. It produces more than 10.000 product types that are sold in over 60 countries throughout the world. Feinrohren has two plants that manufacture Cu DHP copper tubes and capillary tubes which are used for several different applications, including industrial refrigeration, industrial air-conditioning, heat exchangers and boilers.

3.3.Previous competitors on the market

3.3.1. Sameton (later Nuova Samim)

(45) Sameton SpA, later renamed as Nuova Samim SpA, produced industrial copper tubes in Italy at least in the 1980's and the early 1990's. […]

3.3.2. Desnoyers

(46) Desnoyers S.A. ("Desnoyers") of France was involved in the industrial tube sector until its liquidation process started in 2002. Its LWC production facilities were in Longueville, France. Desnoyers was acquired by Mueller Industries Inc. ("Mueller") in May 1997. It was renamed as Mueller Europe S.A. (Mueller Europe) on 1 November 1999 without changing Desnoyers' corporate form.

(47) Desnoyers was never officially member in Cuproclima nor could it use the Cuproclima trademark, but it participated in some of its activities in the mid-1990's, as discussed in recitals (88) to (92).

3.3.3. Buntmetall

(48) Buntmetall Amstetten Ges.m.b.H of Austria is a manufacturing company of semi-finished and special products in copper and copper alloys. Its main business is the manufacture of copper tubes for industrial application in different sectors, such as equipment building, ship building and construction industry. Its manufacturing plant is in Amtstetten, Austria. Buntmetall was wholly-owned by a holding company Austria Buntmetall AG since 1989. Wieland Werke AG acquired […] % of the latter on 9 July 1999 and the ownership was brought to […] % on 1 October 1999 and to […] % on 30 November 2000.

(49) Until the acquisition by Wieland, Buntmetall was an independent competitor in the industrial tube market. It was never officially member in Cuproclima nor could it use the Cuproclima trademark, but it participated in certain meetings in the mid-1990's and submitted data to the statistics collected by the Association also thereafter (recitals (93) to (95)).

4. SIZE, VALUE AND MARKET SHARES

(50) The EEA market value of LWC-tubes is estimated at around EUR 288 million in 2000, based on the turnover information provided by the undertakings concerned.[43]

(51) The table 1 compiles the sales volume tonnages as provided by Outokumpu, Wieland and KME for the period 1991-2001. Wieland's figures prior to 1994 are not available. Buntmetall's data is included in that of Wieland since 1999.

Table 1 - LWC volumes in tons in EEA (1991 – 2001)[44]

Year	Total Cuproclima	Otk	TMX	EM	KME	WW
1991		[…]	[…]	[…]	[…]	
1992		[…]	[…]	[…]	[…]	
1993		[…]	[…]	[…]	[…]	
1994	47,416	[…]	[…]	[…]	[…]	[…]
1995	53,545	[…]	[…]	[…]	[…]	[…]
1996	50,321	[…]	[…]	[…]	[…]	[…]
1997	55,905	[…]	[…]	[…]	[…]	[…]
1998	63,233	[…]	[…]	[…]	[…]	[…]
1999	68,192	[…]	[…]	[…]	[…]	[…]
2000	76,135	[…]	[…]	[…]	[…]	[…]
2001	73,048	[…]	[…]	[…]	[…]	[…]

(52) Based on the aggregated sales volumes, Cuproclima share of the total Community/EEA market in 2001 was ca. 75%-80%.

(53) Calculated on the basis of the sales volume information (recital (51)) provided by OTK, WW and KME, the market share development of LWC-producers within Cuproclima was the following:

Table 2 - LWC market shares within Cuproclima (1994 – 2001)

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[43] This is calculated taking into account an estimated total EEA market share of 75% of these companies. Note that this calculation does not take into account the fact that LWC-tubes are sold at a conversion price which represents a varying percentage of the total price of the product.

[44] File p. 29976 (OTK); 29633 (KME); 23338 (WW).

Year	Total volume Cuproclima	OTK	TMX	EM	KME	WW
1994	47,416	[…]	[…]	[…]	[…]	[…]
1995	53,545	[…]	[…]	[…]	[…]	[…]
1996	50,321	[…]	[…]	[…]	[…]	[…]
1997	55,905	[…]	[…]	[…]	[…]	[…]
1998	63,233	[…]	[…]	[…]	[…]	[…]
1999	68,192	[…]	[…]	[…]	[…]	[…]
2000	76,135	[…]	[…]	[…]	[…]	[…]
2001	73,048	[…]	[…]	[…]	[…]	[…]

5. INTER-STATE TRADE

(54) European industrial tube production is concentrated in a number of sites in several European countries. OTK has relevant production facilities in Finland, Spain and Sweden, WW in Germany and Austria, and KME group in Germany, France and Italy. From these units the three groups supply the Community/EEA market. During the infringement period the undertakings concerned sold their products in most Member States of the Community and EEA directly to end-users in these countries.[45]

(55) Therefore, during the period considered in this Decision, the industrial tube market was characterised by important trade flows between the Member States, as well as some trade between the Contracting Parties to the EEA Agreement.

C - PROCEDURE

6. INVESTIGATION AND REQUESTS FOR APPLICATION OF THE 1996 LENIENCY NOTICE

(56) On 9 January 2001, Mueller informed the Commission about the existence of a cartel in the copper tube market and expressed its willingness to co-operate with the Commission pursuant to the Notice on the non-imposition or reduction of fines in cartel cases ("the 1996 Leniency Notice").[46] Mueller's oral statement was followed by

[45] File p. 29975-29976 (OTK); p. 29633 (KME); p. 22018; 22020-21 (WW).
[46] OJ C 207/04 of 18 July 1996.

a number of written submissions which concern copper plumbing tubes, fittings and/or industrial tubes.

(57) On 12 March 2001, Mueller submitted a written statement with numerous annexes ("Mueller submission") relating specifically to a cartel in the LWC-tube sector organised by the main European producers of these tubes within the framework of Cuproclima Quality Association.

(58) On 22 and 23 March 2001, the Commission carried out unannounced inspections at the premises of Outokumpu (Finland), Wieland Werke (Germany), KME (Germany), Tréfimétaux (France) and Europa Metalli (Italy) pursuant to Article 14 of Regulation 17.

(59) On 9 April 2001, a further inspection was carried out at the premises of Outokumpu. On that date, Outokumpu Oyj informed the Commission about its willingness to cooperate within the framework of the 1996 Leniency Notice.

(60) On 10 April 2001, a further inspection was carried out at the premises of KME pursuant to Article 14 of Regulation 17.

(61) By a letter dated 30 May 2001, Outokumpu Oyj submitted a Memorandum with a number of annexes ("OTK submission"), describing the essential elements of the arrangement.

(62) On 18 July 2001, the Commission interviewed a representative of Mueller's subsidiary Desnoyers, after which Mueller provided a supplementary statement with annexes on 15 October 2001.

(63) On 16 November 2001, Outokumpu Oyj completed its submission by a document entitled "Economic context of the European copper tubes industry".

(64) On 5 June 2002, the Commission interviewed two representatives of Outokumpu at the Commission offices in Brussels ("OTK interviews on 5.6.2002"). The interviews were conducted at the Commission's initiative within the framework of Outokumpu's offer to cooperate with the Commission. Outokumpu's representatives gave oral explanations on the functioning of the cartel.

(65) In July 2002, the Commission sent letters pursuant to Article 11 of Regulation 17 (“Article 11 letter”) to Wieland Werke and KME, and asked Outokumpu to provide certain further information.

(66) On 30 September 2002, Wieland Werke replied to Article 11 letter ("WW Article 11 reply") and at the same time made an application for reduction from fines under the 1996 Leniency Notice.

(67) In a letter dated 8 October 2002, Outokumpu provided additional information and explanations on a number of documents and facts ("OTK letter of 8.10.2002").

(68) On 15 October 2002, KME replied to Article 11 letter ("KME Article 11 reply") and at the same time made an application for reduction from fines under the 1996 Leniency Notice.

(69) On 5 November 2002, KME's representatives met with the Commission services to discuss their submission and the procedural steps. The meeting took place at KME's initiative.

(70) On 19 December 2002, Wieland Werke's representatives met with the Commission services to discuss their submission and the procedural steps. The meeting took place at Wieland Werke's initiative.

(71) On 30 December 2002, 9 January 2003 and 24 January 2003, the Commission sent additional requests for information to Wieland Werke, KME and Mueller Industries, respectively.

(72) On 4 February 2003, the Commission interviewed two representatives of Outokumpu ("OTK interviews on 4.2.2003"). The interview was originally planned for 5 June 2002 but was postponed at the request of the Commission. Outokumpu's representatives gave oral explanations on the functioning of the cartel.

(73) On 17 February 2003, 3 March 2003 and 24 March 2003, KME, Wieland Werke and Mueller, respectively, responded to the Commission's additional requests for information.

7. THE ADOPTION OF THE STATEMENT OF OBJECTIONS AND SUBSEQUENT PROCEDURE

(74) On 2 July 2003, the Commission initiated proceedings in this case and adopted a Statement of Objections against the undertakings to which this decision is addressed, as well as SMI (the parent company of the KME group). After having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, the Commission decided to close the proceedings against SMI for the lack of sufficient evidence of its decisive influence on the commercial policies of its subsidiaries in this specific case.

(75) Parties were granted access to the file, in the form of two CD-ROM's containing a full copy, excluding business secrets and other confidential information, of all the documents in the Commission's file on this case. None of the parties has made objections with regard to the procedure in this respect.

(76) In accordance with the provision of Article 19(1) of Regulation No 17 and Commission Regulation No 2842/98, the Parties were entitled to send their views on the objections within a time limit of eight weeks from the date of receipt of the Statement of Objections. They all replied to the Statement of Objections within this eight weeks time frame accorded.

(77) Having replied in writing to the Statement of Objections, Outokumpu and KME did not request an Oral Hearing on the case, and Wieland Werke withdrew its initial request by a letter dated 1 October 2003. Consequently, no Oral Hearing was organized in this case. None of the parties substantially contested the facts on which the Commission based its Statement of Objections nor the anti-competitive infringements identified in this Decision. Outokumpu has, however, made some clarifications with regard to certain facts, relating mainly to the so-called "quiet period" explained under heading 10.2.4.

D - DESCRIPTION OF THE EVENTS

8. THE ORGANISATION OF THE CARTEL

8.1.Introduction

(78) Towards the late 1980's, the producers organised within Cuproclima Association, including Outokumpu, Wieland Werke, Tréfimétaux, Europa Metalli and Kabelmetall (KME since 1995), extended the scope of their cooperation to competition issues.[47] The Cuproclima meetings held twice a year provided a regular opportunity to discuss and fix prices and other commercial conditions for industrial tubes after the official agenda of the meetings. Bilateral contacts between the undertakings concerned supplemented these anti-competitive meetings.

(79) The anti-competitive arrangement consisted primarily of setting target prices and agreeing on concerted price increases. The success of any price increase depended on the producers being content to maintain their market shares at the prevailing level, hence the need to establish a base for comparison and a continuing monitoring system. Accordingly, the participants allocated customers and froze their market shares. Implementation was ensured through a market leader arrangement for European territories and key customers. Compliance was further monitored through regular exchanges of confidential information by fax, e-mail and phone, as well as in the unofficial Cuproclima meetings.

(80) Price cooperation, including the exchange of information on customer-specific sales volumes and pricing, was included in the unofficial agenda of the meetings among Cuproclima members at the latest in May 1988. Towards 1993, Cuproclima members also decided to stabilise their market shares and started to disclose these to each other.

(81) While the arrangement involved generally only Cuproclima members, outsiders, such Buntmetall and Desnoyers, also participated in some of its activities in the mid-1990's.

8.2.Un-official cooperation within Cuproclima framework

8.2.1. Conduct of the unofficial meetings

(82) Since May 1988 at the latest, an unofficial agenda was added to Cuproclima meetings. Discussions concerning prices, customers, individual sales volumes and market shares mostly took place the second day of the Cuproclima meeting session after the official agenda had been discussed, at least once in the spring and once in the autumn, and sometimes more frequently.[48]

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47 Note that EM was only an associate member until it joined the Association as a full member in late 1993.

48 File p. 30925-30926; 30954; 30956; (OTK interviews on 5.6.2002, p. 7-8; 36; 38); p. 29852 (OTK letter dated 8.10.2002); p. 23324-23326, 23330-23331 (WW Article 11 reply); p. 28171-28172 (KME Article 11 reply); p. 30991-30992; 30994-30995 OTK interviews on 4.2.2003, p. 3-4 and 6-7.

(83) The regular participants in these meetings were normally the same as in the official board and members' meetings, including the members of the Board of Governors and one or two sales persons of each member. In the autumn period, there were sometimes several meetings concerning price discussions, and the members of the Board of Governors did not always attend these additional meetings.[49]

(84) The unofficial meetings were conducted without documentary support, implying that normally no minutes or agendas were drafted.[50] Nevertheless, certain participants took notes and drafted internal memoranda reporting the discussions and the outcome of these meetings. There was generally no need for the members to communicate among each other to establish an agenda for these unofficial meetings, since they generally followed a similar pattern from one year to another.[51]

(85) In the interviews conducted at the Commission on 6 June 2002 and 4 February 2003, Outokumpu's representatives described the way in which the unofficial meetings were conducted. The usual procedure was that the sales persons started discussions on commercial matters after the official statutory Cuproclima meetings. There was no major difference in the structure and participants of the autumn and spring meetings, but the agenda was slightly different due to the nature of the industry. Contracts with customers are negotiated for the calendar year. In the autumn meetings the participants prepared negotiations with individual customers and set the target prices for the year to come according to their expectations on the market. In the spring meeting they monitored compliance with the agreed targets by analysing the general market information and the development of their market shares.[52]

(86) In addition to the multilateral meetings, there were also phone contacts among the participants to follow up compliance. [53] Occasionally, bilateral contacts by phone took place for practical reasons in cases where only two suppliers were present at certain customers.[54]

(87) The scope of the unofficial discussions concerned primarily ACR-tubes in LWCs, including both smooth tubes and IGT-tubes since 1995. According to KME, no market share targets were agreed for IGT-tubes but only the volume data was exchanged, since any attempt to set market shares would have been ineffective due to the fast changing sales figures in the growing market.[55]

8.2.2. Involvement of outsiders

8.2.2.1. Purpose of invitation

(88) In addition to Cuproclima members, two smaller competitors, Desnoyers of France and Buntmetall of Austria, were invited by Cuproclima to attend certain meetings held

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49 File p. 29852 (OTK letter dated 8.10.2002)

50 The security rules "*no paper, no document, only with disquette"* were clarified in the document entitled "Meeting CC May 17 18 and 19th 1995 Location Chateau de Mirambeau" (WW inspection, p. 9955-62).

51 File p. 30939 (OTK interviews on 5.6.2002, p. 21).

52 File p. 29852 (OTK letter dated 8.10.2002); p. 30940, 30954 (OTK interviews on 5.6.2002, p. 22, 36).

53 File p. 30938 (OTK interviews on 5.6.2002, p. 20).

54 Ibid.

55 File p. 29646 (KME Memorandum dated 17.2.2003, p. 9).

in 1995-1996, although they had not applied for membership.[56] An Italian document submitted by KME with regard to the spring meeting of 1995 specifies that Buntmetall and Desnoyers were not accepted as associate members. It further states that "*the meeting with these two companies will not be with Cuproclima but with the companies constituting Cuproclima*".[57]

(89) The official minutes of a Board Meeting in Zürich on 16, 17 and 18 October 1995 indicate that Desnoyers and Buntmetall were invited to attend Cuproclima meetings under the condition that they "*provide Cuproclima with the usual monthly statistic figures for ACR tubes*" and were, in turn, "*served with the aggregated statistics as established by Cuproclima*".[58]According to Outokumpu, the reason to invite these firms to the meetings was "*to have better control, because with a fairly small market share these companies still had a big impact on prices*".[59] OTK's representative further stated that the attempts to integrate outsiders to the Cuproclima discipline were not successful, since they did not continue the cooperation.[60]

8.2.2.2. Desnoyers

(90) The current parent company of Desnoyers, Mueller Industries Inc., has admitted that Desnoyers took part in a number of meetings organised within Cuproclima in 1995 and 1996, as well as in the exchange of detailed information concerning pricing and volumes for each customer in this context.[61] Desnoyers was never officially member in the Association and therefore it could not attend the official meetings nor could it use the Cuproclima trademark.

(91) Desnoyers attended the following Cuproclima meetings in which, according to Mueller, the participants set target prices and agreed on volumes per customer: Mirambeau, 19 May 1995; Prague, 31 October 1995; Zürich, 25 January 1996; Budapest, 9-10 May 1996.[62] The last time that Desnoyers participated in a Cuproclima meeting was therefore in May 1996.

(92) The involvement of Desnoyers in Cuproclima activities ended when it was taken over by Mueller in May 1997. The official Annual General Members meeting of Cuproclima in Hattenheim (Germany) on 14 May 1998 acknowledged that all contacts with Desnoyers had been ceased and the company had been cleared from the official Cuproclima statistics containing the aggregate sales information.[63]

8.2.2.3. Buntmetall

(93) With regard to Buntmetall's involvement in Cuproclima, Wieland Werke has submitted that the former was only invited to attend a special meeting session of

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56 File p. 22050 (Buntmetall's invitation,); p. 1250 , 1002 (Desnoyers' invitation); p. 22307 (Minutes of the Annual General Members Meeting, Mirambeau, 17 May 1995).

57 File p. 24103 (KME Article 11 reply, Annex 13). Quotation translated from Italian: "*L'incontro con queste due società non verrà fatto dal Cuproclima ma dalle Società che compongono il Cuproclima*".

58 File p. 22315 (Minutes of the Board Meeting, Zürich, 16, 17 and 18 October 1995; not signed).

59 File p. 30948 (OTK interviews on 5.6.2002, p. 30).

60 File p. 30947 (OTK interviews on 5.6.2002, p. 29).

61 File p. 1000-1004 (Mueller submission).

62 File p. 1000; 26059 (Mueller submission).

63 File p. 22360 (official minutes of the meeting).

Cuproclima General Meeting in France in May 1995 (the Mirambeau meeting) as a guest and was, to Wieland's knowledge, not party to any anti-competitive agreements until it was taken over by Wieland in July 1999.[64] According to Outokumpu's statement, Buntmetall's representative would have attended another Cuproclima meeting on 16-17 October 1996.[65]

(94) According to Wieland, Buntmetall delivered its sales data to Cuproclima and got in return the aggregated monthly statistics from it at least since 1996.[66] Buntmetall had applied for membership in 1996 and the members had committed to accept its application.[67] The admission procedure was, however, interrupted in 1997, as the company was not willing to undergo the planned initial plant inspection because of its on-going investments.[68]

(95) With regard to Buntmetall's involvement in the price cooperation, tables (submitted by Mueller) used to fix price targets and price quotation sequences in 1995 and 1996 appear to include Buntmetall, identified with letter "C".[69] Mueller has specified that in some tables Desnoyers may correspond to the letter C and Buntmetall to the letter G. According to KME, the letter C had originally been used to designate […] (later […]) and was not re-allocated after the exit of that company from the industrial tubes market.[70]

9. THE BASIC PRINCIPLES

9.1. Fixing of target prices and other commercial terms

(96) In industrial tubes industry, the total price of the product results from a metal (copper) price element, based on the London Metal Exchange (LME) index, and a conversion price corresponding to the value added in the manufacturing company. Therefore, in addition to the copper price, the customer pays for the added value, i.e.that is to say, processing, plus a certain profit margin. An agreement with the customer is normally made on conversion price. The necessary raw material metal for the manufacturing of industrial tubes is either provided by the customer (so called “tolling”) or by the manufacturing company and then billed (so called “full price”). In full price sales the invoiced price is calculated from the conversion price and the metal price.[71]

(97) The price cooperation within Cuproclima related to the conversion prices, i.e.in other words, to the added value which represents a percentage of the final product value.[72]

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64 File p. 23310 (WW Article 11 reply).

65 File p. 23147 (OTK list); p. 30975-30976 (OTK interviews on 5.6.2002, p. 57-58).

66 File p. 23310 (WW Article 11 reply); p. 22360 (Minutes of the Annual General Members Meeting, Hattenheim, Germany, 14 May 1998).

67 File p. 22321 (Minutes of the Annual General Members Meeting, Zürich, 19 June 1996; not signed).

68 File p. 22341 (Minutes of the Annual General Members Meeting, conference call, 18 December 1997; not signed).

69 File p. 1003 (Mueller submission); 1064-1182 (tables).

70 File p. 29644 (KME Memorandum of 17.2.2003, p. 7, fn. 10).

71 File p. 23336-23337 (WW Article 11 reply); p. 30941 (OTK interviews on 5.6.2002, p. 23).

72 File p. 28185 (KME Article 11 reply); p. 23336-23337 (WW Article 11 reply). See also p. 30941 (OTK interviews on 5.6.2002, p. 23).

The price targets by customer or by country for the coming year were normally set within the context of Cuproclima's autumn meeting.[73]

(98) General announcements for increases in prices in the industrial tubes sector were not made. According to Wieland, this is due to the fact that the purchasers were big industrial companies with which prices were individually negotiated once a year.[74] No general price lists were applied and attempts to create such lists within Cuproclima failed.[75]

(99) In the mid 1990's, the participants used letter-codes in the tables discussed in the Cuproclima meetings to identify each manufacturer for the purposes of comparing the target prices and achieved prices, as follows: A = Outokumpu, B = KM Kabelmetall, C = Buntmetall, D = Wieland-Werke, E = Tréfimetaux, F = Europa Metalli, G = Desnoyers.[76] These tables contained indications as to volumes per producer and per customer and future prices to be achieved, as well as the sequence in which the producers were expected to submit price quotations to each customer.[77]

(100) As examples of more recent price cooperation, WW, KME and OTK have all submitted a price survey in the form of a spreadsheet prepared in an unofficial meeting on 25 May 2000 by the members of Cuproclima.[78] This price survey was a database and pricing sheet used in connection with the price cooperation in 2000 and until its discontinuance in March 2001. In this file, customers were identified by names, with indication of KME's, OTK's and WW's delivered quantities for 2000 and forecasted quantities for 2001, as well as the conversion price increase targets for 2001 broken down by customer and by country (4% or 5,5 % depending on the customer).[79]

(101) Sharp price increases occurred in 1994-1995 and 1999-2000, whereas prices mostly declined in 1992-1993 and 1997-1998.[80] The sharp increases coincide with periods identified by Outokumpu as "two big booms" in the European LWC-market between 1990-2001, the first one being in 1994-1995 when the market grew exceptionally, and the second one in 1999-2000. While the market booms allegedly led to "natural price increases", they also gave the participants an occasion to obtain high concerted price increases. Interviewed by the Commission on 5 June 2002, Outokumpu's representative gave the following answer to a general question regarding the level of target prices:

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73 File p. 30924 (OTK interviews on 5.6.2002, p. 6).

74 File p. 23337 (WW Article 11 reply).

75 File p. 28185(KME Article 11 reply).

76 The letters are explained in Mueller's submission, file p. 1003; see also p. 29644 (KME Memorandum of 17.2.2003, p. 7).

77 File p. 1053-1183 (Mueller submission). KME has also submitted an example of a similar customer-specific table containing, among others, payment terms, target prices and achieved prices for 1995 and 1996; file p. 29644; 30427-30429 (KME Memorandum of 17.2.2003, Annex 9, with explanations).

78 Survey of Fab Prices, attached (with explanations) to OTK letter dated 8.10.2002 (annex 3), file p. 23150-51, 23153-82. The same document is attached as annex 2.5 (c) to WW Article 11 reply, file p. 22987-97 (with explanation of context, file p. 23328-23330) ; see also KME Article 11 reply, file p. 30409-30420.

79 File p. 23150-51 (Annex 3 to OTK letter of 8.10.2002, with explanations).

80 File p. 30632; 30666 (OTK); p. 28173 (KME) .

"*We wanted to understand what the market would be and we set the targets accordingly. There were higher targets and there were very low targets to maintain the price level, and on the other hand there were higher targets like 10 %, 20 or even 30%. We also considered what the starting point was. When the prices were strongly eroded and we expected a market boom, we considered that it might be the situation where we can get something. ... Low prices and good demand expectations were the situations in which high price increases could be obtained*.[81]

(102) Cuproclima members also agreed upon other commercial terms, such as payment terms and consignment stocks. According to Outokumpu's representative, these agreements were not necessarily as precise as the price agreements, and they were often country-by-country because of differences in payment terms in different countries.[82]

9.2.Allocation of market shares and customers

(103) According to Outokumpu, the general objective of the arrangement was to maintain a status quo in the market shares in the main European markets. The market shares were frozen towards 1993 and this lasted "until very recently".[83] In 1995, the members agreed that the market shares of 1994 would be used as the basis for the allocation, calculated from the Cuproclima market share: OTK […] %, KM […] %, TMX […] %, WW […] %, EM […] %.[84]

(104) According to a document provided by KME and identified as unofficial minutes of a Cuproclima meeting, the purpose was to maintain these shares and monitor compliance in the meetings:

"*The market share of 1994 is the one officially accepted by everybody. The market share will be controlled during the meeting of October in order to monitor eventual deviations. In case of market share loss, the reasons for this will be examined and the 1994 market share percentage shall be re-established*."[85]

(105) A compensation mechanism to be applied in case of a market share loss or gain was on the agenda in a Cuproclima meeting in May 1995 but apparently did not lead to an agreement.[86] In its reply to the Commission's Article 11 letter, KME has stated that no punishment mechanism was agreed upon or implemented and deviation occurred frequently. When cheating occurred, the cheated member attempted to gain back lost market shares, for instance, by making competitive offers to the cheater's customers, which led to "price wars".[87]

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81 File p. 30941 (OTK interviews on 5.6.2002, p. 23).

82 File p. 30924-30925 (OTK interviews on 5.6.2002, p. 6-7)

83 File p. 30932 (OTK interviews on 5.6.2002, p. 14); p. 30466-30467 (OTK submission); see also p. 28186 (KME Article 11 reply).

84 File p. 9957, 9962 (WW inspection); p. 24104(KME Article 11 reply).

85 File p. 24104 (KME Article 11 reply): "*La quota di mercato del 1994 è quella ufficiale accettata da tutti. Durante il meeting di Ottobre si controllerà la quota di mercato per cercare di riparametrare le eventuali deviazioni. In caso di perdita di quota di mercato si studieranno le ragioni che la hanno determinata e la % del mercato del 1994 dovrà essere ricostituita."*

86 File p. 30930 (OTK interviews on5.6.2002, p. 12).

87 File p. 28188 (KME Article 11 reply).

(106) The participants agreed also upon allocation of key customers and volumes supplied to them, monitored by customer leadership rules. KME has described the procedure of the customer discussions in the first few years of the functioning of Cuproclima as follows:

> "*A customer's identification number would be called. The manufacturers supplying that customer would answer the call and withdraw from the meeting in order to discuss how to proceed vis-à-vis this customer in terms of pricing, supply quantities and terms and conditions. If another manufacturer also wanted to supply the customer concerned, he would contact Mr. Truog. It was then up to the current supplier(s) whether to grant the manufacturer a supply share with respect to the said customer. In the event that several members simultaneously submitted an offer at the same price, the suppliers agreed that each manufacturer would tell the (usually major) customer that it was only able to deliver a limited quantity of tubes. The remaining quantities could then be supplied by the other manufacturer*."[88]

(107) The customer allocation was also implemented by quoting artificially high prices, if a supplier was approached by a customer that was not allocated to it.[89] In practice, according to Outokumpu, the customer situation changed rather often, but the market shares remained stable throughout the years.[90]

9.3.Monitoring and implementation mechanism

9.3.1. Market leader arrangement

(108) In the mid-1990's the companies appointed "market leaders" who were normally responsible for certain member states. The market leader was the member of Cuproclima with the highest sales of Cuproclima tubes in a certain country.[91] Their task was to monitor customer visits and gather information in their respective territories and to decide upon target price changes, as confirmed by the following description provided in a document concerning the spring meeting of 1995:

> "*The mission of the market leader is to protect the interest of each member as agreed. He has to manage the sequence of the visits, he must be informed before the visit and immediately after the report of the negotiation. Only the market leader can change the targets if necessary and must inform immediately all the Co. s involved. No change to be applied before everybody is informed. In case of disagreement between a member and a market leader the market leader is taking the final decision*." [92]

(109) Accordingly, the market leaders made suggestions for their markets regarding, among others, prices and allocation of quantities and co-ordinated the approach in this market. They also informed the other members of the evolution of the contract situation with individual clients. In practice, before customer visits the other members had to contact the market leader, generally by phone, in order to see what quantity they could sell and

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88 File p. 28186 (KME Article 11 reply); see also p. 30951-30952 (OTK interviews on 5.6.2002, p. 33-34).
89 File p. 30939 (OTK interviews on 5.6.2002, p. 21).
90 File p. 30971 (OTK interviews on 5.6.2002, p. 53).
91 File p. 23324-23325 (WW Article 11 reply).
92 File p. 9961 (WW inspection).

at what price. The other members also had a duty to report individual customer information to the market leader in a given market.[93]

(110) The procedure followed in the implementation of the market leader arrangement has been described as follows in a document entitled "Aims, Targets and Measures" found at Wieland Werke but drafted by Mr. […] (EM): [94]

> "*1. Before visits ask/pick up informations from the [department] in charge of the market (quantity and price-information) 2. Information what will be done (price and quantity) 3. After the visit report to the [department] in charge of Results (price, quantity) including all deviations from the standard (checklist)*".

(111) According to a WW's internal report dated 13 May 1997 concerning the European market situation in Cuproclima tubes, similar rules were applied to leaders of big customer accounts, the responsibility of the customer leader being the same as that of market leaders.[95]

(112) The market leader mechanism was the corner stone in the implementation of the Cuproclima discipline in the mid-1990's. Afterwards since 1999, when there were only three companies left in the Association, the idea of the market leader no longer needed to be agreed upon. The territories were established and the members knew each others' key customers, as confirmed by Outokumpu's representative.[96]

9.3.2. Exchange of confidential information

(113) Compliance was monitored through exchanges of detailed information among Cuproclima members on deliveries, market shares, customers and prices primarily within the framework of Cuproclima meetings as well as by fax, e-mail and telephone. As an example of the early information exchange within Cuproclima, Outokumpu has submitted an internal document dated 2.4.1990 containing its prices, volumes and terms for deliveries to certain LWC-customers 1989-90, with indication of target prices and volumes of certain competitors, identified as Tréfimétaux, LMI [later EM], KMO, Wieland Werke, […].[97] Later, possibly around 1993, the members started to disclose also their market shares to each other.[98]

(114) In the beginning, the customers were identified by number-codes. Each customer's identification number was first known only to its respective supplier, and the exchange of information between the participants took place on the basis of spreadsheets and hand-written statistics.[99] Through this system, the companies present at a certain

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93 File p. 30933-30934; 30972-30973 (OTK interviews on 5.6.2002, p. 15; 54-55); p. 24104 (Annex 13 to KME Article 11 reply); p.23325, 23343 (WW Article 11 reply).

94 "Departments in charge" refer to market leaders; see file p. 8376-78 (context explained in WW Article 11 reply, p. 23345-23346).

95 File, p. 8367 (WW inspection); see also p. 9961 (WW inspection) and p. 24512 (KME submission)

96 File p. 30979 (OTK interviews on 5.6.2002, p. 61).

97 File p. 30544; context explained p. 30466 (OTK submission). OTK has later specified (interviews on 5.6.2002) that this is not a Cuproclima document but an internal document.

98 File p. 28186 (KME Article 11 reply); p. 30931-30932 (OTK interviews on 5.6.2002, p. 13-14).

99 File p. 28186 (KME Article 11 reply); see also p. 30951-30952 (OTK interviews on 5.6.2002, p. 33-34).

customer knew each others' prices and volumes, as confirmed by Outokumpu's representative.[100]

(115) Towards 1994-1995 the system of data exchange was changed and a spreadsheet was created for this purpose. The members started to bring laptop computers to the meetings and the information was exchanged in spreadsheet format on the basis of discs to facilitate data processing and dissemination of the information.[101]

(116) According to KME, the customers' number coding was replaced in 1997 by a system whereby customers' names were identified. In practice, this change had no real impact because, in KME's words, it had always been relatively easy for members to identify the other members' key accounts.[102] From 1998 onwards, the discussions concerned only the 70 largest European customers which, for instance, for Germany were only four or five.[103]

(117) Outokumpu has stated that towards 1999, the Cuproclima members realised that the old spreadsheet created in mid 1990's was no longer valid because of the excessive number of customers. As a consequence, they decided to limit it to the important customers that everybody wanted to discuss.[104] For this purpose, a new format for the price and customer spreadsheet was prepared by Wieland Werke who sent it to the other participants. This spreadsheet could be filled in on disc and laptop during the meetings. This jointly created table was then made available to the members in electronic format.[105]

(118) According to the explanations provided by Wieland Werke,[106] the spreadsheet contained the main European customers of Cuproclima tubes, their demand of the particular sizes as well as additional data, such as packaging and metal price. In this file the current prices, the target prices for particular customer accounts, particular suppliers, particular country and the product size were noted. For each supplier and for every customer the planned quantity was noted. The data file was organised in different product groups (inner grooved and smooth tubes). In addition to the ACR-tubes, other application areas were differentiated (heating devices, electronic appliances, fittings).

10. THE OPERATION OF THE CARTEL IN CHRONOLOGY

10.1. Overview

(119) In the period 1985-2001, the statutory annual Board and General Members' meetings of Cuproclima Association were generally held in the autumn and the spring,

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100 File p. 30952 (OTK interviews on 5.6.2002, p. 34).
101 File p. 30953 (OTK interviews on 5.6.2002, p. 35). KME Article 11 reply, file p. 28186.
102 File p. 28187 (KME Article 11 reply).
103 File p. 28187 (KME Article 11 reply).
104 File p. 30967 (OTK interviews on 5.6.2002, p. 49).
105 File p.30962 (OTK interviews on 5.6.2002, p. 44); see also p. 22987-98, WW's explanation on p. 23328-23330 (WW Article 11 reply).
106 File p. 22991-94; explanation , p. 23328-23329 (WW Article 11 reply).

respectively.[107] The official meetings were normally followed by an "unofficial agenda" containing competition matters since May 1988, at the latest. While deviation from the agreed principles occurred from time to time and there were periods of different intensity with regard to the implementation of the discipline, this unofficial cooperation continued at least until March 2001.

(120) Outokumpu's representatives have confirmed that the same basic pattern of cooperation, i.e.that is to say, setting the target prices in Cuproclima's autumn meeting and monitoring the implementation in the spring meeting, was followed regularly from at least May 1988 until February 2001.[108] From Outokumpu's point of view, there was, however, a so-called "quiet period" in the period 1997-1999, during which agreements on prices were not made (recitals (157)-(167)).

(121) The members of the Association participated regularly in all the Cuproclima meetings, including the unofficial part. Since 1989, when KM replaced Schmöle as full member, the members were TMX, OTK, KM, WW and […] until the spring meeting of 1993. Thereafter Europa Metalli-LMI joined the Association as a full member in November 1993, and […] withdrew from it in 1994.

(122) Prior to its full membership, EM-LMI attended a number of Cuproclima meetings as an associate member. As such, it did not participate in the official Cuproclima meetings the first day of the meeting but attended the unofficial meeting the second day, when the regular discussions on competition issues, such as pricing, market shares and customers, took place.[109] The presence of EM-LMI's representatives in certain meetings prior to the autumn meeting of 1993 therefore indicates that commercial matters were part of the agenda.

(123) The below chronology exposes the evidence and details of the meetings organised within the framework of Cuproclima Association and other relevant competitor contacts relating to LWC-tubes. This discussion does not cover exhaustively all such meetings but it focuses on the "unofficial" meetings in which commercial issues were in the agenda and which the Commission is able to document.

10.2. Details on the meetings and other events

10.2.1. The late 1980's

(124) The earliest evidence on the cartel relates to a Cuproclima Board meeting and an ACR meeting held in Zürich on 3 and 4 May 1988, respectively. Based on the recollection of Outokumpu's representative, the attendant companies were Wieland Werke, Tréfimétaux, Schmöle, […] and Outokumpu.[110] The meeting of May 1988 is also referred to in hand-written notes (with mention "document to be destroyed") found at

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107 Lists of meetings, p. 23312-23320 (WW Article 11 reply); p. 23144-23148 (OTK letter of 8.10.2002); p.28639-28644;28659-28667 (KME Article 11 reply). All meetings are not always mentioned in all the three lists.

108 File p. 30994 (OTK interviews on 4.2.2003, p. 6). See also paragraph (156); p. 30467 (OTK submission).

109 File p. 30975 (OTK interviews on 5.6.2002, p. 57); p. 23309 (WW Article 11 reply); p. 29642 (KME Memorandum of 17.2.2003, p. 5); p. 30991-30993 (OTK interviews on 4.2.2003, p. 3-5)

110 File p. 29855, 23144 (OTK letter dated 8.10.2002).

Tréfimétaux, stating that: "*Since the preceding meeting (May 1988), the pressure from WW and KM has somewhat diminished. ...*"[111]

(125) The notes taken by Outokumpu's representative at the May 1988 meetings show that the price cooperation among Cuproclima members had already started prior to these meetings.[112] It appears from these notes and Outokumpu's explanations relating thereto that Europa Metalli-LMI had been given options of price cooperation, statistical market follow-up and market quota system and that it had expressed its willingness to price cooperation with Cuproclima members by giving the following answers to their questions on the second day of the meeting:

> *"1. LMI wants to cooperate with Cuproclima.*
> *They want price cooperation.*
> *2. They do not want to join now.*
> *LMI is ready for statistical follow-up.*
> *3.They do not want to stop their expansion.*
> *4.Only price and tons go together.*
> *5. Step 1: price cooperation; Step2:other cooperation*".[113]

(126) Based on Outokumpu's notes, the situation in different European markets was examined with indications of percentage price increases in Italy (7-8%), Germany (5%) and Spain (5%). A planned price increase was expressed in the following terms:

> "*September meeting*
> *Metal, Terms, Price*
> *- General increase*
> *- Customer by customer*
> *- LMI is ready for discussion*
> *- PREPARE A CUSTOMER LIST".*[114]

(127) The next spring meeting of Cuproclima took place in Paris on 27 and 28 April 1989 between representatives of […], TMX, Schmöle, OTK and WW.[115] OTK's representative recalls that the regular discussions concerning prices and customers were part of this meeting.[116] An internal report of Wieland's representative concerning this meeting contains individual production figures for 1989 and 1990 for each

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111 File p. 5336 ("document à détruire": "*Dépuis la précédante réunion (Mai 1988), la pression de WW et de KM s'est quelque peu atténuée. ...*").

112 File p. 30096-30112 (OTK inspection); see also explanation p. 29962-29963; transcript provided by OTK p. 29964-29972.

113 Translated from Finnish original; transcript p. 29971 ("*1. Vars. LMI haluaa tehdä yhteistyötä Cuprocliman kanssa. Haluavat hintayhtiestyötä. 2. Eivät halua mukaan nyt. LMI valmis statistiseen seurantaan. 3. Eivät halua lopettaa laajenemistaan. 4. Vain hinta ja tonnit kulkevat yhdessä. 5. 1 askel: hintayhteistyö, 2 askel: muu yhteistyö*"); explanation p. 29963.

114 File p. 30111 (OTK inspection). Quotation translated from Finnish: "*Syyskuun kokous. [English] ... - LMI valmis keskusteluihin. - VALM. LISTA ASIAKKAIKSI ...*"

115 File p. 23314 (WW Article 11 reply); p. 28659-28660 (KME Article 11 reply).

116 File p. 30995-30996 (OTK interviews on 4.2.2003).

member, a discussion on the possibilities of price changes in Southern Europe, as well as LMI's and KM's company-specific supply figures.[117]

(128) According to Outokumpu's recollection, commercial matters were also discussed after the official agenda of the Board meeting in 1989.[118] There may have been a regular Board meeting in the autumn prior to an extraordinary Board Meeting which was held on 1 December 1989 in Paris.[119] By this meeting, KM had replaced Schmöle as member of the Assocation. In addition to full members, a representative of EM-LMI also attended this meeting.[120]

(129) Hand-written notes found at Outokumpu's premises demonstrate that its employee considered that the price cooperation within Cuproclima functioned well in 1989: *"Cuproclima- working fine LMI/OC trust - ...- KMO has applied the prices fairly well …"*[121]. This is followed by notes with regard to LWC tubes: *"- Current situation is good. Demand is high. Prices have been rised. All bigger producers are in line. ...- Cuproclima works well – KMO is not a member neither LMI. RGS is still the member. ...- More contact between responsible persons when pricing etc. ...- WW has lowered their prices*." [122]

10.2.2. The first half of the 1990's

(130) In 1990, the Cuproclima spring meeting was held in Helsinki (Finland) on 26-27 April,[123] and the autumn meeting took place in Zürich on 25 September 1990, with the attendance of all the members (TMX, OTK, KM, WW and).[124] According to Wieland's records, another Cuproclima autumn meeting took place in Zürich on 23 October 1990, but it has no recollection of the participants.[125]

(131) On 5 March 1991 - prior to the Cuproclima spring meeting of 1991 - representatives of Europa Metalli, Tréfimétaux and Kabelmetall held an intragroup (SMI) meeting of a working group "industrial tubes" in Serrvalle among the following participants: Messrs […], […] (EM); […], […] (EMS); […], […], […], […] (TMX); […], […] (KM). A report of this meeting, found at Europa Metalli, shows that while the companies of the group viewed themselves as competitors they made efforts to coordinate their commercial policies:[126]

> "*At the moment, the companies of the group are competitors, and therefore it is necessary that the high level decisions with regard to competition problems be transmitted to the sales forces to ensure greater coordination in the market. The*

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117 File p. 22456-22458 (WW internal report annexed to Article 11 reply); see also p. 29643 (KME Memorandum of 17.2.2003, p. 6).

118 File p. 30925 (OTK interviews on 5.6.2002, p. 7).

119 File p. 28660 (KME Article 11 reply); p. 21998 (WW Article 11 reply).

120 File p. 28660 (KME Article 11 reply).

121 File p. 11435 (OTK inspection; notebook […] 2/89); translated from the Finnish original: "*Cuproclima - toimii hyvin LMI/OC luottamus -... - KMO noudattanut hintoja suhteellisen hyvin...*".

122 File p. 11436 (OTK inspection; notebook […] 2/89 in English).

123 File p. 23318 (WW list). Apart from Mssrs […] and […] (WW) participants are not known.

124 File p. 23314 (WW list).

125 File p. 23318 (WW list).

126 File p. 28012-28015 (EM inspection).

German proposal is to appoint responsible people for coordinated policy within each company in order to circulate the decisions reached in the meetings, such as this one in Serrvalle, inside the sales organization.

...

The companies of the group have to coordinate their policy with regard to the other members of Cuproclima and every time that one of the companies 'does not respect entirely the rules established by Cuproclima' the other companies of the group will be informed and substantially agree." [127]

(132) The Cuproclima spring meeting of 1991 was held in Nice on 19 April. Further to the full members of the Association, EM-LMI participated in the meeting.[128] Outokumpu's representative has given the following statement with regard to this meeting: "*It was clear to me that I had to bring the pricing information and that the prices will be discussed. ... I remember that it was kind of a normal Cuproclima meeting... There was a Board Member Meeting in which mainly the same agenda was gone through. After that, we went on to discuss the prices. In the spring meeting, there was normally discussion to check what kind of contracts people had, and how actually their yearly contract negotiations had gone. There was discussion about the achieved results*."[129]

(133) According to Wieland's records, Cuproclima's autumn meeting was held in Zürich on 25 September 1991. In this meeting, also EM-LMI was represented, which as such indicates that it was an unofficial meeting involving commercial matters.[130]

(134) In 1992, the spring meeting of Cuproclima took place in Venice on 14 May 1992.[131] Representatives of EM-LMI were listed as participants in an unofficial agenda provided by KME in its reply to the Commission's Article 11 letter.[132] The latter contained items such as LWC market development, timing and length of negotiations, results of the last negotiations period, new competitors for LWC tubes and Cuproclima-pricelist, which were not included in the official minutes of the meeting.[133]

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127 Quotation translated from Italian (p. 28013): "*Al momento le società del gruppo sono concorrenti, è necessarioquindi che le decisione di alto vertice sui problemi concorrenziali debbano essere trasmesse alla forza di vendita per una maggiore coordinazione sul mercato. La proposta tedesca è quella di creare dei responsabili di*
politica coordinata all'interno di ogni societa allo scopo di trasmettere all'interno della organizzazione di vendita le decisioni di meetings come quello di Serrvalle. ... E' pacifico che le societa del gruppo debbano concordare la loro politica nei confronti degli altri partners del Cuproclima e che comunque ogni volta in cui una della società "non rispetti interamente la regole stabilite dal Cuproclima" le altre societa del gruppo ne siano informate e siano sostanzialmente d'accordo."

128 File p. 23314; 22459-62 (WW Article 11 reply); see also p. 30950-30951 (OTK interviews on 5.6.2002, p. 33-34).

129 File p. 30950-30951 (OTK interviews on 5.6.2002, 32-33); see also KME statement that it is reasonably likely that commercially sensitive information was exchanged in this meeting, p. 29643 (KME Memorandum of 17.2.2003, p. 6).

130 File p. 23314 (WW Article 11 reply).

131 Annex 16 to KME Article 11 reply, file p. 28696 (official minutes); p. 23145 (OTK list); p.23315 (WW list)

132 File p. 28701 (KME Article 11 reply, Annex 16).

133 File p. 28702 (KME Article 11 reply, Annex 16).

(135) In the autumn meeting of 29-30 October 1992, the attendants were the full members of Cuproclima and the associate member EM-LMI.[134] A document entitled "*Conclusions of the preparation of the next Cuproclima meeting*" dated 23 October 1992, which was circulated at TMX, EM and KM, shows that the companies of the SMI-group were prepared to agree on a price increase in certain countries:*"... We would recommend after a precise check of the attitude of the two above-mentioned companies* [WW and OTK] *to continue the Cuproclima operation. ... Our proposal is practically no increase of prices for Germany, France and the other countries without devaluation, and to focalise our effort to increase the prices at least of 10 % in the countries where the currency was devaluated*".[135]

(136) In 1992, Outokumpu and Europa Metalli had also bilateral discussions with regard to the target prices and the level of price increase.[136]

(137) The next Cuproclima spring meeting was held in Tegernsee, Germany on 13-14 May 1993, between the regular participants and EM-LMI's representatives.[137] According to Outokumpu, EM attended only when markets and statistics were discussed. Outokumpu's internal report concerning the meeting contains, among others, data on consumption in Europe in Q1 1993 as compared to 1992 by specifying the percentages for TMX, WW, POCO, LMI, […] and KM. It further reveals that the participants compared their pricing and agreed on common action with regard to commercial strategies and customer approaches:

> *"*[…] *and* […] *may have been wrong targets as counter-attack for having lost the* […] *deal to compensate the lost quantities. Both WW and TMX have had to decrease their prices.*
>
> *Actions:*
>
> *- We will withdraw from* […] *with regard to smooth tubes (will continue efforts in IGT).*
>
> *- At* […] *we will take the quantities that we had at* […] *but we will not play with metal. We will go through the customer lists and attack those customers that belong to only WW or us. ...*[138]

(138) In 1993, deviation from the agreed target prices occurred. According to KME, at this time the entire industrial tubes sector appears to have encountered some difficulties, facing overcapacity and substantial price declines, which led to difficulties of

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134 File p. 23144 (OTK list); p. 23315 (WW list); p. 28661 (KME list).

135 File p. 29381-29382 (KME Article 11 reply, Annex 19).

136 File p. 30530-30531 (OTK submission).

137 File p. 30533 (OTK submission); p. 23145 (OTK list); p. 23315 (WW list); p. 28662 (KME list).

138 File, p. 30533-30535 (OTK submission). Quotation translated from Finnish: "[…] *ja* […] *ovat ehkä olleet väärät kohteet* […] *-sopimuksen menettämisen vastaiskuina määrien kompensoimiseksi. Sekä WW että TMX joutuivat alentamaan hintojaan, mutta OK ei saanut mitään. Actions: - Vetäydytään* […] *koskien sileitä (jatketaan ponnisteluja IGT:ssä) -* […]*:lta otetaan ne määrät, jotka meillä oli* […]*, mutta ei pelata metallilla. Käydään läpi asiakaslistat ja isketään sellaisille asiakkaille, jotka ovat vain WW:n ja meidän. ..."*

implementation of the price and market share arrangements.[139] The deterioration of "Cuproclima principles" was also noted in the OTK report concerning the spring meeting of 1993 (Tegernsee) which further expressed concern over controlling compliance in the future: "*Before the next meeting we will reassess how the compliance with these principles could be ensured."*[140] In an internal report dated 13 October 1993, WW's representative also complained about the price level of industrial tubes and the price attacks from TMX.[141]

(139) After the Cuproclima Board meeting of 3 November 1993, in which EM-LMI participated for the first time as a full member,[142] the companies of the SMI-group (KM, EM and TMX) held a meeting on 9-10 November 1993 to review the situation of competition.[143] A report concerning this latter meeting, submitted by KME, refers to incidents of competition between KM and TMX and contains an agreement by EM/TMX and KM to coordinate their market behaviour to end the tensions. The report illustrates that TMX had been trying to win market shares from KM by undercutting prices by 10-30% and by giving misleading information. As a result, the parties agreed, by signing a written agreement in this regard, on a new start of cooperation within the group in the following terms: "As since nearly 18 months and after the establishment of EMT hardly any communication has taken place, it was agreed to co-ordinate the markets, volumes and in particular the prices."[144]

(140) Thereafter, WW, KME and TMX met in Stuttgart on 19 November 1993, at the request of WW, in order to discuss Cuproclima's future. The below hand-written notes were found at TMX concerning this meeting: "*Meeting on November 19, 1993 at the request of WW in Stuttgart in view of the bad developments. TMX expressed its position whereupon the aim is to regain lost market shares (because of price discipline). They would nevertheless be prepared to "reactivate" CC* [Cuproclima].*Dr.* […] *understands this position. Another meeting is planned for Jan/Feb 94. Topics in particular: Difference between IGT and smooth tube - IGT 100% above smooth, which impedes turnover of IGT. - Therefore buildup of smooth-prices, so that difference amounts to FF 3-4 p kg (otherwise danger from Japan) Plan: 1. Internal 2. WW 3. OTK ...*"[145]

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139 File p. 28186 (KME Article 11 reply); see also fax from Mr. […] (KM) to Mr. […] attached as Annex 19 to KME Article 11 reply, file p. 25090.

140 File, p. 30533-30535 (OTK submission). Quotation translated from Finnish: "*Cuprocliman periaatteet: Ovat murtuneet kilpailun kiristyessä. Ennen seuraavaa kokousta harkitaan jälleen, miten periaatteita saataisiin paremmin noudatettua. "*

141 File p. 9848 (WW inspection).

142 File p. 23316 (WW list); p. 28662 (KME list); 23145 (OTK list).

143 File p. 29639, 25662-25664 (KME Memorandum of 17.2.2003, p. 2, Annex 2).

144 File p. 25663 (KME Memorandum of 17.2.2003, Annex 2). Quotation translated from German: "*Nachdem seit fast 18 Monaten und seit Bestehen von EMT kaum noch Kmmunikation stattfand, wurde ein neuer anlauf beschossen, die Märkte, Menger und for allem die Preise zu koordinieren."* EMT refers to a common sales organisation between EM and TMX.

145 File p. 27545 (TMX inspection) (at least […] of TMX and […] of WW attended the meeting; other participants are not known); transcript p. 29627-29628 (original in German; English translation provided by KME, p. 29629).

(141) The price cooperation within the Cuproclima Association was strengthened in Turku (Finland) on 4-6 May 1994. Participants from all the members (KM, WW, TMX, […], OTK and LMI) attended this meeting.[146] An internal memorandum drafted by WW's representative on 24 May 1994 demonstrates that the participants agreed to carry out price increases in 1995 and planned to fix delivery quotas with regard to the key customers: *"1) Price increases must be forthcoming; 2) Price assessment for the European market was done; 3) Definition of the steps for price increases in 1995. We assume that, as with the price reduction steps initiated by the Europa-Metalli-Group (TMX) in the past 2 years, no severe changes in the market shares will take place. 4) All CC members take into account that they will lose market share against non-Cuproclima producers. 5) For Key Clients (e.g.* […]*) it will be spoken about delivery shares between the concerned CC suppliers, should need be, but only for these key clients. "*[147]

(142) The results of the Turku meeting were discussed in a document entitled "Conclusions of CC Meeting on 5/6 May"[148] and an internal fax within KM dated 9 May 1994[149]. The participants planned to approach also non-Cuproclima producers with an attempt to define "*a certain price philosophy*". In this context, Cuproclima members declared that *"the highest level of confidence between themselves*" was essential and that they were prepared "*to forget the past and start on this new basis"*. The members decided to accept a possible loss of market share to non-Cuproclima producers "*to give a strong priority to prices*" and agreed to divide among themselves the eventual loss of Cuproclima market share.[150]

(143) After the Turku meeting, internal correspondence within KM reveals that the target prices were to be fixed in the next Cuproclima meeting foreseen for 30-31 May 1994 (Düsseldorf) and in this context an invitation was to be made "*to all non-members for talks about new price-levels*".[151] This meeting was, according to WW's records, held as planned.[152] Whether non-members attended the meeting is not known.

(144) Towards the end of the summer of 1994, an internal fax within OTK dated 22 August 1994 informed of a price increase within Cuproclima as follows: *"...1. The price increase of ACR-tubes in Europe – target 20% (10%-30%. Because of the strong DEM the Germans are in the most difficult situation. We will go along with the price*

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146 File p. 23145 (OTK list) p. 23316 (WW list); p. 28663 (KME list). See also p. 9092 (WW internal report issued by Mr. […] on 24.5.1994).

147 File p. 9092 (WW inspection): *"1. Preiserhöhungen müssen im Vordergrund stehen. 2. Preisliche Bestandsaufnahme pro europäischem Markt wurde durchgeführt. 3. Definition der Preiserhöhungsschritte beginnend für 1995. Dabei gehen wir davon aus, daß sich ebenso wie bei den von der Europa-Metalli-Gruppe (TMX) initiierten Preisreduzierungen in den letzten 2 Jahren auch bei den vorgesehenen Preiserhöhungen keine gravierenden Marktanteilsverschiebungen sich ergeben werden. 4. In Kauf genommen wird von allen CC-Mitgliedern, daß Cuproclima eventuell Marktanteile an Non-Cuproclima-Hersteller verliert. 5. Bei Schlüsselkunden (Beispiel* […]*) wird notfalls auch über Lieferanteile zwischen den jeweils Beteiligten CC-Lieferanten gesprochen, aber nur bei diesen Schlüsselkunden.*"

148 File p. 29377-29378 (KME Article 11 reply, Annex 11); the same document was faxed from TMX to KM on 9.5.1994, file p. 29387-29389.

149 File p. 25089-25090 (KME Article 11 reply, Annex 11).

150 See p. 29377-29378.

151 Fax from Mr. […] (KM) to Mr. […] attached as Annex 19 to KME Article 11 reply , file p. 25090.

152 File p. 23318 (WW list); apart from […] and […], other participants are not known.

increase, which will be very difficult, but I personally see that there are realistic possibilities for a substantial price increase. This requires that none of the Cuproclima members slips. If we see some slipping, we will act "independently" in our best interest and Cuproclima's whole future would be threatened. 2. […] *is "our client" and will also keep it. If* […] *goes along with the "Global Agreement", we will have to take it. (Why is WW dealing with* […]*?). ..."* [153]

(145) A preparatory meeting for the regular autumn meeting of 1994 was held on 6-7 September among the members.[154] […] was no longer within the participants. The results of this meeting are reported in hand-written notes of 8 September 1994 entitled « CC-Meeting 6./7.9.94 », found at Wieland Werke.[155] These notes, which WW has identified as an example of co-operation on prices, conditions and market shares, indicate that price increase targets, basis for market shares and rules for market leaders were agreed upon at this meeting. More specifically, details on the composition of offers including, price formulation, payment and distribution terms, as well as on consignment stocks by member, were reviewed. The participants set a price increase target of 6 % with regard to 1993 prices for the year 1995.

(146) Market leader rules were also defined at this meeting, the territorial responsibilities being: Tréfimétaux: France, Spain; Outokumpu: Spain, Norway, Sweden, Finland, Ireland; Wieland Werke: UK, Benelux; LMI: Italy; KM: Germany, Denmark, Portugal, Swizerland.[156] The market leaders were to prepare, among others, proposals for quantities, new price lists and price increases for 1995, as well as to make available the market information to the other members who provided complete information on the offers and their conditions to the relevant market leader.[157]

(147) In WW, the price increase target of 6 %, set in the September 1994 meeting was implemented by an internal letter dated 12 September 1994 informing its sales personnel on the pricing policy to be followed.[158]

(148) According to Wieland, a Cuproclima meeting was held in Stockholm on 12-13 October 1994, but apart from Wieland's representatives the participants are not

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[153] File p. 11039; 30679 (OTK inspection). Quotation translated from Finnish: *"1. ACR-putkien hinnannosto Euroopassa - tavoite 20 % (10 %-30 %). Vahvan DEM:n takia saksalaiset ovat vaikeimmassa tilanteessa. Me olemme mukana hinnannostossa, joka tulee olemaan todella vaikea, mutta näen omalta osaltani realistisia mahdollisuuksia huomattavaan hinnanostoon. Tämä edellyttää, että kukaan Cuprocliman jäsenistä ei lipsu. Jos lipsumista huomataan, tulemme "itsenäisesti" toimimaan meille parhaalla tavalla ja koko Cuprocliman tulevaisuus on vaakalaudalla. 2.* […] *on "meidän asiakas", jonka tulemme myös pitämään. Jos* […] *menee "Global Agreementiin", meidän on otettava se. (Minkä takia WW "huseeraa"* […] *?)."*

[154] File p. 23145 (OTK list).

[155] File p. 10090-95 (WW inspection); explanation of the context, file p. 23342-23343 (WW Article 11 reply); transcript p. 23109.

[156] Transcript of the notes, file p. 23109-10.

[157] "*Die Marktführer (siehe Protokoll 31.05.94) machen Vorschläge für ihre Märkte bis 30.9.94 □ Preise 1995 (Basis Preise 1993 + 6 %) □ Mengenverteilung (Basis Lieferungern/ Kontrakte 94)*; transcript of the notes, file p. 23109; explanation p. 23342-23343.

[158] File, p. 10087-89 (WW inspection).

known.[159] Thereafter, the regular autumn meeting took place in Zürich on 8-9 November 1994 between all the members.[160]

10.2.3. Redefinition of the "Cuproclima rules" in the mid 1990's[161]

(149) Towards mid 1990's, the arrangement began to take increasingly institutionalised features and meetings were held more frequently. The basic principles were clarified and a number of new rules were established in several significant meetings held in 1995 and 1996. KME has estimated that around five Cuproclima meetings took place in 1995 and around eight in 1996, but all of these meetings cannot be documented.[162]

(150) The principles of the arrangement were further specified in the spring meeting of 1995, held at the Château Mirambeau in France on 17-19 May 1995 (the "Mirambeau meeting").[163] Several detailed documents have been submitted by the participants or found during the Commission's inspections with regard to the Mirambeau meeting which was one of the cornerstone cartel meetings.[164] Further to the regular participants from KME, WW, TMX, OTK and EM, Desnoyers and Buntmetall attended the meeting on the last day of the session. The representative of Desnoyers recalls to have participated in two series of discussions: one concerning industrial standards and the other concerning the market conditions, during which very precise procedural rules were presented (e.g. mobile phone with a Swiss number etc.).[165]

(151) The participants made several significant decisions at the Mirambeau meeting.[166] Among others, the market leaders for the European territories were redefined,[167] and the payment terms for 1996 were set forth as follows: "*A B D E F agree to get 60 days date of invoice net as a max limit"*.[168] Security rules to be followed in the meetings were also established in the following terms: "*portable phones for everybody with central point of invoicing in Switzerland"; "no paper, no document, only with disquette*".[169] The agenda for the last day of the meeting shows that the purpose of the participants was, among others, to set the priority on pricing and agree on possible scheme to compensate the resulting losses in market shares: " *a) priority to margin b) management on risk for volume and market share in favour of prices c) inside the group in case volume goes down : proportionally sharing of losses on volume in favour of prices d) getting the target prices and conditions imply precise rules :- fixation of mini prices per customer and per size -agreement on volume per customer per producer - other commercial conditions... e) for 1996 signal to the market and no*

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159 File p. 23319 (WW list).

160 File p. 23145 (OTK list, excluding Mr. […]); p. 23316 (WW list, including Mr. […]); p. 28663 (KME list, mentioning only […], […] of EM and […] of TMX).

161 The term "Cuproclima Rules" has been used by KME, see file p. 28185 (KME Article 11 reply).

162 File p. 28185 (KME Article 11 reply).

163 File p. 1002 (Mueller list); p. 23146 (OTK list); p. 23316 (WW list); p. 28663 (KME list); p. 18212 (Mr. […] 's travel records).

164 File p. 9955-62; 8376-78 (WW inspection); 1257-1261 (Mueller submission); p. 24506-13 (KME Article 11 reply, Annex 17; document idenfied as "unofficial minutes"); p. 28186 (KME explanation of context); p. 24104-06 (KME Article 11 reply; Italian document).

165 File p. 15894 (Mueller submission).

166 File p. 9955-62.

167 File p. 9958.

168 File p. 9959. The letter-codes are explained in paragraph (99).

169 File p. 9958. Outokumpu and Wieland Werke have specified in their replies to the Statement of Objections that the idea of portable phones was never implemented in practice.

offer before 01/11/95 f) meeting agreed on 31st October 1995 in Prague g) Actions against outsiders must be coordinated inside the Club before individual actions h) Compensation for '97 regarding '96 diverted qtys. Basis 1995 (customers structure). i) The evolution of market share 94-95 for KME is due to specific increases on KM-lbertubos (700 tons) and Viega (2000 tons)".[170]

(152) Shortly after the Mirambeau meeting, representatives of WW, TMX, KM and OTK met in Oslo on 24 July 1995.[171] At this meeting, the participants set a price increase target for 1996 covering LWC tubes for ACR, fittings and boilers.[172] They also reviewed the consignment stocks and discussed the possibility to establish a price list for these products, as well as the security issues to conceal the contacts.[173] The "idea of price increase" was presented in a precise way in a document entitled "Meeting Oslo on July 24 1995", found at Wieland Werke:[174]

		"*ACR*	*FITTINGS*	*REDRAW*	*BOILER*
KM	*%*	*7,5*	*7,5*	*7,5*	*7,5 AVE*
OTO	*%*				
TMX	*%*	*10*	*5*		*5*
EM	*%*				
W	*%*	*10*	*7,5*	*7,5*	*7,5 AVE*"

In this meeting, the parties also decided to gather statistics and manage prices with regard to inner grooved tubes ("IGT"), as evidenced by the document entitled "Meeting Cuproclima in Oslo - 24.7.1995", submitted by KME: "*Prices will be managed as we are doing for smooth tubes. Minimum prices will be established. No limits to higher prices. Quantity limitations are not the case as this market is greatly growing."* [175]

(153) The agenda for the next Cuproclima meeting to be held in Prague on 20 September 1995 included essentially the same items as the Oslo meeting, including, among others '*prices and qty for 1994 and 1995 and prices for 1996, price list"*.[176] After Cuproclima's combined statutory Board meeting and Members' meeting in Zürich on 16-18 October 1995,[177] another Cuproclima meeting was held in Prague on 31 October 1995 where, according to Desnoyers, discussions on prices and volumes of the competitors selling LWC in Europe took place.[178] At this meeting, the participants presented tables containing each producer identified by a letter and each customer by a

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170 File p. 9960-61; see also p. 1051-52; 1257-61 (Mueller submission). According to Desnoyers' representative, this was also the first meeting in which Mr. […] of Buntmetall participated.

171 File p. 23146 (OTK list); p. 23319 (WW list, mentioning only […] and[…]); p. 18286-87 (TMX inspection; travel records of Messrs […] and […]).

172 File p. p. 10117-19 (WW inspection); concording document identified as "unofficial minutes" has been provided by KME, p. 24514-24515.

173 See proposals for price lists covering Cuproclima copper tubes for ACR, fittings and boilers, p. 10103-09 (WW inspection).

174 File p. 10118 (WW inspection). OTO appears to refer to Outokumpu.

175 File p. 24515 (KME Article 11 reply, Annex 13).

176 File p. 24515; p. 23146 (OTK list; participants not mentioned); p. 23319 (WW list; only attendance of […] mentioned).

177 File p. 23146 (OTK list); p. 23317 (WW list); p. 28664 (KME list); p. 18346 and 18353 (travel records of Mr. […] and Mr. […]).

178 File p. 15894 (Mueller submission); p. 23146 (OTK list; participants not mentioned). See also p. 18372-3 (TMX inspection; travel records of Mr. […] and Mr. […]).

numerical code, with indication of prices and volumes for each customer and the targets to be reached. They also indicated for each customer the order in which the producers would approach a particular customer to announce price increases, the dimensions of tube, quotations and payment terms.[179]

(154) Based on Desnoyers' recollection, prices and volumes of the competitors selling LWC tubes in Europe were discussed at a meeting held in Budapest on 9-10 May 1996.[180] Desnoyers recalls to have had an argument with Outokumpu at this meeting because the latter did not respect the "rules" concerning a Desnoyers customer. This was the last meeting in which Desnoyers participated.

(155) In 1996, the statutory annual meetings were held in Zürich on 19 June 1996 and 16-17 October 1996 by the members.[181] According to Outokumpu's meeting list, also Buntmetall's representative may have attended the latter meeting on the first day. Desnoyers had also been invited to this meeting but it informed Cuproclima by fax that it was unable to attend.[182]

(156) Outokumpu's representative has confirmed that there was no material change or difference in the meetings held in 1995 and 1996 compared to the earlier commercial meetings, but similar discussions regarding prices, market shares and customers took place in the unofficial parts of the meetings.[183]

10.2.4. The period 1997-1999

(157) According to a number of internal notes and memoranda collected at Wieland Werke, Outokumpu was acting aggressively on various European markets and caused a decline in prices towards 1997.[184]

(158) Outokumpu has submitted that, from its point of view, there was a "quiet period" of about two or two and a half years from 1997 to late 1999. It has specified that *"the normal activities of Cuproclima", such as the development of new technical specification*, still continued *"but the commercial cooperation including the discussions on price targets and market shares etc. was discontinued during this period*".[185] Outokumpu's representative has further explained the quiet period as follows: "*When no agreements basically were made, and prices were not discussed. There was a sort of joint decision to stop it.... I can't remember now who took the initiative, but it was a sort of joint decision anyway. We realised that we couldn't manage the prices."*[186]

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179 File p. 26059 (Mueller submission).

180 File p. 26059; 12144-45 (Mueller submission). For attendance, see file p. 23146 (OTK list; participants not mentioned); 11630-34 (Mr. […] 's travel records); p. 18674 (Mr. […] 's travel records); 23319 (WW list mentioning Messrs […],[…] and […])

181 File p. 23147 (OTK list); p. 28665 (KME list); 23319 (WW list; only October meeting mentioned).

182 File p. 1269 (Mueller submission).

183 File p. 30974 (OTK interviews on 5.6.2002, p. 56).

184 File p. 9849-51 (internal memo dated 4.12.1996); p. 8374 (a fax dated 9.4.97); p. 8375 (hand-written notes).

185 File p. 29852 (OTK letter dated 8.10.2002).

186 File p. 30927 (OTK interviews on 5.6.2002, p. 9); see also p. 29852 (OTK letter dated 8.10.2002).

(159) Outokumpu's recollection with regard to the beginning of the quiet period is not entirely certain, but it has estimated that it began some time at the beginning of 1997.[187] One of its representatives recalls to have participated in a meeting in Zürich in January 1997 in which the other attendants refused to continue the meeting because of Outokumpu's presence: "*they didn't want any cooperation with Outokumpu anymore because Outokumpu had not obeyed the rules*."[188]

(160) Based on Outokumpu's recollection, the "*discontinuance of commercial cooperation under Cuproclima*" may have been discussed in a Cuproclima meeting held in London on 11 April 1997.[189] The participants in this meeting included only the higher level representatives of OTK, TMX, KME and WW.[190]According to WW's internal memorandum regarding this meeting ("Cuproclima-Meeting London am 11.04.97"),[191] classified as '*confidential, please destroy after reading',*[192] the participants agreed to explore ways to continue their cooperation in controlling the European market. It reports that KME and Wieland Werke had complained about Outokumpu's aggressive actions on the market and Outokumpu had been unable to explain why it had attacked WW's customers. The regular discussions of the sales volumes and individual market share developments as well as general price level in Europe were summarised in WW's memorandum. The future of Cuproclima cooperation was one of the items discussed in the meeting, and Outokumpu is noted to have expressed its willingness to manage the European market jointly:

> *"To the clear question, what Outokumpu's future strategy was going to be like in the European market, Outokumpu/*[...] *answered that Cuproclima European market should continue to be jointly managed. This should be kept like that, in spite of the fact that the Cuproclima association has lost some of its weight, on the one hand because the KME group was formed and on the other hand Outokumpu was very concentrated with its ACR tube manufacturing and global marketing (USA, China, Malaysia).* [...] *thought that there were certainly other ways to manage the market. This fits perfectly well with the perception of the other Cuproclima members, the KME group and WW. The way in which the "market management" within Cuproclima is going to take place still has to be defined. ... It was decided that the participants would attempt to come up with concrete ideas about this subject for the next Cuproclima meeting. ..."*[193]

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187 File p. 29852 (OTK letter dated 8.10.2002).

188 File p. 30955-30956 (OTK interviews on 5.6.2002, p. 38).

189 File p. 29854 (OTK letter dated 8.10.2002).

190 File p. 8370 (WW inspection; internal report); p. 23147 (OTK list); p. 23319 (WW list); p. 19291 (Mr. […] 's traveling records).

191 File p. 8370-73 (WW inspection).

192 "*Vertraulich, bitte nach Lektüre vernichten*".

193 Quotation translated from German: "*Auf die klare Frage, wie Outokumpu sich in Zukunft in Europa marktstrategisch zu bewegen gedenkt, kam von Outokumpu/[…] die Auslage, man sollte sicher weiterhin den CuprocIima®-Europamarkt gemeinsam managen. Dies obwohl die Gewichte in der Cuproclima®-Vereinigung verschoben seien, indem die KME-Gruppe sich formierte und andererseits Outokumpu in seiner ACR-Rohr-Fertigung und auch im Marketing global denke (USA/ VR-China, Malaysia).* […] *meinte aber, es müßten andere Wege gefunden werden zum Marktmanagement. Dies kommt auch den Vorstellungen der übrigen Cuproclima®-Mitgliedern, also KME-Gruppe + WW, entgegen. Es muß also Jetzt definiert werden, wie das "Marktmanagement" Cuprodima fortgeführt werden soll. ... Es wurde festgelegt, daß die Teilnehmer sichkonkret darüber noch Gedanken machen bis zum nächsten Cuproclima®-Meeting."*

(161) The next meeting was planned for 12 May 1997 and, according to Wieland Werke's list of meetings, it was also held on that date.[194] Earlier correspondence in March 1997 between KME and TMX concerning this meeting shows that TMX' representative proposed that Outokumpu be invited only for the first day of the meeting.[195] The first day of the meeting was normally reserved for the official meeting of the Association. This suggests that the other members would have continued the commercial discussions that typically took place after the first day, but Outokumpu would have been excluded from these discussions.[196] In March, KME's proposal was to wait until the result of the meeting in London on 11 April 1997 and "*after clarification of some principles*".[197]

(162) On 28 August 1997, a TMX employee faxed a draft agenda for a non-identified Cuproclima Zurich meeting to Wieland Werke, including items such as price lists by segments/areas, and customers review.[198] The Annual General Members' Meeting was organised as a conference call on 11 September 1997 among the regular participants of the members.[199] It was followed by another meeting among the same participants in Zürich on 18 December 1997.[200] In addition to these meetings, Wieland Werke has mentioned the following Cuproclima meetings in 1997 of which no official minutes or other information is available: 4 September 1997, 16 October 1997, 30 October 1997, 20 November 1997.[201]

(163) In 1997 and 1998, exchanges of confidential information among the Cuproclima members still occurred. For instance, in December 1997 KME[202] and Europa Metalli[203] faxed their individual monthly delivery figures concerning the year 1997 to Wieland Werke. Wieland Werke also faxed its internal LWC price list to KME on 4 September 1997.[204]

(164) In 1998, at least the regular spring and fall meetings were held. The Annual General Members meeting among all the members was held in Hattenheim/Eltville (Germany) on 14 May 1998.[205] Outokumpu's representative recalls that: "*It was a more technical type of meeting and a check-up of the market situation. Due to the fact that it was a spring meeting, I don't recall that any individual prices were discussed.*"[206] Outokumpu's representative has also stated the following: "*I think we might have compared data. I'm not saying that we wouldn't compare the statistics which we*

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194 File p. 21200 (apart from […], other participants are not known to WW).
195 File p. 6365 (TMX inspection).
196 This is KME's believe, although it was unable to clarify the issue, as Mr. […] has already left TMX (see file p. 28196, KME Article 11 reply).
197 File p. 6365 (TMX inspection).
198 File p. 10068 (WW inspection) ; see also Mr.[…] travel records, p. 19495.
199 File p. 23147 (OTK list); p. 23317 (WW list); 28665 (KME list).
200 File p. 23147 (OTK list); p. 23317 (WW list); 28665 (KME list).
201 File p. 23320 (apart from […], who attended the meetings of 4.9. and 20.11., other participants are not known to WW).
202 File p. 23048 (WW Article 11 reply, Annex 2.6 (b)).
203 File p. 23049 (WW Article 11 reply, Annex 2.6 (b)).
204 File p. 25324-25 (KME Article 11 reply, Annex 22).
205 File p. 23148 (OTK list); p. 23317 (WW list; mentioning certain additional participants); 28666 (KME list); p. 28776 (Annex 16 to KME Article 11 reply).
206 File p. 30957 (OTK interviews on 5.6.2002, p. 39).

created. I'm referring to those price agreements."[207] KME's employees recall that the main purpose of the Hattenheim meeting would have been to "*re-motivate the Cuproclima members, possibly due to previous tensions among group members or the ineffectiveness of the meetings"* and that "*...It is possible that there were complaints about price cuts or the stealing of customers relating to the year 1997. A few individual customers may also have been discussed. The exchange of commercially sensitive information does not, however, appear to have been the focus of the meeting in Hattenheim."*[208]

(165) The second day of the Hattenheim meeting, 15 May 1998, has been identified as a "*Statistics and Marketing meeting*" in an internal memorandum found at Wieland Werke.[209]Like the first day of this meeting session, representatives of Wieland, TMX, KME, EM and Outokumpu attended also this meeting. This internal report contains, among others, discussion regarding competition from outsiders (Halcor, Feinrohren, Desnoyers, BZC and others) as well as individual market share developments for Cuproclima members in 1997 and the first three months of 1998, as compared to 1994 in the following table 3:[210]

Table 3 - Market development of Cuproclima members according to Cuproclima statistics

	1994 (Basis) jato	**MA %**	**1997** jato	**MA %**	**1998 1-3** jato	**MA %**
Outok./ SF	[…]	[…]	[…]	[…]	[…]	[…]
Outok./ E	[…]	[…]	[…]	[…]	[…]	[…]
KME	[…]	[…]	[…]	[…]	[…]	[…]
EM	[…]	[…]	[…]	[…]	[…]	[…]
TMX	[…]	[…]	[…]	[…]	[…]	[…]
WW	[…]	[…]	[…]	[…]	[…]	[…]
BMA	[…]	[…]	[…]	[…]	[…]	[…]

207 OTK interviews on 5.6.2002, p. 11.
208 File p. 29644-29645 (KME Memorandum dated 17.2.2003, p. 8.)
209 File p. 8344-56 (WW inspection).
210 File p. 8348.

∑ EURO PA	44 610	52 679	15 662

(166) According to KME and WW, the autumn meeting of 1998 was held in Zürich on 15 October 1998 among the members.[211] As to the spring 1999, none of the members has any specific recollection about a possible spring meeting.[212]

(167) Concerns over the future of Cuproclima were expressed at Wieland Werke in the following terms: "*No change to the positive to be expected, as outsiders continue to invest and the fight among CC-members for market shares is not to stop. No basis for trust among CC-members. Hence, mutually agreed detailed agreements, as done in the past, do not work any more."*[213] In an agenda found at Wieland, identified by the latter as an internal document prepared around 1999, Wieland explored the ways in which Cuproclima cooperation could be continued and made references to "*Agreement amongst members with regard to each members market shares and strategic customers (status quo?"* and "*Agreement amongst members with regard to 2000 fab price increase*".[214]

10.2.5. The final period 1999-2001

(168) Based on KME's recollection, around eight "working group" meetings were held between June 1999 and autumn 2000 in which Cuproclima members discussed in detail market shares, prices and customers.[215] These meetings related to the major European markets of industrial tubes subject to official Cuproclima meetings but were held outside the regular statutory meeting schedule. The first of these meetings was held in Essen in June 1999 between the representatives of WW and KME. There were also other bilateral meetings between WW and KME in the summer of 1999. Outokumpu joined these meetings some time later. The exact dates of these meetings are not known, but their locations were in Münster, Zürich, Düsseldorf and Frankfurt.[216] According to KME, in these working group meetings the participants discussed prices charged to individual customers broken down by product type and tube length, as well as market shares and targets for the following year. The main purpose was "*to discuss the Cuproclima arrangements in more detail and intensify the exchange of information, for instance, by discussing customers not discussed in Cuproclima*".[217]

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211 File p. 23317 (WW list); 28666 (KME list).

212 File p. 23148 (OTK list); p. 23317-23318 (WW list); 28666 (KME list).

213 A note dated 25.3.1999, WW inspection, file p.9891. Translated from German: "*Änderung zum Positiven kaum zu erwarten, da die Outsider weiter investieren und der Kampf um die Marktanteile innerhalb der CC-Mitglieder nicht zu bremsen ist. Keine Vertrauensbasis unter den CC-Mitgliedern. Insofern sind einvernehmliche Detailregelungen auf breiter Basis, wie früher gehandhabt, zum Scheitern verurteilt.“*.

214 File p. 9889-90 (WW inspection); context explained in WW Article 11 reply, p. 23349.

215 KME Article 11 reply, file p. 28189.

216 Ibid.

217 Ibid.

(169) In addition, according to KME's statement WW and KME, and to a lesser extent Outokumpu, had regular contacts mostly over the phone to discuss individual customers or prices. These calls took place on a regular basis until 1999, and occurred less frequently thereafter until they completely stopped in March 2001.[218]

(170) Outokumpu recalls that after the "quiet period" the price cooperation recommenced in the context of the regular Cuproclima meetings and a new spreadsheet was created for this purpose later in 1999, with a price increase target of 4 % within Cuproclima.[219] The specific meeting at which this took place may have been the meeting held in Zürich on 27 August 1999 between the representatives of OTK, WW and KME.[220]

(171) Wieland Werke recalls that there was a Cuproclima meeting in Düsseldorf on 7 October 1999, but the exact points of discussion are not known to it.[221] This may have been the same meeting that KME has identified as a "working group meeting" above in recital (168).

(172) In 2000, two Cuproclima meetings were organised in the spring. The first one was, according to Wieland, held in Zürich on 7 April 2000 between OTK, WW and KME.[222] It was followed by an unofficial meeting held in Zürich on 25/26 May 2000.[223] According to WW's records, the meeting was attended by WW, KME and OTK. In this meeting, the members prepared a "Survey of fab prices" and agreed upon price increase targets between 4% and 5,5% (depending on customer) for 2001, broken down by customer and by country.[224]

(173) The autumn meeting of 2000 took place in Zürich on 2-4 August.[225] According to Outokumpu, this was a preparatory meeting in which a new customer file was created.[226] The recollection of Outokumpu's representative of the specific discussions is the following: "*We discussed the prices and the targets for the next year and I think at that point we condensed the customer base. We did not want to discuss about so many customers but condensed it to the key customers. Then we discussed that group of key customers separately and also a more transparent database was established at that point*."[227]

(174) An additional meeting between KME, OTK and WW was organised on 1.9.2000.[228] Outokumpu recalls that the purpose of this meeting was to finalise the database and the spreadsheet which was delivered to every company through e-mail by Mr. […] (KME).[229]

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218 Ibid.
219 File p. 29852 (OTK letter dated 8.10.2002).
220 For lists of participants, see file p. 23148 (OTK list); p. 23318 (WW list); 28666-28667 (KME list).
221 File p. 23320 (WW list). The meeting is listed as "*Cuproclima-Treffen (ohne genaue Daten und Besprechungspunkte)"*.
222 File p. 23318 (WW list).
223 File p. 23320 (WW list); 30409-30420 (KME Article 11 reply).
224 File p. 23150-51, 23153-82, 22987-97, 30409-30420.
225 File p. 23148 (OTK list); p. 23318 (WW list); 28667 (KME list; Messrs […] and […] not included).
226 File p. 29854; 23148; 23150-82 (OTK letter of 8.10.2002).
227 File p. 30943 (OTK interviews on 5.6.2002, p. 25).
228 File p. 23148 (OTK list); p. 23320 (WW list includes […], […], […], […], […], […]).
229 File p. 29854 (OTK letter of 8.10.2002).

(175) The last known Cuproclima meeting in which commercial issues were discussed was held in Zürich on 2 February 2001.[230] Based on the recollection of OTK's representative: "*It was a kind of a follow-up meeting and maybe we exchanged the market information*".[231] KME's internal document "Minutes 02.02.01", prepared on the basis of Cuproclima figures, consists of tables containing the individual and aggregated market share and sales volume data for KME, WW and OTK for 1998-2000, and projections for 2001-2003, separated for Cuproclima smooth tubes and IGT-tubes.[232]

(176) Following the Commission's inspections on 22-23 March 2001, the members have declared that the co-operation within Cuproclima Association was entirely suspended.[233] The president of the Board of Governors resigned in December 2001.[234] According to Wieland Werke's statement, the Association has been in the process of liquidation at its initiative since March 2001.[235]

E. APPLICATION OF ARTICLE 81(1) OF THE TREATY AND ARTICLE 53(1) EEA

11. ARTICLE 81 (1) OF THE TREATY AND ARTICLE 53 (1) OF THE EEA AGREEMENT

11.1. Applicability

(177) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

(178) Article 53(1) of the EEA Agreement contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced in the EEA Agreement by a reference to "trade between Contracting Parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by the…[EEA] agreement".

(179) The EEA Agreement came into force on 1 January 1994. In so far as the arrangements prior to that date restricted competition in Austria, Finland, Iceland, Liechtenstein, Norway or Sweden (then EFTA Member States) they will not be regarded as a

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230 File p. 23148 (OTK list); p.23320 (WW list).
231 File p. 30944 (OTK interviews on 5.6.2002, p. 26).
232 File p. 30422-30425 (KME Article 11 reply, Annex 17; explanations provided in KME Memorandum of 17.2.2003, Annex 10).
233 File p. 28187 (KME Article 11 reply); p. 29853 (OTK letter dated 8.10.2002); p. 23311 (WW Article 11 reply).
234 File p. 28647-28648 (KME Article 11 reply, Annex 14).
235 File p. 23311, 23327 (WW Article 11 reply).

violation of Article 53(1) of the EEA Agreement. For the period preceding that date, the only provision applicable to the present proceedings is Article 81 of the Treaty.

(180) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the Treaty became applicable to the arrangements in so far as they affected competition in those markets. The operation of the arrangements in Norway and Iceland remained in violation of Article 53(1) of the EEA Agreement. In practice, it follows that in so far as the cartel agreements operated in Austria, Finland, Norway, Sweden and Iceland they constituted a violation of the EEA and/or Community competition rules as from 1 January 1994.

11.2. Jurisdiction

(181) The Commission is the competent authority to apply both Article 81(1) of the Treaty and Article 53(1) of the EEA agreement on the basis of Article 56 of the EEA Agreement. In this case the turnover of the parties achieved in the territory of the EFTA states is less than 33% of their turnover in the EEA, and the primary effects of the arrangements in question are on trade between Member States and on competition in the Community. The effect on trade between Member States was shown in recitals (54) and (55)

12. THE NATURE OF THE INFRINGEMENT

12.1.1. Agreements and concerted practices

(182) An *agreement* for the purposes of Article 81(1) of the Treaty can be said to exist when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their respective action (or abstention) on the market.[236] It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties, since a line of conduct may be evidence of an agreement. If an undertaking is present at meetings that have a manifestly anti-competitive purpose, unless it publicly distances itself from what is agreed, it will be considered to be a party even if it does not in fact abide by the outcome of the meetings.[237] Furthermore, it is not necessary, in order for there to be an infringement of Article 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty may apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(183) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" can properly be applied not only to any overall plan or to the terms expressly agreed upon but also to the implementation of what has been agreed on the basis of the same

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236 The case law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See recitals No 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement..

237 Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 232.

mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgement of the Court of First Instance, has pointed out in Case C-49/92P *Commission v Anic Partecipazioni SpA*[238] infringement of Article 81 (1) of the Treaty may result not only from an isolated act but also from a series of acts or from continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of that article.

(184) Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of *"concerted practice*" and that of "*agreements between undertakings***".** The object of the Treaty in creating the notion of concerted practice is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[239]

(185) The criteria of co-ordination and co-operation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which it intends to adopt in the common market. Although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[240]

(186) Although in terms of Article 81(1) of the Treaty the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active on the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81 (1) of the Treaty even in the absence of anti-competitive effects on the market.[241]

(187) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 (1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure

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238 See [1999] ECR I - 4125, at paragraph 81.

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

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

241 See also Case C-199/92 *P Hüls v Commission*, [1999] ECR I-4287, at paragraphs **161-162**.

that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.[242]

(188) However, in the case of a *complex infringement* of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement.

(189) In its *PVC II* judgement, the Court of First Instance confirmed that "*[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty*".[243]

12.1.2. Single and continuous infringement

(190) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81(1) of the Treaty.

(191) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries or cheating may occur, which will not, however, prevent the arrangement from constituting an agreement or a concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

(192) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in

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

243 *Limburgse Vinyl Maatschappij NV et al. v. Commission,* joint cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECR [1999], p. II-00931, para. 696.

question was aware of the offending conduct of the other participants or could have reasonably foreseen it and that it was prepared to take the risk.[244]

(193) In fact, as the Court of Justice stated in its judgement in Case *C*-49/92 P ***C****ommission v Anic Partecipazioni*[245], the agreements and concerted practices referred to in Article 81 (1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that infringement of that article may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves an infringement of Article 81 of the Treaty.

(194) The fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 81 (1) EC. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

12.1.3. Nature of the infringement in this case

12.1.3.1. Agreement and/or concerted practice

(195) The facts described in Part D demonstrate that during the period 1988-2001 Outokumpu, Wieland Werke, Tréfimétaux, Europa Metalli and KME made the following arrangements with regard to the European market of LWC tubes:

- agreed upon target prices by country and/or by customer and updated these target prices on a yearly basis with the view of arriving at identical or similar prices for these products;
- agreed upon percentage price increases;
- agreed upon delivery and payment terms;
- allocated customers and stabilised market shares and sales volumes by customer and/or by country;
- ensured implementation of the price agreements and the market allocation by a monitoring system consisting of a market leader arrangement for various European territories and major customers, as well as by regular exchanges of confidential information.

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244 Case C-49/92 P, *Commission v Anic Partecipazioni*, [1999] ECR, I-4325, paragraphs 78-81, 83-85 and 203.

245 Ibid, paragraph 79.

(196) This overall scheme qualifies as an "agreement" between undertakings within the meaning of Article 81 of the Treaty in the sense that in their unofficial meetings within Cuproclima Association the undertakings concerned expressed their joint intention to conduct themselves on the market in a specific way, as the evidence exposed in Part D demonstrates.

(197) Furthermore, even though it is not necessary to show that the participants had agreed in advance upon a comprehensive common plan, the description of the overall scheme in Part D demonstrates that Cuproclima members agreed upon such a comprehensive plan in their unofficial meetings which were normally organised after the official meeting sessions of the Association at least twice a year. Price cooperation, as well as customer and market allocation, together with a monitoring system to ensure compliance with the common rules, were all parts of this overall plan. The common aim of this plan was to control the European market for industrial tubes. Indeed, this was explicitly expressed at several occasions (see e.g. recitals (89), (152) and (160)).

(198) The term "agreement" applies not only to the overall plan but also to the implementation of what had been agreed in pursuance of the same common purpose of controlling the market. One of the actions taken to implement this overall plan was the appointment of market leaders who monitored customer visits and informed the other cartel members of the evolution of the contract situation within their respective territories (recitals (108) to (112)). Moreover, the parties created spreadsheets and customer-files in order to facilitate the dissemination of the market information, which enabled to review implementation of the price targets and customer allocation (recitals (100) and (114) to (118).

(199) Some factual elements of the illicit arrangement could also aptly be characterised as a concerted practice. While there was clearly an agreement behind the action taken to ensure implementation through the market leader arrangement and the exchange of confidential information, the operation of this arrangement through the actual regular exchange of the sales volume, price and customer information between the undertakings could also be regarded as adherence to a concerted practice to facilitate the coordination of the parties' commercial behaviour. Through this, the producers in question were able to monitor the current prices, customer visits and market shares in order to ensure adequate effectiveness of the agreement as well as the joint control of the market.

(200) In view of their identical purpose, the various agreements and concerted practices formed part of a scheme of fixing the target prices and market shares and monitoring compliance in the competitor meetings and through telephone contacts as well as through exchanges of faxes and electronic data. This scheme was part of a series of efforts made by the undertakings in question, in pursuit of a single economic aim, namely to distort the normal movement of prices on the market. It would thus be artificial to split up such continuous conduct, characterised by a single purpose. The fact is that the participants took part - over a period of more than ten years - in an integrated scheme constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices.[246]

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246 Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraphs *259-260.*

(201) On the basis of the above considerations, it may be concluded that the complex of behaviours conducted by Outokumpu, Wieland Werke, KME, Tréfimétaux and Europa Metalli in this case present all the characteristics of an agreement and a concerted practice in the sense of Article 81 of the Treaty.

12.1.3.2. Continuity of the infringement

(202) With regard to the period 1997-1999, defined by Outokumpu as a "quiet period" from its point of view and during which no agreements on prices were made, the Commission notes that, prior to receiving the Statement of Objections, the other participants had not identified the existence of such a period. Rather, KME's statement refers to customer discussions among Cuproclima members in 1997 and 1998.[247] Wieland Werke, in turn, has stated that in 1997 and 1998 the members had increasing doubts on whether Cuproclima was a practical forum for communication among themselves, as they could not manage to stop the price decline.[248]

(203) It is apparent from the facts that the tension inside the cartel was largely caused by Outokumpu's price cutting actions and attacks at the other members' customers during this period, as shown in recitals (157), (159) and (160). Indeed, the other parties considered its exclusion from the cartel arrangement at this point, which apparently also occurred to some extent (recital (161)). The mutual trust among Cuproclima members appears to have suffered a loss, and towards 1999 at least Wieland Werke explored ways in which this trust could be re-established (recital (167)).

(204) The Commission has established that Outokumpu, Wieland Werke, KME and its subsidiaries Europa Metalli and Tréfimétaux continued to have their regular meetings within the Cuproclima Association during this period, including also some "unofficial" discussions beyond the scope of the official trade association activities. Such discussions involving all the Cuproclima members took place at least in April 1997 (recital (160)) and possibly in May 1998 (recitals (164) to (166)). Furthermore, exchanges of confidential information still took place during this period (recitals (163) and (169)). Accordingly, Cuproclima was still used as a forum to discuss the members' commercial strategies and the market situation not only in aggregate but also in individual terms.

(205) The Commission highlights that it is settled case law *"that the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*".[249] Even assuming that the applicant's conduct on the market was not in conformity with the conduct agreed, that in no way affects its liability for an infringement of Article 81(1) of the Treaty.[250] Such distancing would have had to take the form of an announcement by the company that it would take no further part in the

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247 File p. 28187 (KME Article 11 reply).

248 File p. 23325-23326 (WW Article 11 reply).

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

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

meetings (and therefore did not wish to be invited to them). It does not appear that any of the companies involved in this proceeding ever adopted this course of action.

(206) It may well be true that no agreements with regard to prices were made during this period. This does not, however, imply that the infringement would have been totally suspended or terminated with regard to all of its elements, which has not even been claimed. There is no evidence that any of the participants would have formally ended its involvement in the cartel or publicly demonstrated its divergence and willingness to terminate the infringement. To the contrary, at a meeting among Cuproclima members in April 1997 Outokumpu itself clearly and explicitly expressed its willingness to continue the common control of the European LWC-tube market, as appears from recital (160). The Commission has no evidence on a joint decision to stop the cooperation on commercial matters at that point. It is apparent in recitals (159) to (161), that Outokumpu did not manifest its willingness to terminate the cartel, but the others excluded it from certain unofficial discussions because of its misbehaviour on the market.

(207) It is therefore apparent that this period can be more appropriately viewed as a period of crisis resulting from mistrust and tension between the cartel participants, rather than termination of one infringement and starting another. It is natural that the discussions over a longer than a twelve-year period may have involved a shifting constellation of undertakings, their respective importance in the cartel may have varied, and there may have been a period of tension including a return to more competitive prices. If the agreed price levels broke down, this was a result of a power struggle and deviation inside the cartel, not of any desire to return to conditions of free competition.

(208) The period of mistrust with regard to Outokumpu ended at the latest in the summer of 1999 when Outokumpu, Wieland Werke and KME set common price targets for 2000 (recitals (168)-(170)). Cuproclima members finally realised that the power struggle was self-defeating and returned to their regular discussions and agreements relating to prices, customers and market shares within the framework of this Association. This indeed occurred after the crisis ended in 1999.

(209) There is a clear continuity of method and practice of the cartel scheme throughout the entire period 1988-2001. When the mutual trust among the participants was re-established in 1999, the European LWC-tube market continued to be discussed in the same forum, in the regular meetings within the context of Cuproclima, by the same undertakings and even by the same representatives of the respective undertakings (recitals (170)-(175)). The major difference in this regard was that since the autumn meeting of 1999 KME group membership replaced the previous individual membership of TMX, KME and EM. There was also a change in the form and scope of the data exchange, but the basic principles with regard to the fixing of target prices and monitoring customer information and market data in connection with Cuproclima meetings remained the same.

(210) Given the common design and common objective of the parties' conduct, the Commission observes that while the infringement constituted a continuous infringement, its intensity and effectiveness varied over the duration of the time period covered. The producers steadily pursued a common objective of restricting competition in the LWC-tube industry. Consequently, it may be concluded that the conduct in question constituted a single *continuous* infringement of Article 81(1) of

the Treaty in which each participant must bear its responsibility for the duration of its adherence to the common scheme.

(211) On the basis of the above, the anti-competitive arrangements between Outokumpu, Wieland Werke, KME, Tréfimétaux and Europa Metalli continued from at least 3 May 1988 to 22 March 2001. The infringement can thus be taken as a whole to constitute a prohibited 'agreement' in terms of Article 81 of the Treaty. In any event, even if the concept of 'agreement' does not apply for the whole period of the infringement, the conduct in question during the power struggle still falls under the prohibition of Article 81 as a concerted practice.

(212) The Commission therefore considers that the there was a single and continuous infringement from 3 May 1988 to 22 March 2001.

13. RESTRICTION OF COMPETITION

(213) Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which[251]:

- directly or indirectly fix selling prices or any other trading conditions;
- limit or control production, markets or technical development;
- share markets or sources of supply.

(214) Specifically, the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants in a cartel to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.[252] More generally, such cartels involve direct interference with the essential parameters of competition on the market in question.[253] By expressing a common intention to apply a given price level for their products, the producers concerned cease independently determining their policy in the market and thus undermine the concept inherent in the provisions of the Treaty relating to competition.[254]

(215) In this case, agreeing upon target prices, percentage price increases as well as other commercial terms, such as delivery and payment conditions, are examples of the fixing of prices and other trading conditions. By planning common action on price initiatives with price increases and target prices as well as other trading conditions for an agreed period of time, the undertakings aimed at eliminating the risks involved in any unilateral attempt to increase prices, notably the risk of losing market share. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at inflating prices to

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251 The list is not exhaustive.

252 Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 21.

253 Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 675.

254 Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 192.

their benefit and above the level which would be determined by conditions of free competition.

(216) Market sharing and control of production occurred through allocation of market shares and customers, as well as the agreements on market leaders for different European territories. These arrangements aimed at stabilising market shares and sales volumes in respect of these territories and customers, implying that the producers were restricted from competing for market share. Freezing market shares also enabled the parties to succeed in increasing the market price or preventing it from declining at the pace of the market forces.

(217) Price fixing and market sharing by their very nature restrict competition within the meaning of both Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement.

(218) The anticompetitive object of the parties is also shown by the fact that they took explicit action to conceal their meetings and to avoid detection of their agreements and documents. To this effect, they established security rules to prevent a paper trail (recitals (150) and (151)) and used a coding-system to hide the identity of the producers in their documents and spreadsheets concerning target prices (recitals (95), (99) and (151). Moreover, certain documents concerning Cuproclima meetings contain an express mention instructing the addressee to destroy the document after reading (recitals (124) and (160)), which further indicates the illegal purpose of the meeting and the intention to conceal it. The anticompetitive object of the parties, which was to control jointly the European market for industrial tubes, is also explicitly stated in the evidence referred to in recitals (89), (152) and (160)).

(219) Regarding the anti-competitive object of the exchange of information, the arrangement has to be seen in its context and in the light of all the circumstances. It served to attain the single objective and further enabled the undertakings to adapt their strategy to the information received from competitors. This permanent exchange of information was intended to guarantee the stability of the illegal scheme. In the event of a manifest imbalance in market shares or prices, the conflict could be settled through discussion, proposals, persuasion or even pressure.[255]

(220) This complex of agreements and concerted practices, as described in the Part D, has therefore as its object the restriction of competition within the meaning of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement. The fact that this entire complex of agreements and concerted practices had the same anticompetitive object confirms that it must be considered as a single infringement.

(221) In this case, while Outokumpu, Wieland Werke and KME admit the existence of the anticompetitive agreements and practices, each of them has advanced defensive arguments, such as a negligible effect on prices and customers, difficult economic environment (overcapacity), lack of implementation, frequent deviation, and/or the buyers' purchasing power, as will be further discussed in recitals (295) to (314).

(222) It is, however, settled case-law that for the purpose of application of Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement there is no need to take into

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[255] See also Case C-7/95P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 67, upholding the judgement of Court of First Instance.

account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.[256]

(223) In this case, it is therefore not necessary, given the manifestly anti-competitive object of the agreement, to demonstrate an adverse effect upon competition. Price fixing and market sharing by their very nature restrict competition within the meaning of Article 81(1) EC. The fixing of target prices and market shares together with the exchange of confidential information must at the very least have distorted, if not eliminated, the free play of market forces in the establishment of a competitive price level. Whilst the competition-restricting object of the arrangements is sufficient to support the conclusion that Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement have been infringed, in this case it may be concluded that, on the basis of the elements which are put forward in this Decision, the Commission has also proved that the anti-competitive agreements have been implemented and that actual anti-competitive effects of the cartel arrangements have taken place, as will be shown in recitals (299) to (314) and (357) to (364) hereafter.

14. EFFECT UPON TRADE BETWEEN MEMBER STATES AND BETWEEN EEA CONTRACTING PARTIES

(224) The continuing anti-competitive arrangements between the industrial tube producers had an appreciable effect on trade between Member States and between EEA Contracting Parties.

(225) Article 81(1) of the Treaty is aimed at arrangements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53 (1) of the EEA Agreement is directed at arrangements that undermine the achievement of a homogeneous European Economic Area. In order that an agreement, decision or concerted practice may affect trade between member states, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement, decision or concerted practice in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states.[257]

(226) As demonstrated in the "Inter-State Trade" section 5 of Part B, the market for industrial tubes is characterised by a substantial volume of trade between Member States. There is also a considerable volume of trade between the Community and EFTA countries belonging to the EEA.

(227) The application of Articles 81(1) of the Treaty and 53(1) of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these

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256 Case T-62/98 *Volkswagen AG vs Commission* [2000] ECR II-2707, paragraph 178.

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

provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[258]

(228) In this case, the cartel arrangements covered virtually all trade throughout the Community and EEA. The existence of a price-fixing mechanism and a quota allocation system must have resulted, or was likely to result, in the diversion of trade patterns from the course they would otherwise have followed.[259]

(229) Insofar as the activities of the cartel related to sales in countries that are not members of the Community or the EEA, or to sales before these countries became members of the Community or the EEA, they lie outside the scope of this Decision.

F - ADDRESSEES

15. APPLICABILITY OF LIMITATION PERIODS

(230) Pursuant to Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition,[260] the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing infringements, the limitation period only begins to run on the day the infringement ceases.[261]Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period and each interruption shall start time running afresh.[262]

(231) In this case, the Commission investigation started with the surprise inspections pursuant to Article 14(3) of Regulation No 17 on 22 March 2001. Hence, for infringements ceased prior to 22 March 1996 no fines may be imposed.

(232) With regard to […] (former […]), one of the founding members of Cuproclima, the Commission notes that it withdrew from the Association and apparently from the LWC-tube market towards the end of 1993 or early 1994. There is no evidence of its involvement in the cartel after 1993/1994 which precedes the relevant date, 22 March 1996, for the calculation of the five-year prescription period. Therefore, the Commission has not opened proceedings against […] in view of a decision under Article 15(2) of Regulation No 17, and no fines will be imposed on it.

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

259 See the judgement of the Court of Justice in Joined Cases 209 to 215 and 218/*78 Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 170.

260 OJ L 319, 29.11.74, p.1.

261 Article 1(2) of Regulation No 2988/74.

262 Article 2(1) and 2(3) of Regulation No 2988/74.

(233) With regard to Buntmetall, although its contacts with the cartel members in 1995 and 1996 constitute a collusion, the Commission does not have sufficient evidence on its involvement in the cartel as a separate undertaking beyond the date 22 March 1996.[263] Therefore, the Commission has not opened proceedings against Buntmetall in view of a decision under Article 15(2) of Regulation No 17, and no fines will be imposed on it.

16. LIABILITY FOR THE INFRINGEMENT

16.1. General principles

(234) The subject of Community and EEA competition rules is the "undertaking", a concept that is not identical with the notion of corporate legal personality in national commercial or fiscal law. The term "undertaking" is not defined in the Treaty. It may, however, refer to any entity engaged in economic activity. According to the circumstances, it may be possible to treat the whole group or individual subgroups or subsidiaries as the relevant "undertaking" for the purposes of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(235) With regard to the liability of the parent company over its subsidiaries' conduct the Courts have consistently referred to an absence, on the part of the subsidiary, of "*autonomy in determining its course of action in the market*".[264] In this regard, it may be presumed that a wholly owned subsidiary, in principle, necessarily follows the policy laid down by the parent company and thus does not enjoy such an autonomous position.[265]

(236) The Court of Justice has paid attention, among others, to whether the parent company was in a position to exert a decisive influence on its subsidiary's commercial policy or whether the subsidiary was autonomous.[266] Apart from the situation of a wholly owned subsidiary, this power is exercised where the facts of the case show that the subsidiary is not "autonomous" in its behaviour on the market, and vice versa. This may be the case, among others, where the parent company has directly instructed its subsidiary to adopt that behaviour,[267] where the parent was otherwise actively implicated in the infringement, for example by representing the interests of its subsidiary in the cartel meetings,[268] or where the parent company had been aware of the infringing behaviour in question but had not intervened to put an end to it.[269]

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263 Note that Buntmetall was not affiliated to Wieland Werke until 1999.

264 Cf. Case 48/69 *ICI v Commission* [1972] ECR 619, paragraph 134; Case 107/82 *AEG v Commission* [1983] ECR 3151; see also Case T-354/94, *Stora v Commission* [1998] ECR II-2111.

265 Case 107/82 [1983] ECR 3151, *AEG v Commission*, paragraph 50.

266 Case C-286/98 P *Stora v Commission* [2000] ECR I-9925, paragraph 28..

267 *ICI v Commission*, loc.cit, paragraph 137, 138 ; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 16 ; *AEG v Commission*, loc. cit., paragraph 51.

268 Case T-309/94, *Koninklijke KNP v Commission* [1998] ECR II-1007, paragraph 48 ; confirmed in Case C-248/98 P [2000] ECR I-9641, paragraph 73.

269 Cases T-308/94 *Cascades v Commission* [1998] ECR II-925, paragraph 158 ; T-347/94, *Mayr-Melnhof v Commission* [1998] ECR II-1751, paragraphs 397, 398 ; T-354/94 *Stora v Commission* [1998] ECR II-2111, paragraph 83 . See also Cases C-279/98 P *Cascades v Commission* [2000] ECR I-9693 paragraph 77; C-286/98 P *Stora v Commission* [2000] ECR I-9925, paragraphs 31 and 32 ; cf., in the same sense the opinion of Advocate General Mischo in the latter Case [2000] ECR I-9925, paragraphs 40 and 51.

16.2. The liabilities in this case

16.2.1. The liability of Outokumpu OYj

(237) In the Statement of Objections, the Commission considered that Outokumpu Oyj was jointly and severally liable for the illicit activities of its wholly owned subsidiary Outokumpu Copper Products OY (OCP). This was based on the finding that the parent company, previously denominated Outokumpu OY, was a founding member of the Cuproclima Association, whereafter the Copper Products Division was incorporated as a separate legal person through the establishment of the subsidiary OCP in December 1988. The Commission held that as the infringement had already started by May 1988, the parent company was directly involved in it at the beginning and thus necessarily aware of it also thereafter. Outokumpu OYj also controlled the entire capital of OCP throughout the rest of the duration of the infringement. Therefore, the Commission presumed effective control of Outokumpu OYj over its subsidiary's commercial policy, and noted that this presumption was not contradicted by any element in the file.

(238) In its reply to the Statement of Objections, Outokumpu stresses that only Outokumpu Copper Products management was involved in the infringement, and that the infringement occurred only in Outokumpu Copper Products in Europe. In this context, Outokumpu notes that Outokumpu Copper Products Oy was registered as a corporate entity in May 1988 and took fully over this activity by December 1988. From May 1988 until February 2001, the Outokumpu copper business unit concerned in this infringement was Outokumpu Copper Products Oy Europe.

(239) Outokumpu further argues that even if there may have been a short period when Outokumpu Oy was the ultimate parent for the division dealing with copper products at the beginning of Cuproclima, there was a divisional structure dealing with copper tubes which was moved into Outokumpu Copper Products Oy in 1988. No Outokumpu's staff above Outokumpu Copper Products as a Division or a company has been implicated in these proceedings. The highest representative who participated in any meetings in this case was the Vice-President and General Manager for the Copper Tubes Business (in the meeting in April 1997). OTK thus considers it artificial and unfair to treat Outokumpu Oyj as having had "*full knowledge of the unlawful activities concerned*."

(240) Outokumpu also considers it unfair and artificial to treat Outokumpu Oyj as "jointly and severally liable" for the whole period of 12 years of infringement, since Outokumpu's copper business was in a division of Outokumpu Oyj only during the changeover period from May to December 1988.

(241) The Commission reminds that the presumption of liability in case of a wholly-owned subsidiary can be rebutted by adducing evidence that the subsidiary determines autonomously its course of action in the market, implying that the parent does not exercise effective control over the commercial policy of the subsidiary.[270] This does not necessarily imply that the subsidiary enjoys such autonomy specifically with respect to the infringement. Hence, it is not necessary to show that the parent company

[270] Case 48/69 *ICI v Commission* [1972] ECR 619, paragraph 134.

would have directly participated in the cartel meetings or other illicit competitor contacts.

(242) The Commission notes that Outokumpu Oyj has held 100% of OCP's shares since the formation of the latter as a separate legal entity. The precise date of OCP's establishment is not entirely clear. In its letter of 8 October 2002, Outokumpu stated that Outokumpu Copper Oy (whose name was changed to Outokumpu Copper Products OY, "OCP", in 1996) was formed as a separate legal entity on 30 December 1988,[271] whereas according to its reply to the Statement of Objections OCP was incorporated in May 1988, taking fully over the copper tube activity in December 1988. This appears to result from the fact that while the exact date of registration of the company was 25 May 1988, its commercial activity was registered on 30 December 1988.[272] The Commission therefore considers that while during the transition period from 25 May 1988 to 30 December 1988 OCP already existed as a legal entity in terms of corporate formalities, the parent company was still responsible for the copper tube activities during that period and consequently directly involved in the infringement. The infringing behaviour itself can therefore be positively traced back to the parent company, whose representatives attended the first known cartel meeting of 3 May 1988 (recitals (124)-(126). It can therefore be concluded that Outokumpu OYj bears liability of its own illegal conduct during the period from 3 May 1988 until 30 December 1988.

(243) During the infringement period following the achievement of OCP's formation on 30 December 1988 (from 31 December 1988 until 22 March 2001), the Commission presumes Outokumpu Oyj's effective control over the commercial policy of its wholly-owned subsidiary. There are no elements in the Commission's file showing real business autonomy of OCP, nor has Outokumpu been able to adduce sufficient evidence to rebut this presumption. Accordingly, Outokumpu Oyj and OCP must be regarded as a single undertaking for the purposes of this Decision. Moreover, there are letters in the Commission's file showing that the chief executive officer of Outokumpu Oyj had meetings and contacts with the vice president of Europa Metalli in 1993 to discuss the market situation in copper and copper alloy semis.[273] He also intervened to suggest meetings between OCP's and Europa Metalli's management.[274] Hence, the Commission has valid reasons to assume that the top management of Outokumpu Oyj was involved in the commercial policy of its subsidiary OCP.

(244) Consequently, Outokumpu OYj is held liable for its own illegal conduct during the period from 3 May 1988 until 30 December 1988. Outokumpu Oyj is further held jointly and severally liable with Outokumpu Copper Products OY (OCP) for the illicit activities of the latter in the period from 31 December 1988 until 22 March 2001.

16.2.2. The liabilities within the SMI/KME group

(245) The Statement of Objections was addressed both to SMI and its current subsidiaries KME, TMX and EM. The latter three companies were held jointly and severally liable for each other's behaviour as part of the same cartel during the period 1990-2001,

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271 File p. 29859.
272 Excerpt of the company registry, file p. 29861.
273 File p. 10831.
274 File p. 10830.

when they have all belonged to the SMI-group (recitals (25) and (34) to (42)). Furthermore, SMI was an addressee, bearing joint and severe liability for the illicit activities of EM and TMX since the beginning of the infringement in May 1988 and of KM (KME since 1995) since it joined the SMI-group in 1990, until the end of the infringment in March 2001.

– KME's arguments

(246) SMI maintains that it cannot be held liable (jointly and severally with KME, EM and TMX) for the behaviour challenged, its main argument being that, as a pure financial holding company SMI was not involved in the operational business of its subsidiaries nor did it participate in the arrangements described in the Statement of Objections. This claim is further substantiated in KME's reply to the Statement of Objections in which further information is adduced to demonstrate that SMI did not exercise decisive influence over its own commercial policy or that of its subsidiaries. These documents include copies of the most relevant intragroup services agreements and related documents, as well as documents indicating that after the restructuring of the group in 1995, KME has the legal responsibility for the management of the group.

(247) With regard to the period from 1988 to 1995, KME points out that SMI's shareholding in EM (which in turn held 100% of TMX) was only between ca. 41-52%. It contests the Commission's interpretation that SMI's important role in appointing EM's board members and the three common members (out of 11 or 12) in the management boards of SMI, TMX, and EM be evidence of decisive influence of SMI on EM from 1988 to 1995.

(248) While KME has not contested the attribution of liabilities among KME, EM, and TMX, it has argued, for the purposes of determining the relative weight of the cartel participants (recital (324)), that the companies composing the group did not always follow a common commercial policy. To show the existence of intra-group competition and that no overall common commercial policy existed, KME refers to various documents in the Commission's file.[275] With regard to the period from 1988 until the end of 1993, it cites three documents, i.e. a report concerning an intra-group meeting of 30 May 1991 (see recital (131)), a report on an intra-group meeting held on 9 and 10 November 1993 (see recital (139)), and the TMX 1993 Annual report which refers to the intra-group competition as a reason for creating EMT, a common sales organisation of TMX and EM (see recital (34)). In KME's view, the fact that the companies of the group had to take the measures referred to in these documents (i.e. decision to coordinate the market behaviour and to create a common sales organisation) to stop competing against each other demonstrates that competition existed between them and that they carried out their commercial policies autonomously.

(249) With regard to the period following these measures (i.e. after November 1993), KME submits that the coordination or the elimination of intra-group competition was only partially successful. As examples of documents in the Commission's file indicating

[275] File p. 10079-10080, 9891, 28012, 26329, 29653, 29655 (confidential),

intra-group competition, KME refers to a document dating from 1996[276] and another one dating from 1999[277].

– The Commission's view

(250) After having examined the views expressed by SMI and KME with regard to SMI's position in these proceedings, the Commission will not address this Decision to SMI. The Commission points out, however, that the legal responsibility of the management of a company does not necessarily coincide with the business reality.

(251) It should be noted that unlike Outokumpu Oyj, SMI did not have 100% control over its subsidiaries. As concerns the period after 1999 when SMI controlled 98.6 % of KME, the overlaps and the interlocking relationships described in recital (37) did no longer exist. Furthermore, in contrast to the situation of Outokumpu Oyj for which the Commission can establish direct involvement in and awareness of the cartel at the beginning of the infringement, the Commission is unable to demonstrate that SMI would have been either involved in the cartel or aware of it, nor could it be established in this case that SMI would have managed the commercial policies of its subsidiaries or given them instructions relating thereto. This does not, however, prejudge the outcome of the Commission's ongoing investigation in the Case 38.069 - Copper Plumbing Tubes.

(252) The Commission takes note that the evidence referred to in recital (246) expressly states that since the restructuring of the SMI-group in 1995, KME has been fully responsible for the business management of the group from a legal standpoint. As a matter of fact, KME has only contested the liability of the holding company SMI. On the contrary, it has not disputed, in this context, the joint and several liability of KME, EM and TMX in the period 1990-2001 during which all these companies have been part of the SMI-group, nor does it contest the joint and several liability of EM and TMX in the period preceding KME's entrance in the group in 1990, as established in the Statement of Objections.

(253) Nevertheless, based on the evidence adduced, it appears appropriate to distinguish two separate periods for the purposes of imputation of liability within the SMI-group, once SMI has been exonerated from such liability. During the first period including the years 1988 to 1995, KME's management board was different from that of its sister companies (recital (37)), and KME's operational management and reporting structures appear to have been coordinated with those of EM and TMX only after the restructuring of the group in 1995 (recitals (41) and (42)). Furthermore, the incidents of intra-group competition and other evidence reported above in recital (248) suggest that the entities of the group competing against each other on the market were mostly KME and TMX. These elements together lead the Commission to consider that KME was a separate undertaking from EM and TMX until 1995, regardless of the fact that it joined the SMI-group already in 1990. It may therefore be concluded that during the period from 1988 to 1995, KME is liable only for its own conduct and that of its predecessor Schmöle, as explained in recital (257).

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276 File p. 10079-10080.

277 File p. 9891.

(254) On the other hand, EM and its wholly-owned subsidiary until 1995, TMX, must be regarded as one economic unit and thus a single undertaking distinguished from KME until the restructuring of the group. Further to 100% control of EM over TMX, a number of other elements support the presumption that the subsidiary did not follow an autonomous commercial policy. KME itself has stated that Italian managers were introduced to TMX organisation at the board level and TMX business plan and commercial strategies were aligned with those of EM since 1987 (recital (34)). Moreover, a common sales organisation between EM and TMX (EMT) was formed in 1993, and during the period from 1993 to 1997 EM's representative in the Cuproclima meetings reported to TMX's commercial director (recital (41)). The commercial policies of EM and TMX were thus intertwined and the companies were closely involved in each other's strategic and organisational management. When the parent company and its subsidiary both manufacture the same product and furthermore participate in the same cartel, as in this case, it is hardly conceivable that each of them would conduct its own autonomous policy on the market of the product in question and make independent decisions with regard to competitively sensitive issues, in particular, prices, sales and production volumes. Accordingly, in the period 1988-1995, EM bears liability of its own conduct and is jointly and severally liable for the illicit behaviour of its subsidiary TMX.

(255) As to the period following the restructuring of the SMI group in 1995, after which KME has controlled 100% of the capital of both EM and TMX, the management of these entities was closely interconnected. The composition of the management boards of these companies was reorganised so that there were significant overlaps between the entities of the group (recital (38)) and their operational management was coordinated (recitals (41) and (42)). Accordingly, and considering the reasoning exposed in the preceding recital, KME and its wholly-owned subsidiaries must be considered to have acted as a single undertaking on the market during the period 1995-2001. The presumption of control based on KME’s 100% shareholding in EM and TMX, which is further supported by significant management links and economic reality, has not been rebutted by sufficient evidence.

(256) Based on the above, KME is liable for its own infringement from 3 May 1988 until 22 March 2001. In addition, while KME bears joint and several liability of EM’s and TMX’s illegal conduct during the period from 1995 to 2001, EM is jointly and severally liable for TMX’s conduct during the period from 1988 to 1995.

16.2.3. Succession

– Schmöle

(257) The Commission notes that Kabelmetall (renamed as KM Europa Metal, "KME", in 1995) absorbed Schmöle, one of the founding members of Cuproclima, in October 1988 (recital (27)). Schmöle was involved in the infringement from its beginning in May 1988 (recitals (124) and (127)). KM assumed Schmöle's membership in Cuproclima as of 1 July 1989, and Schmöle ceased to exist as a legal entity in August 1989. The employees participating in the cartel meetings thus formally represented Schmöle from October 1988 to July 1989, but they were in the process of being integrated into KM's operational business. Accordingly, KM must be considered to be the legal and economic successor of Schmöle. As such, KME bears liability of Schmöle's infringement.

– Europa Metalli

(258) As regards Europa Metalli, the entity that started the infringement in 1988 was Europa Metalli-LMI S.p.A ("EM-LMI") (recitals (31) and (125)-(129)). EM-LMI contributed its industrial operations to its newly founded subsidiary Europa Metalli S.p.A ("EM") in 1995 and ceased to exist as a legal entity thereafter. As EM-LMI's successor, EM bears the liability for the infringement committed by its predecessor.

17. ADDRESSEES OF THE PRESENT DECISION

(259) It is established by the facts as described in this Decision, and taking into consideration the liabilities and successions defined in Section 16 above, that Wieland Werke AG, KM Europa Metal AG, Europa Metalli SpA and Tréfimétaux SA participated in the infringement found in this Decision from 3 May 1988 until 22 March 2001. In addition, Outokumpu Oyj participated directly in the infringement from 3 May 1988 until 30 December 1988 and Outokumpu Copper Products OY (OCP) from 31 December 1988 until 22 March 2001 (recitals (242) to (244). For the latter period, Outokumpu Oyj is held jointly and severally liable with OCP for the conduct of the latter.

(260) EM and TMX are considered to have formed a single undertaking during the period from 1988 to 1995 (recital (254)), bearing joint and several liability for the infringement in that period. EM is also liable for its predecessor's EM-LMI's conduct from the beginning of the infringement on 3 May 1988 until it succeeded the latter as a legal entity (recital (258)).

(261) The Commission considers that KME, EM and TMX have formed a single undertaking since 1995 (recital (255)), bearing joint and several liablility for the infringement during the period 1995-2001. As the successor of Schmöle, KME is also liable for its predecessor's conduct since the beginning of the infringement on 3 May 1988 until it absorbed the former (recital (257)).

(262) On the basis of the above, the Commission considers that the following companies should bear responsibility for the infringement and be addressees of the present Decision, as follows:

(a) Wieland Werke AG from 3 May 1988 until 22 March 2001;

(b) Outokumpu Oyj individually from 3 May 1988 until 30 December 1988, and jointly and severally with Outokumpu Copper Products Oy from 31 December 1988 until 22 March 2001;

(c) Outokumpu Copper Products OY from 31 December 1988 until 22 March 2001 (jointly and severally with Outokumpu Oyj);

(d) KM Europa Metal AG individually from 3 May 1988 until 19 June 1995, and jointly and severally with Tréfimétaux SA and Europa Metalli SpA from 20 June 1995 to 22 March 2001;

(e) Europa Metalli SpA., jointly and severally with TMX from 3 May 1988 to 19 June 1995, and jointly and severally with KM Europa Metal AG and Tréfimétaux SA from 20 June 1995 to 22 March 2001;

(f) Tréfimétaux SA, jointly and severally with Europa Metalli SpA from 3 May 1988 to 19 June 1995, and jointly and severally with KM Europa Metal AG and Europa Metalli SpA from 20 June 1995 to 22 March 2001.

G - Duration of the infringement

18. STARTING AND ENDING DATES RETAINED FOR THE PURPOSES OF THE PRESENT PROCEEDINGS

(263) As the exact date on which the collusion between Wieland Werke, Outokumpu, Tréfimétaux, Europa Metalli and KME started can no longer be established with certainty, the Commission in this case limits its assessment under competition rules and the application of any fines to the period from 3 May 1988, this being the date of the first documented meeting between Cuproclima members in which price cooperation took place (recitals (124) to (126)). None of the parties have contested this starting date.

(264) As to the ending date, the Commission retains 22 March 2001 as relevant (the date of the Commission inspections). Neither Wieland nor KME contests this date. OTK, in turn, emphasises that it has not participated in any Cuproclima activities since the last meeting of Cuproclima in February 2001.

(265) The Commission notes that even though the last known cartel meeting within Cuproclima took place on 2 February 2001 (recital (175)), as indicated by Outokumpu, the relevant date for determining duration of the infringement depends, however, on the implementation of the agreement rather than on the date of the last cartel meeting. As there is no evidence to the contrary, the Commission considers therefore that the implementation of the cartel agreements continued at least until 22 March 2001, when the Commission carried out its inspections pursuant to Article 14(3) of Regulation 17.

(266) With regard to KME (named Kabelmetall until 1995), the Commission notes that it became a full member of Cuproclima on 1 July 1989, which was more than a year after the infringement had started. However, as KME is the legal and economic successor of Schmöle who was involved in the infringement from 3 May 1988 (recital (257)), KME's involvement will also be counted from 3 May 1988.

(267) As to Europa Metalli, the fact that it was not a full member in Cuproclima until 1993 does not change the duration of the infringement in its case, as the Commission has established that by 3 May 1988 it had also started to exchange price information with Cuproclima members and expressed its willingness to participate in their price cooperation (recitals (124)-(126)). Thereafter, it participated regularly in the unofficial meetings among Cuproclima members as an associate member of the Association, implying also its involvement in the cartel. The transformation of Europa Metalli-LMI

S.p.A into Europa Metalli S.p.A in 1995 does not affect the duration in EM's case (see recital (258)).

(268) With regard to Tréfimétaux and Europa Metalli, the fact that their individual membership in Cuproclima ended in August 1999, when the group membership of KME was recognised and after which they were represented by KME in Cuproclima meetings, is not relevant when determining their involvement in the cartel. Rather, the latter is based on their conduct on the market, which continued to be affected by the cartel beyond their individual membership.

(269) In Outokumpu's case, the infringement is considered to have been committed by Outokumpu Oyj and OCP forming a single undertaking (recitals (242) to (244)). The duration for Outokumpu runs therefore from 3 May 1988 until 22 March 2001.

19. PERIODS OF REDUCED CARTEL ACTIVITY

(270) The Commission notes that none of the parties has contested the Commission's assessment as such that the cartel constituted a single continuous violation, as assessed in recitals (202) to (211), throughout the infringement period from 3 May 1988 to 22 March 2001. This implies that the infringement as a whole lasted for a period of 12 years and 10 months.

(271) All the undertakings concerned have claimed that in this case the Commission should reduce the duration by periods during which the cartel activity was significantly reduced or suspended (subsections 19.1 and 19.2).

19.1. Exclusion of Outokumpu

(272) Outokumpu highlights that it did not participate in pricing and market-sharing agreements between the beginning of 1997 and late 1999 (approximately 2½ years). In support, Outokumpu refers to several documents in the Commission's file evidencing the other cartel members' complaints about Outokumpu's aggressive market behaviour and the fact that Outokumpu was not fully integrated in Cuproclima during this period.[278]

(273) With regard to the exchange of statistical information, Outokumpu accepts that it is not clear whether or not such exchange occurred in this period, while considering that the evidence is not conclusive on the issue. In this respect, Outokumpu mentions specifically a Cuproclima meeting held in Hattenheim in May 1998 (recitals (164) and (165)) and recalls that there was discussion about the general market situation and the aggregated official statistics system. Outokumpu does not know how Wieland has been able to put together such detailed statistics in its internal notes for this period, other than market intelligence or some other more specific access to figures through other parties than Outokumpu.

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[278] SO para. 203, footnote 274; file pages 9849-51; SO paras 204 and 206, footnote 276; file page 30927 and 30956; SO para 210, footnote 288; file pages 6365, 28196, 8373, 8374, 8370, 8375, 21879, 8334; SO para 214, footnotes 300 and 301, and para 215. File page 29853, 30957 and 29645; file page 7929; 23348, 21823, 30149-30150, SO para 222, footnotes 311 and 312; file page 28189, 23325-6, 23328, 23050.

(274) The Commission highlights that although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. Internal conflicts and rivalries or cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective, as in this case. An undertaking may be held responsible for a cartel as a whole, even if it has directly participated only to one or some of its constitutive elements, if it knew or should necessarily have known that the collusion in which it participated was part of a global plan which covered all the constitutive elements of the cartel in question. Under such circumstances, the fact that the undertaking in question did not directly participate in all the constitutive elements of the global cartel, does not relieve it from the responsibility for the infringement of Article 81(1) of the Treaty.[279]

(275) The Commission notes that Outokumpu participated in the autumn meeting of 1996 in which target prices for 1997 were fixed.[280] The fact that the contracts are negotiated once a year in the industrial tube business (recitals (97) and (98)), thus implied that Outokumpu was party to and fully responsible for the price agreement effective throughout 1997. Even though Outokumpu was cheating on the other members of the cartel during 1997, there is no evidence in the Commission's file nor has Outokumpu claimed that it would have openly and expressly distanced itself from the principles agreed in the cartel meetings, as required by case law set forth in recital (205). Rather, the other participants excluded Outokumpu from certain unofficial discussions in 1997 because of its misbehaviour on the market (recitals (159) to (161)). The Commission therefore concludes that Outokumpu was still party to the price agreement which was in force in 1997,and even if it followed, despite colluding with its competitors, a more or less independent policy on the market, it was simply trying to exploit the cartel for its own benefit.[281]

(276) The Commission accepts that there is no evidence on Outokumpu's participation in price and market sharing agreements in 1998. With regard to the exchange of confidential information, however, the Commission considers that the statements and documentary evidence exposed in recitals (164) and (165) are sufficiently convincing to conclude that exchange of competitively sensitive information occurred in the meeting of May 1998 (see also recital (280) hereafter). While there are other indices that Outokumpu never entirely stopped the exchange of information (see e.g. recital (169)), the question of a possible suspension of Outokumpu's cartel activity becomes superfluous, when the attenuating factor for cooperation outside the 1996 Leniency Notice is applied in recitals (384) to (387).

19.2. The other participants

(277) KME has explicitly stated that it does not assert that the information exchange would have been entirely interrupted during the period of 1997-1999. In its reply to the Commission's Article 11 letter, KME made the following statement concerning the exchange of information: "*From 1998 onwards, Cuproclima discussions only concerned the 70 largest European customers. For example, with respect to the*

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279 Case T-334/94 *Sarrió* v *Commission* [1998] ECR II-01439, paragraph 168-169.

280 File p. 1109-1181 (tables showing the target prices fixed for 1997); recitals (154) to (156).

281 Case T-308/94 *Cascades SA v Commission,* [1998] ECR II-925, paragraph 230; see also case T-156/94 *Siderurgica Aristrain Madrid SL v Commission*, ECR 1999 II-645, paragraph 173.

German market, only the four or five most important customers would be discussed during the meetings".[282] KME claims, however, that this period should not be taken into account for the purpose of assessing duration because the cartel activities were reduced significantly. The same should apply, in KME's opinion, to another period of crisis in 1993 and 1994. Hence, it claims that at least five years should be excluded from the duration of the infringement.

(278) Similarly, Wieland has maintained that the duration of 12 years and 10 months must be reduced by the periods of interrupted or suspended cartel activity in 1997-1999 and apparently in 1993-1994.

(279) In the case of Wieland Werke and KME, it was shown in recitals (161) and (162) that regardless of the exclusion of Outokumpu from some meetings, they continued the cartel activity in 1997. The considerations exposed above in recital (275) with regard to Outokumpu apply also to the other parties of the agreement.

(280) With regard to the year 1998, Wieland's internal report concerning a Cuproclima meeting on 15 May 1998 (recital (165)) contains comparison of commercial data and a table of the sales volume figures of Cuproclima members. Although it is not known to the Commission whether Wieland obtained these figures from Cuproclima or directly from the other members, the Commission does not believe that they could be mere estimations in view of their precise and very detailed nature. When compared to the volume figures provided by the companies in their replies to the Commission's requests for information (table 1 in recital (51)), it is noteworthy that EM's sales volume for 1997 is exactly the same as reported in Wieland's table and those of KME and Outokumpu (including Finland and Spain) are very close. It is thus hardly conceivable that Wieland would have itself estimated these figures. Considering also the statements of the parties quoted in recital (164), it may therefore be concluded that in the spring of 1998 anticompetitive exchange of confidential information within Cuproclima still occurred.

(281) The Commission notes that there is evidence suggesting that the official Cuproclima statistics were discontinued at least from October 1998 until the end of August 1999, as KME has pointed out.[283] In this regard, KME refers, among others, to an internal Wieland note of 23 August 1999: "*1. Statistics: Last edition: October 1998. KME does not report any more. If no [data] submissions, then no market purpose in Cuproclima*.".[284] KME has, however, indicated (see e.g. recital (169) that the exchange of information continued outside the Cuproclima framework.

(282) As was indicated in recital (168), KME and Wieland started their bilateral working group meetings without Outokumpu in June 1999, and Outokumpu joined them some time later during the summer of 1999, to discuss in detail market shares, prices and customers.

(283) With regard to the period 1993-1994 for which Wieland and KME have requested a reduction of duration because of the reduced cartel activity, it is sufficient to refer to recitals (135) to (147) to show that although cheating and tension among the cartel

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282 File p. 23371 (KME Article 11 reply).
283 File p. 9891, 9914, 9916.
284 File p. 9916.

members occurred during this period, anticompetitive contacts between the competitors in question were frequent in these years, and agreements on a common market conduct were still in force.

(284) Based on the above, the Commission considers that the cartel activity was never entirely interrupted, although periods of different intensity can be identified. The parties' claims according which the duration of the infringement should be reduced are therefore rejected, and the appropriate duration is confirmed to 12 years and 10 months.

H – REMEDIES

20. ARTICLE 3 OF REGULATION NO 17

(285) Where the Commission finds that there is an infringement of Article 81(1) of the Treaty or Article 53 (1) of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 3 of Regulation No 17.

(286) While the undertakings concerned have informed the Commission of having taken the necessary steps to ensure that their representatives no longer take part in anti-competitive meetings and other collusive contacts, under the current circumstances it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore necessary for the Commission to require the undertakings to which the present Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

(287) The prohibition should apply not only to secret meetings and multilateral or bilateral contacts but also to the activities of the undertakings in so far as they involve, in particular, diffusing individualised sales statistics.

21. ARTICLE 15(2) OF REGULATION NO 17

21.1. General considerations

(288) Under Article 15(2) of Regulation No 17[285], the Commission may by decision impose upon undertakings fines of from one thousand to one million Euro, or a sum in excess thereof not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in a infringement where, either intentionally or

[285] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*". (OJ L 305/6 of 30 November 1994)

negligently, they infringe Article 81(1) of the Treaty and/or Article 53 (1) of the EEA Agreement.

(289) In this case, the cartel constituted an intentional infringement of Articles 81(1) of the Treaty and 53(1) of the EEA Agreement. With full knowledge of the illegality of their actions, the leading producers of industrial tubes combined to set up a secret and institutionalised system designed to restrict competition in a major industrial sector. The intentional nature of the infringement is shown, among others, by the expressions of the parties of their common aim to jointly control the European market for industrial tubes and by the precautions they took to conceal the cartel (see references in recital (218)).

(290) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation No 17.

21.2. The basic amount of the fines

(291) The basic amount is determined according to the gravity and duration of the infringement.

21.2.1. Gravity

(292) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

– *Nature of the infringement*

(293) The present infringement consisted mainly of price-fixing and market-sharing practices, which are by their nature the most serious restrictions of competition. The cartel operated entirely for the benefit of the participating producers and to the detriment of their customers and, ultimately, the general public.

(294) The Commission, therefore, considers that the present infringement constituted by its nature a very serious infringement of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

– *The actual impact of the infringement*

(295) In their earlier submissions and respective replies to the Statement of Objections, Outokumpu, KME and Wieland Werke have made several arguments to show that the cartel had no or only a limited impact on the market, due to various factors, such as overcapacity, buyer power, difficult economic conditions and loose implementation of the agreements.

(296) Outokumpu has submitted a Memorandum entitled "Economic context of the European copper tubes industry" in which it intends to demonstrate the limited impact of the cartel on the market.[286] In its reply to the Statement of Objections, Outokumpu

[286] File p. 30628-30637.

expressly reserves its position as to whether and to what extent the cartel had material effects in practice.[287]

(297) With regard to the lack of impact on prices, KME has submitted a report by a group of expert economists of NERA Economic Consulting entitled "An Analysis of the Impact of Industry Information Exchanges on Copper Tube Prices in Europe" (the "NERA Report"). This report, made upon KME's request, analyzes whether and to what extent the prices charged by KME and its subsidiaries *increased* as a result of the discussions during the 1990's. The analysis is based on a data set constructed on the basis of all of KME's available invoice and customer information provided by KME that contains data concerning orders and quantities delivered to every customer for a period of more than a decade. The principal findings of the NERA Report are that: "[t]*he Cuproclima discussions among copper tube producers had a statistically insignificant impact on the prices actually charged to the customers of industrial tubes by the KME group"* and that "*[t]he analysis subsidiary by subsidiary and for each product family confirms that there is no evidence that the Cuproclima discussions had a positive and statistically significant effect on prices."*

(298) Wieland Werke, in turn, does not deny that the cartel had effects but it submits that these effects have been relatively minor and fluctuating. It argues that for certain periods of time, prices even reached competitive levels due to the suspension of the agreements. Besides buyer power, the limitation of agreements to certain customers, over-capacity of producers and a permanently difficult market situation, Wieland emphasises the defensive nature of the cartel as reason for its minor effects on the market. According to Wieland, the primary goal of the cartel was not to increase prices but rather to stop price erosion and stabilise market shares, i.e. to maintain a status quo on the market. Moreover, the agreements found their basis not in the attempt to generate excessive profits but in the attempt to ensure economic survival of the participating companies. Wieland further submits that the target prices were set at the highest slightly above hypothetical competitive prices. Wieland also claims, in line with KME, that for the purposes of determining gravity the Commission has to take into account that the participants did not derive economic advantage from the cartel.

(299) The Commission emphasises that with regard to the actual impact of the cartel on the market, there is no need for the Commission to quantify in detail the extent to which prices differed from those which might have been applied in the absence of these arrangements. This cannot always be measured in a reliable manner, since a number of external factors may simultaneously have affected the price development of the products, thereby making it extremely difficult to draw conclusions on the relative importance of all possible causal effects. Indeed, this difficulty is apparent in the parties' arguments relating to the various factors that have affected the price level and it is aggravated by the length of the infringement.

(300) It is impossible for the Commission to determine what the evolution of prices during the period of infringement exceeding 12 years would have been in the absence of the cartel. Moreover, as stated in the *ADM* case,[288] the fact that the participants informed

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[287] Outokumpu's argument is presented as an issue going to mitigation but for analytical purposes is treated here.

[288] Case T-224/00, *Archer Daniels Midland Company and others v Commission of the European Communities*, paragraph 279.

each other about their sales volumes and price levels was likely to influence their conduct within the cartel and in the market.

(301) The Commission further notes that the arrangements were not only aimed at raising prices higher than they would otherwise have been but, in particular, at preventing prices from declining at the pace determined by market forces. Indeed, setting target prices was at the heart of the whole discipline imposed by the cartel rules. Although it is difficult to say to what extent prices without the cartel would have been different from the prices that were applied during the existence of the cartel, it some elements show that prices were higher than under normal conditions of competition. For example, Wieland Werke has recognised that the deviation from the agreements led to competitive prices, implying thus that in other periods prices diverged from competitive levels (recital (298)).

(302) The approach followed by the NERA Report is to compare on the one hand the price level in periods without discussions to those with discussion (comparison over time) and on the other hand to compare the price level in countries with discussions to countries without discussions (comparison between countries). Implementing a dummy variable for the years and countries in which discussions were effective does this. Furthermore, several other variables are included taking into account for changes in the copper price, differences in buyer power and demand conditions. Finally, the estimated model allows for unexplained differences between countries, subsidiaries and product classes, and incorporates a linear time trend as well. The study analyses only transaction data for KME customers. The main result of the study is that after controlling for the influence of all these variables on prices (as measured by deflated added value per kg) no or an even negative statistical significant impact on the prices of KME caused by the discussions could be detected.

(303) However, given conceptual as well as methodological problems the explanatory power of the study is only limited. From a conceptual perspective, it should be recalled that, according to the case law, the impact of a cartel does not to have to be assessed at the level of one undertaking or even a group but at the level of the global cartel. The Court of Justice has indeed ruled that "*Lastly, when considering how the effects of the infringement had been taken into account, the Court of First Instance did not have to examine the individual conduct of the undertakings when, as it rightly pointed out at paragraph 280, the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it had participated*".[289] It should therefore be concluded that a report which examines the impact of the cartel on a single or few undertakings does not match the requirements set up by the case-law and cannot be conclusive in this respect. This applies also to the arguments provided by the other parties on the impact they claim they experienced individually.

(304) This being established, a few additional points must be made regarding the methodology applied. First of all, the study claims to provide a comparison of prices between periods with and without discussions within a jurisdiction. In addition, the NERA Report relied on data not coinciding with the duration of the infringement.

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[289] Case C-49/92 P *Commission v Anic Partecipazioni SpA*, paragraph 152.

Indeed, information on demand and on KME invoices belongs to the period 1990-2002 while the contested behaviour goes from May 1988 to February 2001. The only period considered unaffected by the discussions is the year 2002 (also, discussions are considered for 2001 when the cartel was allegedly terminated in March). Hence, the study compares – for a moment not taking into account the cross-country comparison - the average price from 1991 to 2001 with the price in the year 2002. Any effect influencing the price in 2002 and being not considered in the estimated model will strongly bias the result. Moreover, the data for the year 2002 are not complete, opening the door for a further selection bias. Furthermore, it remains to be proven until which point in time the discussions remained to be effective in the market. No robustness checks have been presented regarding this assumption. If for example, the discussion would have had an ongoing impact on the prices in 2002 the methodology applied does not have any explanatory power at all (regarding the comparison over time). Given the weakness of the comparison over time the study collapses mostly to a cross-country comparison between Western European countries and others.

(305) However, even this cross-country comparison lacks explanatory power. A main point of criticism is that production cost measures are missing in the study. As significant differences between countries regarding labour, energy or capital cost exist, a cross-country study which does not take them into account lacks explanatory power. Because the cost measures vary over time, simple cross-country dummy variable (as employed in the report) can represent these changes only poorly.

(306) As an example, how the cost structure can influence the result, take the estimation results provided for the product class IGT. Data outside Western Europe (hence, not being exposed to the discussions) are mostly available for the TMX subsidiary . Hence, the results are especially relevant for this subsidiary if one assumes a comparable cost structure within one subsidiary.[290] The results in estimate a positive impact of the discussions on the IGT price of more than […]% (however, the increase is not statistically significant).

(307) Next, the report does not look into changes of the market structure in the markets used for comparison (besides the buyer power variable discussed below), i.e. no information is provided whether countries not affected by discussions have a comparable market structure to those affected by discussions. If for example in these markets monopolies become active or discussions are held, the cross-country comparison has again limited explanatory power.

(308) Finally, one can question whether the variable which measures the buyer power takes on some of the effects of the discussions. If for example, bigger customers were exposed to the discussions more severely than smaller customers, the measured price discount for big customers would have been higher without discussions. As customer specific information is missing, the report does not control for this effect. This may significantly bias the estimation results toward lower price effects due to the discussions.

[290] The assumption is that the costs factors within a subsidiary cross-country are lower than the cost factors cross-subsidiaries and cross-country.

(309) Summing up, the report rests on two weak assumptions. Firstly, the comparison over time is mainly a comparison of the prices before 2002 to the prices in 2001 burdened with poor data quality and insignificant robustness checks. Secondly, the comparison between countries does not take into account changes in production costs between countries and does not give any hint on the market structure and the degree of competition in the countries taken for comparison. Hence, the results have only limited explanatory power to ascertain the impact of the discussions on the prices of KME or even the overall effect of the discussions on the market outcome.

(310) The Commission considers that as concerns prices, it appears that some of these arrangements were more effective than the others. The general erosion of prices of LWC-tubes in 1992/1993 and 1997/1998 could give the impression that the agreements to raise prices and the setting of target prices did not produce the effect aimed by the cartel members on the market. The Commission notes, however, that the periods of deep price erosion coincided with periods during which deviation from the cartel rules occurred, namely around 1993 and 1997/1998, as described in recitals (101), (138) and (157)-(167). Furthermore, while sharp price increases appear to coincide with market booms in 1994-1995 and in 1999-2000, the evidence in the Commission's file shows that the cartel members agreed upon and implemented price increases in those years, as evidenced in recitals (141) to (148); (152) to (156) and (170) to (175). In order to evaluate the impact, it should also be considered that the Cuproclima members represented 75-85% of the total EEA market.

(311) It is therefore likely that the prices would have developed in a different way, either eroded more or increased less, as the case may be, in the absence of the anti-competitive agreements.

(312) Even the reported failures to achieve the target prices are far from demonstrating in any convincing manner that the implementation of the cartel agreement could not have played any role in the setting and fluctuation of prices in the industrial tubes market. The fact that in spite of the cartel's efforts the results sought by the participants were not entirely achieved may illustrate the difficulties encountered by the parties in increasing prices in a specific market situation, but it does not prove in any way that the cartel had no effect on the market, or that prices were not kept at an artificial level. It should also be borne in mind that "not entirely achieved" involves a certain degree of success and that the subsequent initiatives were designed to complete the efficiency of what had partially succeeded. The Commission also considers that the impact of a cartel is not limited to prices, especially where the object of the anticompetitive behaviour also concerns market allocation. In this case one of the objectives was to stabilise market shares, as both Outokumpu and Wieland Werke have explained (see recitals (103) and (298)). None of the participants have contested the Commission's finding in the Statement of Objections that the market shares remained relatively stable throughout the period of the infringement, although customers fluctuated between the participants (see table 2 in recital (53); and Outokumpu's statements in recitals (103) and (107)).

(313) Irrespective of the Commission's finding that the infringement had a restrictive effect, the fact that it had a restrictive object which was intrinsically very serious must, in any event, be a more significant factor in the Commission's categorisation of the infringement as very serious than factors relating to its effects. The effect which an agreement or concerted practice may have had on normal competition is not a

conclusive criterion in assessing the proper amount of the fine. As confirmed by case law, factors relating to the intentional aspect, and thus to the object of a course of conduct, may be more significant than those relating to its effects, "*particularly where they relate to infringements which are intrinsically serious, such as price-fixing and market-sharing*".[291]

(314) In the light of the foregoing and the efforts put by each participant into the organisation of the cartel, there is sufficient proof that, regardless of the fact that implementation was from time to time disturbed by the parties' deviation from the agreed principles, the anti-competitive scheme has overall had an impact on the market, although it is not possible to quantify it precisely. The Commission considers that the parties concerned by the present Decision have not been able to rebut its finding as to the actual impact of the infringement on the industrial tubes market in the EEA.

– *The size of the relevant geographic market*

(315) Outokumpu requests that since Norway, Sweden, Finland and Austria only joined the EEA in 1994, any unlawful activity relating to these countries between May 1988 and that date falls beyond Community/EEA jurisdiction. First, this should be taken into account when calculating Outokumpu's market share, as its sales in these four countries amounted to some […]% of its Community/EEA LWC sales in 1994, and in the three preceding years, OTK's EU market share was on the average some […]% (as opposed to […]% Community/EEA market share in 1994). If the Commission only focuses on Outokumpu's more recent turnover, according to the company, it would be fined for behaviour outside the EC jurisdiction during much of the infringement duration. Second, this would affect the market leadership, as Finland, Sweden and Norway (OTK's territories) were non-Community/EEA countries before January 1994.

(316) It is important to note that the cartel covered the whole of the Community and, following its creation, most of the EEA. Practically every part of the Community/EEA market was under the influence of the collusion. For the purposes of assessing gravity, the Commission therefore considers the entirety of the Community and the EEA to have been affected by the cartel.

(317) In this context, the Commission takes into account the territory affected by the cartel, i.e. the geographic extent of the industrial tubes business, as a whole and not the territorial scope of the activity of each individual undertaking or their leadership in certain specific countries. Accordingly, OTK's argument relating to its activities in Norway, Sweden, Finland and Austria prior to their entry into the EEA must be rejected.

– *The Commission's conclusion on gravity*

(318) The Commission will also take into account that LWC is an important industrial sector, with an estimated market value in the EEA of EUR 288 million, based on the total price of LWC tubes charged to customers in 2000, which was the last full year of

[291] Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraphs 635-636.

the infringement.[292] The estimated market value has been calculated by adding to the accumulated turnovers of the parties, which account for ca. 75% of the total EEA market, 25% share for other producers. In 2001, this value was lower, ca. EUR 250 million, as indicated in the Statement of Objections.

(319) The arguments of the parties according to which turnover would not be relevant measure of the importance of the market, or that the infringement took place only on the conversion margin, suggesting therefore that the price of copper should not be considered, are not acceptable. The Court of First Instance ruled that: "*as is confirmed by the case-law on the application of Article 85(1)(a) of the EC Treaty, the prohibition of agreements and concerted practices which directly or indirectly fix prices also extends to agreements relating to the fixing of a part of the final price (see, in particular, Case T-29/92 SPO and Others v Commission [1995] ECR II-289, paragraph 146). It follows, in particular, that AST's argument that most of the final price of stainless steel was not the subject of an agreement is irrelevant*".[293] Hence, in the present case an agreement on part of the tubes price is an agreement on the price of tubes. When evaluating the economic importance of the industrial sector affected by an infringement, it would not be justified to subtract the price of raw materials, irrespective of how the price of such raw materials is formed.

(320) Taking all the foregoing factors into account, it can be concluded that the undertakings concerned by the present Decision have committed a very serious infringement of Articles 81(1) of the Treaty and Article 53(1) of the EEA Agreement.

21.2.2. Differential treatment

(321) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition, as well as to set the fine at a level which ensures that it has sufficient deterrent effect. The Commission notes that this exercise seems particularly necessary where there is considerable disparity in the size of the undertakings participating in the infringement. For this purpose, the undertakings concerned can be divided into different categories according to their relative importance in the market concerned, subject to adjustment where appropriate to take account of other factors and especially the need to ensure effective deterrence.

(322) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition. In this context, the specific weight is distinguishable from the importance of the undertaking in question in terms of its size or economic power. The proportion of turnover derived from the goods in respect of which the infringement was committed is likely to give a fair indication of the scale of the infringement on the

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[292] Note that the parties' own estimates of the total EEA market value of LWC tubes in 2000 vary between EUR 252 and 343 million.

[293] Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless GmbH and Acciai Speciali Terni SpA vs Commission*, paragraph 157.

relevant market.[294] Whilst an undertaking's market shares (based on turnover or sales volume) cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market affected by the infringement.[295] Moreover, the market share of any given party to the cartel also gives an indication of its contribution to the effectiveness of the cartel as a whole or, conversely, of the instability which would have affected the cartel had it not participated.

(323) As the basis for comparing the relative importance of an undertaking in the market concerned, the Commission considers it appropriate to take in this case the market shares of the undertakings on the LWC market in the EEA. This is supported by the fact that this was primarily an EEA-wide cartel, the object of which was *inter alia* to fix prices and allocate markets in EEA and to a lesser extent in Eastern Europe. The comparison is made on the basis of the product market share in EEA in the last full year of the infringement (2000):

Table 4
Size and relative importance in the LWC-tube market

Under-taking	World-wide total turnover for the year 2002 (in € billion)	World-wide turnover for LWC-tubes (in € million) and estimated market shares for the year 2000	EEA turnover for LWC-tubes (in € million) and estimated market shares for the year 2000[296]
Wieland Werke AG	0.95	[…]	[…]
OTK-group	5.56	[…]	[…]
KME-group	2.05	[…]	[…]

– The parties' arguments

(324) KME argues that the combined market shares of KME, TMX and EM (within Cuproclima share of the market, KME-group held […]% between 1994 and 2001) overstate the relative importance of KME-group in the LWC tube market, since KME, TMX and EM acted as independent companies and competed against each other

294 Case T-220/00, *Cheil Jedang Corp., vs Commission*, paragraph 91.

295 Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 139.

296 Note that the parties' own estimations of the total EEA market value of LWC tubes in 2000 vary between EUR 252 and 343 million. The indicated market shares have been calculated on the basis of the Commission's estimation of the market value in 2000 (EUR 288 million), based on the accumulated turnovers of the parties added by 25% share for other producers (Cuproclima share of the total EEA market is estimated at 75%).

during most of the relevant period. It therefore requests that the Commission take into account that the relative weight of the KME group was significantly lower due to the intra-group competition (recital (248)).

(325) Wieland points out that the product market is broader than that taken into account in the market shares set forth in the Statement of Objections (i.e. LWC-tubes), because LWC-tubes in rolled form have the same application as ACR-tubes in straight lengths. On the basis of such a wider market definition (industrial tubes or ACR-tubes), Wieland's EEA-wide market share from 1993/94 to 2000/01 was only between […]%.

The Commission's view

(326) The Commission considers that for the purposes of evaluating the relative weight of the participants within the affected geographic area, it is generally appropriate to take into account their market shares of the product in question in the last full year of the infringement, i.e. the year 2000 in this case (see table in recital (323)).

(327) The Commission notes that the products affected by the infringement within Cuproclima were LWC tubes, excluding other kinds of industrial tubes (for example straight length tubes). The market shares do therefore not take into account ACR-tubes in straight length regardless of Wieland's argument. With a total share of [30-50] % of the market in 2000, the KME-group is by far the largest player on the EEA market for LWC tubes and will therefore be placed in the first category. Outokumpu and Wieland Werke, having relevant market shares between [10] % and [20]% are placed in a second category, consisting of companies that can be considered as medium-size operators within the EEA market of LWC. Having a market share of around one third of that of KME, Outokumpu's and Wieland's starting amount will be 33% of that of KME.

(328) On the basis of the foregoing, the appropriate starting point for a fine resulting from the criterion of relative importance in the market concerned is for each category as follows:

– KME-group: EUR 35,00 million

– Wieland Werke: EUR 11,55 million

– Outokumpu-group: EUR 11,55 million

(329) As EM and TMX formed a single undertaking in the period 1988-1995 (recital (254)), they are jointly and severally responsible for the respective part of the infringement. Similarly, KME AG, EM and TMX formed a single undertaking (the "KME-group") in the period 1995-2001 (recital (255)), and they are jointly and severally responsible for that part of the infringement. The Commission cannot therefore take possible intra-group competition into consideration when assessing the relative weight of the participants in the cartel in the period following the restructuring. Rather, the basic amount of the fine is divided in two parts, one for the period 1988-1995 and one for the period 1995-2001. The first part (EUR 17,50 million) is divided in two equal parts between KME AG, on the one hand, and EM and TMX (jointly and severally), on the other hand. The second part (EUR 17,50 million) is attributable jointly and severally to KME AG, EM and TMX. This division is as follows:

– 17,50 for KME-group (jointly and severally among KME AG, TMX and EM);

– 8,75 for KME AG,

– 8,75 for EM and TMX (jointly and severally).

21.2.3. Deterrence

The parties' arguments

(330) Outokumpu claims that it should not face a double penalty, because of its concurrent involvement in the LWC and sanitary tubes cartels which both stemmed from a single problem, the poor economics of the copper tubes sector. In particular, it would not be fair to impose a fine on it by considering for the base amount the turnover of a larger part of Outokumpu's business (such as Outokumpu Copper Products Oy in Europe) in both the LWC and sanitary tubes cases. Outokumpu therefore requests that, if the Commission plans to fine on the basis of Outokumpu's turnover in all copper products in both the LWC and sanitary tubes cases, there should be a reduced assessment for deterrence in each case to avoid the double penalty. In addition, Outokumpu questions the fairness of the Commission's general approach in fining "for deterrence" by looking at the turnover of a wider business unit, covering other businesses than that specifically involved in an infringement. It considers that this unfairly penalises larger companies involved in many markets and submits that any fines should be focussed on involvement and impact on the market concerned, not whether companies are conglomerates or not.

(331) KME submits that it is a medium-sized undertaking with limited legal and economic resources. Wieland claims that it is considerably smaller than both KME and Outokumpu.

The Commission's view

(332) In order to ensure that the fine has a sufficient deterrent effect on large undertakings and to take account of the fact that large undertakings have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and to be aware of the consequences stemming from that conduct under competition law, the Commission may adjust the starting amount of fine. For this purpose, total turnover is the figure which gives an indication of the size of the undertaking and of its economic power, which must be known in order to assess whether a fine will deter it.[297]

(333) The Court of First Instance has approved the Commission's approach consisting in applying a multiplying factor. In a recent judgement, it stated that insofar as the amount of fine "*was further multiplied by 2.5 in order to take into account the applicant's position as a European group, that weighting was not applied on the basis of the applicant's total turnover*" and that "*the multiplier of 2.5 has no proportional*

[297] Case T-220/00 *Cheil Jedang Corp., v Commission*, paragraphs 83 and 96.

link with the difference between the applicant's and the other undertakings' total turnover".[298]

(334) In this case, the Commission considers appropriate to apply a further upward adjustment in Outokumpu's case to take account of its size and overall resources. In this assessment, it is appropriate to take into account the overall world-wide turnover of the group (over EUR 5 billion), since the parent company (Outokumpu Oyj) itself initiated the infringement in 1988 and has controlled 100% of the capital of OCP throughout its involvement in the cartel. Therefore, the starting amount of its fine determined in recital (328) should be increased by 1.5 to EUR 17,33 million.

21.2.4. Duration of the infringement

(335) As discussed in recitals (263) et seq. the infringement involving the addressees of the present Decision, i.e. Outokumpu-group, Wieland Werke, KME AG, Tréfimétaux and Europa Metalli, started at the latest on 3 May 1988 and continued at least until 22 March 2001. Accordingly, each addressee committed a continuous infringement of 12 years and 10 months.

(336) KME argues that Commission should follow the line adopted in the 2002 Leniency Notice[299] (even under the 1996 Leniency Notice) and not increase the fine for duration or gravity, when an undertaking provides evidence relating to facts previously unknown to the Commission. Accordingly, the periods from May 1988 to November 1992 and from 1997 to 1999 should be reduced from the duration in its case, since it was the first to admit that the arrangements took place during those periods and to submit a list of meetings that closed the gap in the Commission's file concerning the first period. With regard to the period from 1997 to 1999, KME claims to have decisively assisted the Commission in establishing that the arrangements were not completely interrupted.

(337) In addition, KME refers to the case *Luxemburg Breweries*[300], in which the fine for a cartel of a duration exceeding 14 years was increased by only 100 %, to argue that any increase should be lower than 100 %.

(338) First, it must be noted that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 17.[301] Hence, KME's argument in recital (337) based on a previous Commission decision must be rejected. The current policy of the Commission for cartel cases is to increase the fines by 10% per year of infringement in excess of five years. This has resulted in increases in duration of more than 100% in several recent cases.[302] In this case, where the cartel was of a duration of

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298 Case T-31/99 *ABB Asea Brown Boveri Ltd. V Commission*, [2002] ECR II-1881, paragraph 155.

299 Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002 C 45/3, paragraph 23.

300 Commission Decision 2002/759/EC in case COMP/37.800 *Luxembourg Breweries* OJ 2002 L 253/21, paragraphs 86 and 97.

301 T-23/99, *LR AF vs Commission*, paragraph 234.

302 See, e.g. Case COMP/E-1/37.519 Methionine, decision of 2 July 2002, not yet published; COMP/E-1/37.370 Sorbates, decision of 1 October 2003, not yet published; and Case COMP/E-1/37.956, Reinforcing bars, decision of 17 December 2002, not yet published.

12 years and 10 months, the Commission considers it appropriate to increase the fines by 10% per year.

(339) The Commission rejects also KME's claim that the Commission should follow the approach adopted in the 2002 Leniency Notice and not increase the duration or gravity in its case for those infringement periods that were first - or as primarily source - disclosed by KME. KME was not the first undertaking to provide information concerning the duration and scope of the infringement in the period from May 1988 to November 1992, as Outokumpu had already disclosed the continuity of the cartel during that period. Similarly, prior to KME's submission, the Commission had already obtained evidence from the inspections with regard to the period 1997-1998. It is therefore more appropriate to evaluate this claim in connection with the application of the 1996 Leniency Notice (Section 21.6).

(340) Based on the above, the Commission considers that Wieland Werke, Outokumpu-group, Tréfimétaux, Europa Metalli and KME AG infringed Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement from at least 3 May 1988 until 22 March 2001. They committed a continuous long-term infringement of over twelve years and ten months.

(341) As indicated in recital (329), KME AG was a separate undertaking from that formed by EM and TMX during the period from 3 May 1988 to 19 June 1995. The increase for duration is therefore calculated separately for these two undertakings for this period of seven years and two months. For the rest of the duration from 20 June 1995 to 22 March 2001, in other words five years and eight months, the increase is common for the whole KME-group.

(342) The starting amount of the fines determined for gravity will therefore be increased by 125 % for Outokumpu and Wieland Werke, by 55% for the KME-group, and by 70% for KME AG, on the one hand, and for the undertaking formed by EM and TMX, on the other hand.

21.2.5. Potential fines in parallel proceedings

(343) KME and Outokumpu have requested that the Commission should consider the fact that they may be the subject of an additional fine in the parallel proceeding concerning copper plumbing tubes (Case COMP/E-1/38.069). In support, KME refers to the Commission decision in *Specialty Graphites*[303] in which the fine imposed on one of the companies was reduced by 33% to take account of its delicate financial position and the fact that it recently had received a large fine.

(344) The Commission considers that the fact that the Commission is conducting investigation on several cartel cases in which the same undertakings are involved (although the cases were initiated as one and later separated) does not prevent it from imposing, if appropriate, the maximum amount in each infringement. The splitting was decided, when it became apparent that the infringements were different, performed by different players and concerned different products. In any event, unless sufficient deterrence is already achieved, an obligation on the Commission to take account, when

303 Case 37.667, decision of 17 December 2002 (not yet published), paragraph 558.

determining the fine, of an undertaking's participation to multiple cartels would be tantamount to conferring an unjustified advantage on undertakings who commit multiple parallel infringements. Each separate infringement merits a separate fine. If not, an undertaking involved in one or more cartels would have nothing to lose by entering into further cartels. It could then derive unjustified profits from additional cartels without any risk of a fine for that behaviour. Imposing a fine for each separate infringement serves to deter such behaviour.

(345) It should be noted that in its *Specialty Graphites* decision, the Commission reduced the amount of the fine imposed to an undertaking becauseis the undertaking in question was both in a serious adverse financial situation and had relatively recently been imposed a significant fine by the Commission. The Commission considered that, in those particular circumstances, imposing the full amount of the fine did not appear necessary in order to ensure effective deterrence. This conclusion took in particular account of the fact that the aggravating circumstance of recidivism did not apply to the undertaking in question. Contrary to what KME suggests in its reply to the SO, the undertaking in question was not in a delicate financial position but in a serious adverse financial situation. In addition, it had been imposed a fine of EUR 80,2 million in a previous case. None of these conditions apply in this case.

(346) At this stage, the Commission has adopted only the present Decision and continues to investigate the plumbing tube case(Case COMP/E-1/38.069). The situation mentioned by Outokumpu does therefore not, as of yet, arise in connection with this Decision. The Commission will therefore not consider the issue of cumulative fines in these proceedings.

21.2.6. Conclusion on the basic amounts

(347) The Commission accordingly sets the basic amounts of the fines for KME-group at EUR 27,13 million, for Outokumpu-group at EUR 38,98 million, and for Wieland Werke at EUR 25,99 million. Within the KME-group, the basic amount of fine for the period 1988-1995 is divided between KME AG (EUR 14,88 million), on the one hand, and EM and TMX (EUR 14,88 million, jointly and severally), on the other hand.

21.3. Aggravating circumstances

(348) In this case, the Commission found only one aggravating circumstance in the repeated infringement by Outokumpu. Outokumpu was addressee of the Commission decision 90/417/ECSC *Cold-rolled Stainless steel flat products*[304] (hereinafter "Stainless steel case").

(349) Outokumpu contests, however, the Commission's finding of recidivism in its regard as addressee of the Commission decision in the Stainless steel case. According to Outokumpu, that case involved a very different situation, since it was in a quasi–public context where Outokumpu was acting under government influence and in the belief that the arrangements were publicly endorsed. It also argues that the Commission itself accepted that this was not a straightforward infringement and imposed no fine.[305] In this regard, Outokumpu refers to the *Thyssen* case in which the

304 OJ L 220, 15/08/1990, p. 28.
305 Ibid, at Section X, paragraph 12.

Court of First Instance stated that "*Recidivism, as understood in a number of national legal systems, implies that a person has been committing fresh infringements after having been penalised for similar infringements*.[306]

(350) As further argument, Outokumpu stresses that different businesses were concerned, involving different units and employees in different locations, as well as a different treaty provision (Article 65 of ECSC Treaty). In OTK's view, therefore, to link the two infringements (one in LWC conversion and the other in stainless steel) would be to penalise a company with many different businesses in comparison to smaller companies with only interests in copper tubes. OTK also notes that the Commission's Decision concerning stainless steel was in July 1990, some two years after the starting date of the infringement in industrial tubes sector (May 1988), and therefore cannot form the basis for recidivism for the earlier period.

(351) In conclusion, OTK maintains that fining for deterrence and recidivism would be unfair and disproportionate, since the infringements are not the same nor have they been committed in the same business. It therefore considers that if the Commission increases fines for deterrence twice (in the LWC and sanitary tubes cases) and again for recidivism (by making a link to a completely unrelated business), it would mean that Outokumpu could end up with a triple penalty, just for being a large company with many operations in many different sectors.[307]

(352) The Commission considers that a repeated infringement occurs when an undertaking, which has been addressee of a Commission decision in the past as party to an infringement, is later found responsible for another infringement of the same type. In addition to ordering the undertaking to end the infringement, the function of such a decision is to warn and deter the undertaking in question from committing similar infringements in future, even if for some reason no fine is imposed. The Commission also considers that as the decision concerning stainless steel intervened after the infringement in the industrial tube sector had already initiated, Outokumpu's executives involved in the latter should have taken measures to end the infringement. Continuing it after being warned by a decision in a different product sector amounts to recidivism.

(353) The present Decision concerns the same type of infringement as the Stainless steel case which concerned fixing of quotas and prices to control production and share markets.[308] As for Outokumpu's argument relating to a different treaty provision, it is sufficient to recall that according to case law Article 65 of ECSC Treaty is equivalent to Article 81(1) of the Treaty.[309]

(354) That Outokumpu continued its infringement in the industrial tubes sector after being ordered to end its infringement in the stainless steel sector by a Commission decision clearly shows that the previous decision did not have a sufficiently deterrent effect on Outokumpu's market behaviour. Hence, future deterrence has to be ensured by

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306 *Thyssen Stahl AG v. Commission*, Case T-141/94, [1999] ECR I-347 at paragraphs 617-625 (emphasis added).

307 *Parker Pen v. Commission*, Case T-77/92, [1994] ECR II-549 at paragraphs 94-95.

308 For the notion of the "same type" of infringement, see Case T-203/01, *Michelin v Commission,* paragraphs 284 et seq.

309 See ao. Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraphs 258 et seq.

increasing the amount of fine in this case. Consequently, the gravity of the infringement is aggravated in Outokumpu's case by the fact that it has been subject to a previous decision finding a similar infringement. This aggravating circumstance justifies an increase of 50% in the basic amount of the fine imposed to Outokumpu.

21.4. Attenuating circumstances

(355) The Commission considers that among the attenuating circumstances invoked by the parties, the following should be analysed.

– *Non-implementation in practice of the arrangements*

(356) KME and Wieland Werke have requested that the Commission take into account, as an attenuating factor, that the cartel was not fully implemented. Because non-compliance was not punished, deviation could not be avoided. They cite a number of incidents of deviation and customer fluctuations reported in the Commission's file to demonstrate that the infringement was not fully implemented.[310] KME further refers to the NERA Report demonstrating that the pricing policy adopted by KME in the market was "competitive".

(357) Unlike the impact of a cartel on the market, which must be assessed for the cartel as a whole, implementation of the agreements is to be analysed separately for each participant. In order to determine whether the agreements were implemented in practice, it is necessary to ascertain whether the circumstances which the cartel members plead are capable of showing that during the period in which they were party to the infringing agreements they actually avoided applying them by adopting competitive conduct in the market.[311] The fact that an undertaking which has been proved to have participated in collusion on prices with its competitors did not behave at all times on the market in the manner agreed with its competitors is not necessarily a matter which must be taken into account as an attenuating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[312]

(358) It would therefore be necessary for each individual undertaking to show that it *systematically* and *clearly* refrained from applying the restrictive agreements. The simple fact of cheating on the other cartel members cannot thus be held as an attenuating factor. In this case, it is apparent that none of the participants systematically refrained from implementing their agreements. This is shown, for instance, by incidents when they attempted to regain market shares or orders that they had lost as a result of either the price discipline or the other parties' deviation, as shown in recitals (137) and (140).

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310 See, e.g. file p. 7847, 8345, 8349, 8368, 8370, 9859, 9952, 9985- 9986, 9988-9989, 10038-10043, 10045-10046, 10049, 10078-10080, 10147, 10148-10150, 10190-10191, 21885, 23325.

311 Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 4872 to 4874.

312 Case T-308/94 *Cascades SA v Commission,* [1998] ECR II-925, paragraph 230.

(359) It is also established case law that the implementation of agreements on target prices and other commercial terms does not necessarily require that these exact prices and conditions be applied. In line with the Court of First Instance's judgement in the *ADM* case[313], when there is an agreement relating to price objectives rather than to fixed prices, "*it is clear that implementation of that agreement simply meant that the parties would endeavour to achieve those objectives*." The failure to apply the agreed price targets does not necessarily constitute an attenuating circumstance. The agreements can therefore be held to be implemented when the parties fix their prices in order to move them in the direction of the target agreed upon. This was the case for the cartel affecting the industrial tubes market.

(360) In this case, the implementation of the cartel decisions was ensured through the monitoring scheme consisting of the market leaders and the regular exchange of confidential information. In such circumstances, it may be presumed that the competitors in question took into account of the information exchanged in determining their own conduct on the market. It has been established that each of the participants supplied their sales figures regularly to the Cuproclima Association, exchanged these data among each other and compared them in their meetings, which as such proves that the agreement to exchange confidential information was implemented in practice by each of them. It is therefore sufficient to observe, in line with the *ADM* case,[314] that by informing each other about their sales volumes the participants implemented the agreement in question, irrespective of whether the information supplied was correct.

(361) The implementation of the cartel decisions was also ensured by the frequent contacts between competitors. The periods of tension and deviation from the agreed principles, which occurred in particular towards 1993 and during the period 1997-1999, may be considered normal in the life cycle of a long-lasting cartel.

(362) With regard to the implementation of the price agreements, the Commission has evidence of Wieland's internal instructions to implement a price increase agreed upon at a meeting with competitors (recital (147)) and of Outokumpu's notes reporting the success of the price cooperation as well as the application of price increases (recital (129).

(363) It appears that some elements of the agreements were more effectively implemented than others. For instance, Outokumpu and KME sometimes implemented the customer allocation by making certain customers turn to another cartel member by quoting an artificially high price or by referring to capacity limits (recitals (107) and (106)). Moreover, in their common meetings all the participants together reviewed the contract situation in order to compensate lost volumes at other customers and make those not respecting the allocation to explain their action (recital (160)). Nevertheless, customers appear to have somewhat fluctuated among the producers.[315]

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313 Case T-224/00, *Archer Daniels Midland Company and others v Commission of the European Communities*, paragraphs 160 and 271.

314 Case T-224/00, *Archer Daniels Midland Company and others v Commission of the European Communities*, paragraph 279.

315 SO para. 203, footnote 274; file pages 9849-51; SO paras 204 and 206, footnote 276; file page 30927 and 30956; SO para 210, footnote 288; file pages 6365, 28196, 8373, 8374, 8370, 8375, 21879, 8334; SO para 214, footnotes 300 and 301, and para 215. File page 29853, 30957 and 29645; file page 7929;

(364) The Commission notes that in Part D, elements of proof were adduced that Outokumpu, Wieland Werke, KME, TMX and EM implemented several of the cartel agreements in practice. This attenuating circumstance is therefore not applicable to any of the addressees of the present Decision.

– *Limited benefit derived from the infringement*

(365) All the parties maintain that the fines should be reduced due to the limited profits or absence of economic advantage deriving from the infringement. Arguably, the participants made unsatisfactory operating profits or losses on their European activities. Moreover, Wieland disagrees with general statements of the Commission that the hypothetical market price cannot be determined and claims that the Commission is obliged to estimate the hypothetical price. If it is no longer possible to adduce proof of additional profits derived from the infringement, it should not lead to any disadvantage of the parties but the burden of proof would be on the Commission.

(366) Unlike the parties suggest, the Commission does not consider that in general non-benefit from a cartel or a lack of economic advantage resulting from participation in such an infringement could be either an attenuating factor or reduce the gravity of the infringement. As stated by the Court of First Instance, "*the Commission is under no obligation to take into account the profits derived from the infringement*".[316] It is generally difficult to determine what profits each undertaking has derived from its participation in the infringement, and that would have been so particularly in this case. Where there has been a serious and deliberate infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, that infringement may be considered to be sufficiently important so that the Commission does not have to attach particular importance to the actual profits.

(367) The Commission notes, however, that the validity of the parties' arguments based on data not coinciding with the duration of the infringement is highly questionable. Especially when it is known, as noted in the NERA Report, that the growth rate of the sector decreased significantly (and became negative) in the months following the termination of the infringement after a constant period of expansion culminating in a "boom" in the last years of the said infringement.

(368) It should be also reminded that according to Wieland the objective of the cartel was to stop the price erosion (recital (298)). The fact that in certain years the participants allegedly did not earn so high economic or financial benefits from the infringement is compatible with this objective, especially in a sector in which there are high exit costs. The economic or financial benefits derived by the offenders cannot be restricted to super-profits. A loss which would be smaller than in the absence of the cartel also constitutes an economic or financial benefit.

(369) Finally, contrary to Wieland's suggestion, should the Commission demonstrate the existence of such advantages and the fact that the fine is not exceeding the advantage, it would increase the amount of the fine, as it would constitute an aggravating circumstance. The fact that the Commission cannot evaluate such benefit does not

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23348, 21823, 30149-30150, SO para 222, footnotes 311 and 312; file page 28189, 23325-6, 23328, 23050.

316 T-23/99, *LR AF vs Commission*, [2002] ECR II-1705, paragraph 268.

transform this element into an attenuating circumstance. In other words, the absence of an aggravating circumstance does not constitute an attenuating circumstance.

– *Economic difficulties in the industrial tube sector*

(370) All the parties have submitted that, regardless of the fact that LWC has been an expanding market, it has suffered from overcapacity since the late 1980's. In particular, many manufacturers switched into this sector in the first part of the 1990's, which led to price erosion and low profitability. In real terms prices have decreased of around […]% over the period from 1991 to 2001 throughout the industrial tube industry. The parties have submitted several studies showing the situation of the industry.[317] While the industry is characterized by high exit cost, making restructuring difficult, KME has invoked the closure of several production plants and the loss of thousands of jobs.

(371) The Commission emphasises that, in attempting to cope with difficult market conditions or falls in demand, undertakings must use only means that are consistent with the competition rules. Price fixing and market sharing are certainly not legitimate means of combating difficult market conditions. Nor are undertakings entitled to flout Community competition rules because of alleged overcapacity. As a consequence, the Commission does not consider that the situation invoked by Outokumpu, Wieland and KME constitutes an attenuating circumstance.

(372) The Commission maintains, however, that the situation in the copper industrial tubes sector cannot be compared with the situation described in the Commission decisions in cases *Alloy Surcharg* [318] and *Seamless Steel Tubes*[319]. In the Seamless Steel Tubes case, the Commission concluded that "*Since the 1970s, the Community steel market has been affected by a long, serious crisis, the most notable features of which have been the continuous fall in demand and the collapse of prices. These market conditions have brought with them serious problems of overcapacity, low plant-utilisation rates and prices failing to cover total production costs and ensure the profitability of firms. The crisis in the steel market has not just hit ECSC steel but has also affected the non-ECSC sectors, which include the pipes and tubes covered by this decision*" (recital 25 of the decision). In addition, "*With regard in particular to the pipe and tube industry in the Community, since 1980 Community production has been severely restructured in order to adapt capacity to changing market conditions. By the end of 1990, seamless pipe and tube production capacity had been reduced by about 20 %. Between 1988 and 1991, more than 20000 jobs were lost. Since early 1991, the worsening situation of Community production, combined with the growing influx of imports, has resulted in draconian decisions having to be taken concerning the continued reduction of capacity to core levels and in the closure of several production mills in Germany, Italy and the United Kingdom*" (recital 26 of the decision).

(373) In the alloy surcharge case, the Commission found that: "*On the other hand, the economic situation in the sector at the end of 1993 was particularly critical. The price of nickel was rising rapidly, while the price of stainless steel was very low. It should*

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317 File p. 28174; 28224-28403; 30628-30637.

318 Commission Decision 98/247/ECSC (OJ 1998 L 100/55), paragraphs 83 to 84 (the reduction for Acerinox also took into account other mitigating factors in addition to the economic crisis).

319 Commission Decision 2003/382/EC (OJ 2003 L 140/1), paragraphs 168 to 169.

be noted that this particular situation applies only to the very beginning of the concerted action" (recital 83 of the decision).

(374) In this case, according to the NERA Report prepared at the request of KME, which analyses the situation of the industrial tubes sector, "*the CAGR (compound annual growth rate) had been […] percent between 1991 and 2000*". This represents a growth of more than […]% over the period. The main Member States experienced annual growth rates "*which were around […] percent in Germany, […] percent in Italy,*[…] *in France, […] percent in the UK and […] percent in Spain between 1991 and 2000*". More specifically, as concerns IGT and smooth LWC, "*the consumption of these products displayed an increase trend between 1991 and 2000, especially in Germany and Italy, but this trend was interrupted in 2001*". Apart from the fact that the period starting after the first months of 2001 falls outside the infringement period, it is interesting to see the consequences of the decline in demand as explained by the NERA Report: "*the adverse consequences of the decline in demand for copper industrial tubes in 2001 and 2002 have been aggravated by the capacity increase that occurred between 2000 and 2002. According to internal KME estimates, the capacity of the four top European producers of industrial copper tubes (Halcor, Outokumpu, Wieland Werke and KME) increased by 17 percent between 2000 and 2002 from 162 thousand to 189 thousand tons. This capacity increase was the result of the investments carried out during the demand boom, between 1999 and the early months of 2001*" (emphasis added by the Commission). This appears to be in line with Outokumpu's analysis suggesting that the overcapacity was created or fuelled by the active players in the market who tried to take advantage of the expansion of the sector from the beginning of the 1990's.

(375) The Commission must therefore conclude that this sector was not in a crisis similar to the above-mentioned cases during the infringement period and that a reduction of fine is thus not justified.

– *Gradual drifting to illegality*

(376) Wieland invokes, as an attenuating circumstance, the fact that the cartel behaviour was initiated and intensified gradually over the years alongside the legal activities Cuproclima Association. According to Wieland, the transition from legal discussions to anti-competitive behaviour was blurred, and the difference was not always obvious for non-lawyers.

(377) The Commission rejects this argument. It has been established that by May 1988 Cuproclima members had already started the price cooperation with the aim of controlling jointly the LWC tube market (recitals (125) and (129)). The participants' attempts to conceal the discussions in their meetings at the beginning of the infringement period also show that they knew about the illegal nature of these discussions from the beginning, as is apparent in recital (124). That the cartel activity gradually became more intensive and extended to market share allocation only in 1993, cannot be considered an attenuating factor for the purposes of fine calculation.

– *Termination of the infringement*

(378) KME and Wieland maintain that the Commission should take into account the fact that they ceased to participate in the cartel immediately following the dawn raids and prior to the Commission's Article 11 letter.

(379) The Commission considers that the immediate cessation of the illegal behaviour cannot in general be regarded as an attenuating circumstance in cartel cases involving deliberate infringements. According to the Court of First Instance, "*[a]n undertaking's reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case*" and "*the Commission cannot therefore be required, as a general rule, either to regard a continuation of the infringement as an aggravating circumstance or to regard the termination of an infringement as a mitigating circumstance…*".[320]

(380) The claims of KME and Wieland to obtain a reduction of fine based on the termination of the infringement are therefore rejected.

– *Compliance Programme*

(381) All the parties have requested that the Commission take into account that they have adopted antitrust compliance programmes.

(382) The Commission welcomes any initiatives to set up antitrust compliance programmes. Nevertheless, it should be borne in mind that, whilst it is important that an undertaking should take steps to prevent fresh infringements of Community competition law from being committed in the future by members of its staff, that does not alter the fact that an infringement has been committed. Thus, the mere fact that in certain of its previous decisions the Commission took the implementation of a compliance programme into consideration as an attenuating factor does not mean that it is obliged to act in the same manner in any given case,[321] especially where the infringement in question is, as in this case, a clear infringement of Article 81(1)(a) and (b) of the Treaty and Article 53(1)(a) and (b) of the EEA Agreement.[322]

(383) The Commission therefore does not accept any claims to take adoption of a compliance programme into account as an attenuating factor.

– *Cooperation outside the 1996 Leniency Notice*

(384) The Commission notes that unlike point 23 of the 2002 Leniency Notice, the 1996 Leniency Notice does not provide for any specific reward to a leniency applicant that discloses facts previously unknown to the Commission and affecting the gravity or duration of the cartel. It is therefore appropriate to consider any such cooperation under the attenuating factors.

(385) Whilst KME's claims that it was the first or principal undertaking to provide decisive evidence on certain periods of infringement have been rebutted in recitals (339) and

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320 Case T-31/99, *Asea Brown Boveri v. Commission*, [2002] ECR II-018, at paragraph 213.

321 Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 357, confirmed on appeal in Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235.

322 Case T-224/00, *Archer Daniels Midland Company and others v Commission of the European Communities*, paragraph 280.

(417)-(420), the Commission considers that Outokumpu's cooperation qualifies for an attenuating factor in this regard. Outokumpu was the first to disclose the whole duration of the cartel in the industrial tubes sector. Based on the evidence obtained from the immunity applicant (recital (394)) and from the inspections (recital (400) prior to Outokumpu's leniency application, the Commission could have established a continuous infringement from May 1994 to May 1998, corresponding to a duration of only four years. Outokumpu's cooperation allowed to prove the existence of the cartel from May 1988 until March 2001, which transformed the cartel into a long-term infringement (recital (340)).

(386) The Commission considers that Outokumpu should not be penalised for its cooperation by imposing on it a higher fine than the one that it would have had to pay without its cooperation. Therefore the basic amount of Outokumpu's fine is reduced by a lump sum of EUR 22,22 million so that it will be the same as the hypothetical amount of fine that would have been imposed on Outokumpu for a four-year infringement.

(387) In the light of the above, Outokumpu's basic amount of the fine is reduced by EUR 22,22 million for effective co-operation outside the 1996 Leniency Notice.

21.5. Application of the 10% turnover limit

(388) KME maintains that the relevant figure for the purposes of determining the 10% ceiling for fines is KME's worldwide 2002 added value (i.e. conversion value) turnover instead of its consolidated turnover based on full price (i.e. added value and metal price). KME further maintains that the 10% turnover limit must be applied prior to any reduction for leniency and to the combined amount of the two fines that will be imposed in cases Industrial Tubes and Plumbing Tubes (COMP/E-1/38.069).

(389) Outokumpu maintains, for reasons set forth above in recitals (238) and (239), that it would be unfair and disproportionate for the Commission to look at a turnover greater than Outokumpu Copper Products Oy for Europe for the purpose of any fine.

The Commission's view

(390) With regard to KME's argument pertaining to the conversion value turnover, reference is made to the discussion in recital (319). Turnover reflects what is charged to customers and therefore is the relevant figure.

(391) The amount of the fine calculated by taking account of any attenuating or aggravating circumstances may not exceed 10% of the worldwide turnover of the undertaking concerned. According to settled case law, the Commission does not have to limit the maximum amount of the fine to 10% of the turnover in the relevant product and geographical market, but turnover is to be understood as meaning the total turnover of the undertaking concerned.[323]

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[323] Case T-220/00, *Cheil Jedang Corp., vs. Commission*, paragraph 60; joined cases 100 to 103/80 *Musique diffusion française and Others v Commission,*[1983] ECR 1825, paragraph 119*, Case T-43/92 Dunlop Slazenger v Commission [1994] ECR II-441,* paragraph 160*, and Case T-144/89 Cockerill Sambre v Commission [1995] ECR II-947,* paragraph 98.

(392) The Commission refers to its reasoning at recital (344) to rebut the argument that the 10% turnover limit should be applied to the combined amount of fines in the industrial and plumbing tubes cases. The fact that the Commission is conducting investigation on several cases (although they were initiated as one and later separated) does not prevent it from imposing, if appropriate, the maximum amount in each infringement.

21.6. Application of the 1996 Leniency Notice

(393) The addressees of this Decision have co-operated with the Commission, at different stages of the investigation into the infringements for the purpose of receiving the favourable treatment set out in the 1996 Leniency Notice. The Commission therefore examines in the following section whether the parties concerned satisfied the conditions set out in the notice.

(394) As a preliminary remark, the Commission notes that Mueller, the current parent company of Desnoyers, was the first undertaking to inform the Commission about the existence of a cartel in the LWC-tube sector affecting the EEA market in the mid-1990's. The documentary evidence and corporate statement Mueller provided on 12 March 2001, prior to the Commission's investigation, enabled the Commission to establish the existence, content and the participants of a number of cartel meetings held in 1995 and 1996, as well as to undertake inspections on 22 March 2001 and thereafter. However, Mueller cannot be held liable for the infringement, as it never directly participated in the cartel in question, and the Commission has no evidence on Desnoyers' involvement in the infringement after May 1997, when Mueller acquired the latter. Liability for Desnoyers' behaviour before the acquisition by Mueller would therefore remain with Desnoyers.[324] As to Desnoyers, the Commission has not opened proceedings against it, since its limited participation in the cartel continued only slightly beyond the relevant date for prescription (22 March 1996), it withdrew voluntarily from the cartel in 1996, and it is currently in liquidation as a result of bankruptcy proceedings initiated in 2002 (see recitals (90) to (92)).

21.6.1. Outokumpu

(395) Outokumpu informed the Commission about its willingness to cooperate with the Commission on 9 April 2001 (when a second inspection at its premises was undertaken). It provided the documentary evidence in its possession on 30 May 2001, shortly after the Commission's inspections on 22 and 23 March 2001 and on 9 April 2001.

(396) The documentary evidence, corporate statements and witness testimonies provided by Outokumpu cover a period extending from 1988 to 2001. In its Memorandum dated 30 May 2001, Outokumpu provided a description of the cartel including a non-exhaustive list of the multilateral meetings within Cuproclima (with indication of the dates, locations and participants), as well as a number of additional documents it had found in its internal audit. It also described the context of a number of hand-written notes and other documents found during the inspections at its employees' offices, which allowed to connect these documents to specific cartel events. This submission was completed by oral explanations given by Outokumpu's employees at interviews conducted at the

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[324] See Case C-279/98 P, Cascades, paragraphs 78-80.

Commission's invitation in Brussels on 5 June 2002 and on 4 February 2003, as well as by a response of 8 October 2002 to the Commission's request for information sent as a follow-up of the interviews. It should be noted that the interviews of 4 February 2003 were initially planned for June 2002, and the employees in question had agreed to submit to the interviews at that time, but the Commission postponed the questioning of these employees for its internal reasons. This will not be counted to Outokumpu's disadvantage.

(397) The Commission notes that the list of meetings attached to Outokumpu's first submission of May 2001 contained gaps concerning certain periods of the infringement (notably the years 1989-1991 and 1997-1999). These gaps were, however, subsequently fulfilled to a satisfactory extent by recollections of Outokumpu's representatives concerning a number of meetings during those periods and, in particular, by statements confirming that the cartel meetings involving a similar pattern of setting the target prices in the autumn meeting and monitoring compliance in the spring meeting was followed regularly at least twice a year since 1988, with the exception of the "quiet period" in 1997-1999. The fact that Outokumpu no longer has specific recollections concerning all the cartel meetings throughout the whole period of the infringement does not alter the Commission's conclusion that Outokumpu's cooperation was complete.

(398) Outokumpu's cooperation in this matter began nearly a year and a half before that of the other participants. The Commission therefore accepts that Outokumpu's early assistance allowed the Commission to better understand the infringement and interpret the documents obtained in the inspections. The information submitted by Outokumpu in the form of documentary evidence, corporate statements and executive interviews was detailed and therefore extensively used by the Commission in the pursuance of its investigation. That information was also used to draft requests for information that largely contributed to trigger the admission by Wieland Werke and KME of their participation in the cartel. Outokumpu thus assisted the Commission significantly in establishing the facts on which this Decision is based.

(399) Outokumpu does not qualify for a non-imposition of a fine or a very substantial reduction of at least 75% in its amount under Section B of the 1996 Leniency Notice. More specifically, it does not meet the condition set forth in point (a) of Section B, since it did not inform the Commission about the cartel before the Commission undertook an investigation, ordered by decision, in this case.

(400) Furthermore, Outokumpu does not qualify for a substantial reduction from 50% to 75% under Section C of the 1996 Leniency Notice, as the Commission investigations ordered by decision provided sufficient grounds for initiating the procedure leading to a decision in this case. The inspections produced direct evidence on the existence of the cartel primarily in the period from May 1994 to May 1998. While the evidence and indices before and after that period, including documents concerning the first known cartel meeting in May 1988, were only sporadic, the Commission considers that it could have opened proceedings in this case and established a continuous infringement from 1994 to 1998 without Outokumpu’s cooperation. Nevertheless, since Outokumpu was the first to disclose the whole duration and continuity of the infringement, it was granted an attenuating factor for its cooperation outside the 1996 Leniency Notice (recitals (384) to (387)).

(401) Under Section D of the 1996 Leniency Notice, an undertaking which does not comply with all the conditions set out in Sections B or C of that Notice can still benefit from a significant reduction of 10% to 50% of the fine that would otherwise have been imposed. The Commission notes that before the Statement of Objections was sent, Outokumpu materially contributed to establishing the existence of the infringement, and after having received the Statement of Objections, it has informed the Commission that it does not substantially contest the facts on which the Commission has based its allegations. Outokumpu therefore fulfils the conditions set out in Section D of the 1996 Leniency Notice, qualifying for a significant reduction in a fine (10%-50%).

(402) In accordance with Section D of the 1996 Leniency Notice and in view of Outokumpu's early and extensive cooperation, the Commission, accordingly, grants Outokumpu a **50 %** reduction of the fine that would otherwise have been imposed if it had not co-operated with the Commission.

(403) The total fine imposed on Outokumpu will therefore be EUR 18,13 million.

21.6.2. Wieland Werke

(404) The Commission takes into account the fact that Wieland Werke did not start cooperating with the Commission until it responded to Article 11 letter addressed to it in July 2002. This is all the more relevant considering that the on-site inspections ordered by a Commission decision were carried out as early as in March 2001, so that Wieland was aware of the Commission's investigation but did not offer its cooperation at an earlier stage before it was approached again by a formal Commission intervention. Its application for leniency was therefore not entirely spontaneous, and it was introduced at a relatively late stage after about a year and a half had lapsed from the Commission's inspections in March 2001. A large part of the information provided was in reply to Article 11 letter of July 2002 and therefore falls, as such, within the ambit of the undertaking's duty to fully reply to these requests as set out in Article 11 of Regulation 17.

(405) The Commission acknowledges, nevertheless, that Wieland Werke's reply to the Commission's Article 11 letter, in which it also applied for leniency, went beyond its obligation to reply. It provided the most detailed list of the Cuproclima meetings since its formation in 1985 (without, however, indicating the ones with anticompetitive aspects), a description of the functioning of the cartel under the umbrella of Cuproclima, and extensive explanations on the context of a number of documents found at the Commission's inspection. Consequently, the Commission considers that Wieland Werke contributed materially to establishing the existence of the infringement before the Statement of Objections was sent, for which adequate recognition should be accorded. The Commission notes, however, that in its application for leniency Wieland recalled that the cartel activities began only towards 1993, as opposed to late 1980's disclosed by the other participants.[325] In its reply to the Statement of Objections, Wieland has not contested the starting date of the infringement.

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[325] Although Wieland's list of Cuproclima meetings covers the period 1985-2001, it has not provided any information on the possible anticompetitive purpose and subject matter of the meetings prior to 1993.

(406) After having received the Statement of Objections, Wieland Werke has informed the Commission that it does not substantially contest the facts on which the Commission has based its allegations.

(407) The Commission notes that Wieland Werke was not the first undertaking to provide the Commission with decisive evidence on the industrial tubes cartel, as required under point (b) of Section B of the 1996 Leniency Notice, and therefore it does not qualify under Section C which refers to the conditions set out in Section B, points (b) to (e) of the said Notice. Nevertheless, under Section D of the Notice, an undertaking which does not comply with all the conditions set out in Sections B or C can still benefit from a significant reduction of 10% to 50% of the fine that would otherwise have been imposed.

(408) After due consideration of all these circumstances, it can be concluded that Wieland Werke fulfils the conditions set out in Section D(2) first and second indent of the 1996 Leniency Notice and grants it a **20%** reduction of the fine that would have been imposed if it had not co-operated with the Commission.

(409) The total fine imposed on Wieland Werke will therefore be EUR 20,79 million.

21.6.3. KME

(410) KME claims that it qualifies for the maximum reduction of 50% available under Section D of the 1996 Leniency Notice. It submits, referring to Commission decision in *Amino Acids*[326], that it is irrelevant for the purpose of Section D that it cooperated following the receipt of the Commission's Article 11 request. It considers its cooperation voluntary to the extent it provided full answers to certain questions to which it had no legal obligation to answer under the *Orkem*-rule[327] and provided information beyond the questions asked by the Commission in Article 11 letter . In this regard, KME also notes that the fact that Wieland submitted its Article 11 reply two weeks earlier than KME should be irrelevant for the purpose of assessing the reduction under Section D of the 1996 Leniency Notice.

(411) More specifically, KME argues that it was the principal undertaking to provide decisive information concerning the period from May 1988 to November 1992. KME identifies this gap of 4,5 years in Outokumpu's first submission of 30 May 2001, highlighting that Outokumpu's subsequent interviews only contain recollections concerning one meeting in Nice in April 1991. With regard to Wieland's submission concerning this period, it points out that Wieland only listed a number of meetings prior to November 1992 without disclosing their anticompetitive nature. Consequently, KME considers to be the only participant that from the very beginning provided dates, locations, and participants of the meetings and acknowledged that the exchange of sensitive information had taken place prior to 1993.[328]

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326 Commission Decision 2001/418/EC in case COMP/36.545/F3 *Amino Acids*, OJ 2001 L 152/24, paragraphs 424, 431.

327 Case 374/87 *Orkem v. Commission*, [1989] ECR 3283, paragraphs 34-35. See also Case T-112/98 *Mannesmannröhren-Werke AG v. Commission*, [2001] ECR II-729, paragraphs 67 *et seq.*

328 It mentions, in particular, meetings on 27-28 April 1989 (Paris), 26 September 1989 (Zürich), 1 December 1989 (Paris) and 14 May 1992 (Venice).

(412) KME further asserts that its description of the early years of the Cuproclima arrangements is more detailed than those provided by the other participants and that this information allowed the Commission to send out further information requests to KME and Wieland and to conduct further interviews with Outokumpu's employees.

(413) With regard to the period from 1997 to 1999, identified as a "quiet period" by Outokumpu, KME considers that it decisively helped the Commission to assess the extent of the activities during that period and, in particular, the fact that the arrangements were not entirely interrupted. It also provided evidence of twelve Cuproclima meetings that took place from January 1997 to August 1999.

(414) In addition, KME claims to have provided both new evidence and corroborated existing evidence for the entire period of the infringement from 1988 to 2001. It pretends that prior to the KME Article 11 reply, the Commission had been provided with only very limited descriptions of the anticompetitive arrangements. It mentions seven meetings[329] that were unknown to the Commission prior to KME's submission. Furthermore, KME claims credit for a number of Cuproclima meetings that it had mentioned in its submission but which had not been referred to in the Statement of Objections or for which KME was not identified as source of information.

(415) The Commission takes into account the fact that KME did not start cooperating with the Commission until it responded to Article 11 letter addressed to it in July 2002. This is all the more relevant considering that the on-site inspections ordered by a Commission decision were carried out as early as in March 2001, so that KME was aware of the Commission's investigation but did not offer its cooperation at an earlier stage before it was approached again by a formal Commission intervention. Its application for leniency was therefore not entirely spontaneous, and it intervened at a relatively late stage after about a year and a half had lapsed from the Commission's inspections in March 2001. A large part of the information provided was in reply to Article 11 letter of July 2002 and therefore falls, as such, within the ambit the undertaking's duty to fully reply to these requests as set out in Article 11 of Regulation 17.

(416) The Commission acknowledges, nevertheless, that KME's reply to the Commission's Article 11 letter, in which it also applied for leniency, exceeded its obligation to reply. It provided a number of documents contemporaneous to the infringement and a detailed description of the functioning of the cartel under the umbrella of Cuproclima, as well as explanations on the context of a number of documents found at the Commission's inspection. Consequently, the Commission considers that KME contributed materially to establishing the existence of the infringement for its full duration before the Statement of Objections was sent, for which adequate recognition should be accorded.

(417) With regard to the alleged gap of information from May 1988 to November 1992, the Commission notes that by the time KME replied to the request of information in October 2002, the Commission already had decisive evidence from other sources showing that the infringement was continuous during the period in question (see

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[329] 27-28 April 1989 (Paris), 1 December 1989 (Paris), 12-13 October 1994 (Stockholm), 12-14 May 1997 (Zürich), 4 September 1997 (Zürich), 20 November 1997 (Zürich) and 7 April 2000 (Zürich).

references in recitals (124)-(126), (128), (129), (131)-(136), and the Commission's conclusion in recital (397)). KME's argument that it was the principal undertaking to provide decisive information and the first participant to admit that anticompetitive activity took place during that period must therefore be rejected. The Commission recognises, however, that as opposed to Wieland, KME's description of the cartel cooperation within Cuproclima extended also to these early years of the infringement 1988-1993.

(418) Whilst the Commission acknowledges that KME's description of the early years of the Cuproclima arrangements is detailed, it is not more detailed or more comprehensive than that provided by the other participants, in particular by Outokumpu in the interviews conducted in June 2002. The information provided by KME may have assisted the Commission in drafting its further information requests and in defining its questions to Outokumpu's employees in February 2003, but these information requests and interviews were not based on KME's submission. Furthermore, the latter part of Outokumpu's interviews was initially planned for June 2002 but postponed upon Commission's request.

(419) With regard to the period from 1997 to 1999, the Commission admits that KME helped it to assess the extent of Cuproclima activities during that period and, in particular, the fact that the arrangements were not entirely interrupted. It was also the only participant to provide information on the bilateral and multilateral working group meetings which preceded the setting of target prices in the Cuproclima autumn meeting of 1999. It must be pointed out, however, that the Commission had previously obtained documentary evidence concerning a number of meetings and exchanges of confidential information during this period as a result of the inspections and from other sources, as set forth in recitals (160)-(165).

(420) The Commission accepts KME's claim that it has provided both new evidence and corroborated existing evidence for the entire period of the infringement from 1988 to 2001. In contrast, it does not agree with KME's assertion that the Commission had been provided with only very limited descriptions of the anticompetitive arrangements prior to KME's reply to the Commission's request of information, as already pointed out above in recital (418). With regard to the specific meetings disclosed only by KME and/or not mentioned in the Statement of Objections, the Commission notes that the purpose of the Statement of Objections was not to mention exhaustively all the official meetings of the Association; rather, it focuses on the unofficial meetings with anticompetitive aspects. Yet, KME has not specifically indicated which meetings involved an anticompetitive purpose.

(421) The Commission notes that KME was not the first undertaking to provide the Commission with decisive evidence on the industrial tubes cartel, as required under point (b) of Section B of the 1996 Leniency Notice, and therefore it does not qualify under Section C which refers to the conditions set out in Section B, points (b) to (e). Nevertheless, under Section D of the said Notice, an undertaking which does not comply with all the conditions set out in Sections B or C can still benefit from a significant reduction of 10% to 50% of the fine that would otherwise have been imposed.

(422) After having received the Statement of Objections, KME has informed the Commission that it does not substantially contest the facts on which the Commission has based its allegations.

(423) After due consideration of all these circumstances, the Commission considers that KME fulfils the conditions set out in Section D(2) first and second indent of the 1996 Leniency Notice and grants it a **30%** reduction of the fine that would have been imposed if it had not co-operated with the Commission. This reduction exceeds by 10 % that granted to Wieland Werke, because in its application for leniency KME disclosed the existence of the anticompetitive arrangements since the 1980's (the exact starting point was not mentioned), as opposed to 1993 which was identified as the beginning of the cartel activities in Wieland's application for leniency. KME also disclosed a number of "working group" meetings in 1999 (recital (168)) not mentioned by the other participants and helped the Commission to appreciate the extent of cartel activity during the "quiet period" from 1997 to 1999.

(424) The total fine imposed on the companies of the KME-group will therefore be EUR 39,81 million (of which EUR 18,99 million to KME-group; EUR 10,41 million to KME AG; and EUR 10,41 million to the undertaking formed by EM and TMX).

21.6.4. Conclusion on the application of the 1996 Leniency Notice

(425) In conclusion, with regard to the nature of their co-operation and in the light of the conditions as set out in the 1996 Leniency Notice, the Commission grants to the addressees of this Decision the following reductions of their respective fines:

(a) Outokumpu-group: a reduction of **50 %**

(b) KME-group: a reduction of **30%**

(c) Wieland Werke: a reduction of **20%**

21.7. Ability to pay

(426) [Arguments presented by KME to justify inability to pay a fine]

(427) [Arguments presented by KME to justify inability to pay a fine]

(428) [Summary of confidential information provided by KME]

(429) The Commission remarks that KME and its subsidiaries, […], cannot be considered as companies in difficulty. KME provided a dividend to its shareholders in 2002 and with corrective measures it assumed that in 2003 it would be able to steer itself successfully through the difficult world economic circumstances. Its annual report of 2002 states also that the asset and capital structure and the cover ratios in KME AG's balance sheet are satisfactory. EM's losses in 2002 were due to extraordinary items, the gross operating margin being largely positive. As for TMX, its 2002 report mentioned that expected savings will enable the company to considerably improve its results during the second semester of 2003.[330]

[330] Annual accounts of KME, EM and TX for 2002, attached to the reply to the SO.

(430) The Commission also notes that, according to the consolidated accounts of the SMI group (SMI mother company + KME group) submitted by KME, the group reached a net profit of 5,1 million EUR in the exercise 1996-1997, 19,1 million EUR in 1997-1998, 33,5 million EUR in 1998-1999, 46,9 million EUR in 1999-2000, 38,6 million EUR in 2000-2001 and 6,8 million EUR in the six month exercise of July-December 2001. This gives a total of 150 million EUR. In 2002, for the first time the group suffered a loss of 19,3 million EUR. It should be noted that in 2002, KME continued its expansion taking over a competitor (Yorkshire Copper Tube Ltd) and selling a company not belonging to its core activity. Estimates for 2003 indicate losses for the three companies of the group, but as part of the increased costs are related to the restructuring plan, they are also not likely to appear in future exercises.

(431) […] According to case-law: "*In any event, recognition of an obligation requiring the Commission to take account, when determining the fine, of an undertaking's loss-making financial situation would be tantamount to conferring an unjustified competitive advantage on undertakings least well adapted to the conditions of the market.*[331] A fortiori, a reduction of the fine for a group not in difficulty, but mainly confronted to present general market conditions, would confer them a greater competitive advantage with regard to the other producers.

21.8. The amount of the fines imposed in these proceedings

(432) In conclusion, the Commission sets the fines to be imposed pursuant to Article 15(2) Regulation No17 as follows:

- Outokumpu-group: EUR 18,13 million
- Wieland Werke AG: EUR 20,79 million
- KME-group EUR 18,99 million
- KM Europa Metal AG: EUR 10,41 million
- Europa Metalli SpA and Tréfimétaux SA EUR 10,41 million

[331] Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others v Commission* [1983] ECR 3369, paragraph 55*;* Case T-319/94 *Fiskeby Board* v Commission [1998] ECR II-0000, paragraph 76.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed the provisions of Article 81(1) of the Treaty and - from 1 January 1994 - Article 53(1) of the EEA Agreement by participating, for the periods indicated, in a complex of agreements and concerted practices consisting of price fixing and market sharing in the industrial tubes sector:

(a) Wieland Werke AG from 3 May 1988 until 22 March 2001;

(b) Outokumpu Oyj individually from 3 May 1988 until 30 December 1988, and jointly and severally with Outokumpu Copper Products Oy from 31 December 1988 until 22 March 2001;

(c) Outokumpu Copper Products OY from 31 December 1988 until 22 March 2001 (jointly and severally with Outokumpu Oyj);

(d) KM Europa Metal AG individually from 3 May 1988 until 19 June 1995, and jointly and severally with Tréfimétaux SA and Europa Metalli SpA from 20 June 1995 to 22 March 2001;

(e) Europa Metalli SpA., jointly and severally with TMX from 3 May 1988 to 19 June 1995, and jointly and severally with KM Europa Metal AG and Tréfimétaux SA from 20 June 1995 to 22 March 2001.

(f) Tréfimétaux SA, jointly and severally with Europa Metalli SpA from 3 May 1988 to 19 June 1995, and jointly and severally with KM Europa Metal AG and Europa Metalli SpA from 20 June 1995 to 22 March 2001.

Article 2

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

(a) Wieland Werke AG:	EUR 20,79 million
(b) Outokumpu Oyj and Outokumpu Copper Products Oy: jointly and severally	EUR 18,13 million
(c) KM Europa Metal AG, Tréfimétaux SA and Europa Metalli SpA: jointly and severally	EUR 18,99 million
(d) KM Europa Metal AG:	EUR 10,41 million
(e) Europa Metalli SpA and Tréfimétaux SA: jointly and severally	EUR 10,41 million

The fines shall be paid, within three months of the date of the notification of this Decision to the following account:

Account N°

001-3953713-69 of the European Commission with :

FORTIS Bank, Rue Montagne du Parc 3, 1000 Brussels

(Code SWIFT GEBABEBB – Code IBAN BE71 0013 9537 1369)

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3,5 percentage points, namely 5,5 **%**.

Article 3

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

They shall refrain from repeating any act or conduct referred to in Article 1, and from adopting any measure having equivalent object or effect.

Article 4

This Decision is addressed to:

1. Wieland Werke AG

Graf-Arco-Strasse 36

89079 Ulm

GERMANY

2. Outokumpu OYj

Riihitontuntie 7 D

02201 Espoo

FINLAND

3. Outokumpu Copper Products Oy

Riihitontuntie 7 A

02201 Espoo

FINLAND

4. KM Europa Metal AG

Klosterstrasse 29

49074 Osnabrück

GERMANY

5. Europa Metalli S.p.A

Via dei Barucci, 2

50127 Firenze

ITALY

6. Tréfimétaux S.A

11 bis, rue de l'hôtel de ville

92411 Courbevoie

FRANCE

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels, 16 December 2003.

For the Commission

Mario MONTI
Member of the Commission