



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.7.2009
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COMMISSION DECISION

of 22.7.2009

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

COMP/39.396 – Calcium carbide and magnesium based reagents for the steel and gas industries

(Only the English, German, Slovak and Slovene languages are authentic)

(Text with EEA relevance)

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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 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 24 June 2008 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty²,

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

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

Whereas:

I. INTRODUCTION

- (1) This decision relates to a single and continuous infringement of Article 81 of the Treaty establishing the European Community (hereinafter "the Treaty") and Article 53 of the Agreement on the European Economic Area (hereinafter "the EEA Agreement"). The infringement consisted of market sharing, quotas, customer allocation, price fixing and exchanges of sensitive commercial information between suppliers of calcium carbide and magnesium granulates on a substantial part of the EEA market and lasted from at least 7 April 2004 until 16 January 2007.³

- (2) This Decision is addressed to the following companies:

1. I.garantovaná a.s.;
2. Akzo Nobel NV;
3. Almamet GmbH;
4. AlzChem Hart GmbH;
5. ARQUES Industries AG;
6. Carbide Sweden AB;
7. Donau Chemie AG;

¹ OJ L 1, 4.1.2003, p.1.

² OJ L 123, 27.4.2004, p.18.

³ See Chapter VII of this Decision for an assessment of the individual duration of infringement for each addressee.

8. ECKA Granulate GmbH & Co KG;
9. Evonik Degussa GmbH;
10. Holding Slovenske elektrarne d.o.o.;
11. non ferrum Metallpulver GmbH & Co KG;
12. Novácke chemické závody, a.s.;
13. SKW Stahl-Metallurgie GmbH;
14. SKW Stahl-Metallurgie Holding AG;
15. TDR Metalurgija d.d.

II. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

II.1 The products

- (3) Calcium carbide (CaC_2) is a chemical compound produced in a carbide furnace through a high temperature reduction process. It has the appearance of greyish white lumps and it is crushed, sieved, grinded and packaged in accordance with each client's specifications.⁴ Calcium carbide may be applied in several ways.⁵
- (4) In a basic cubic form (granulates) calcium carbide is used in the gas industry for the production of acetylene. Welding and cutting with acetylene is relatively unsophisticated, but remains the most commonly used technique for joining materials in the world. This type of application will be referred to as *calcium carbide granulates* in this Decision.
- (5) In powder form, calcium carbide is used in the steel industry to decontaminate and purify molten steel from oxygen (desoxidation) and sulphur (desulphurisation). For desulphurisation purposes, the calcium carbide is mixed with smaller quantities of active ingredients such as carbon dust, flux agents and magnesium to further enhance its properties.⁶ This type of application will be referred to as *calcium carbide powder* in this Decision.
- (6) The size of the market of calcium carbide in the EEA for the applications stated in recital (5) and (6) is approximately 260 000 tons with an estimated value of over EUR 130 million⁷.
- (7) For desulphurisation purposes in the steel industry calcium carbide competes with magnesium based reagents⁸. Magnesium is more expensive but requires less

⁴ [*]. Any reference to '*' in this public version of the decision refers to information that is not made public on the basis of a claim for protection as a business secret or other confidential information from the information provider and/or where the Commission considers that disclosure would undermine the protection of court proceedings or the purpose of its inspections, investigations and audits.

⁵ Apart from the two main applications referred to in recitals (4) and (5), calcium carbide is also used for various other applications: the production of calcium cyanamide (= fertiliser), polyvinyl chloride (PVC), in the ripening of fruit, carbide lamps, signal flares, etc. None of these applications are relevant to the current Decision.

⁶ See for instance [*]. In principle, each individual customer buys a variety of tailor-made calcium carbide mixtures. Calcium carbide is supplied without additions when used for desoxidation.

⁷ Estimation for 2006, with a proportion of calcium carbide powder versus calcium carbide granulates of approximately 49/51. [*].

volume and acts faster.⁹ The use of magnesium based reagents for desulphurisation purposes in the steel industry will be referred to as *magnesium granulates* in this Decision.

- (8) For desulphurisation purposes, calcium carbide powder and magnesium granulates can be used independently or co-injected.¹⁰ Some steel plants use calcium carbide powder, others magnesium granulates, but most use mixtures of calcium carbide powder and magnesium granulates. They can easily switch from calcium carbide powder to magnesium, which is the trend.¹¹ The size of the market of magnesium granulates for desulphurisation purposes in the EEA is approximately more than 22 000 tons with an estimated value of more than EUR 45 million.¹²

II.2 The undertakings

II.2.1. Akzo Nobel

- (9) The Akzo Nobel group is active in the areas of healthcare, coatings and chemicals. The ultimate holding company of the group is Akzo Nobel NV based in Amsterdam, the Netherlands.¹³ The Akzo Nobel group is hereinafter referred to as "Akzo Nobel".
- (10) Akzo Nobel produces calcium carbide in Sundsvall, Sweden, in its subsidiary Carbide Sweden AB¹⁴ and previously in Akzo Nobel Surface Chemistry AB¹⁵ and Casco Products AB.¹⁶ Carbide Sweden AB (and its predecessors) supplied calcium carbide granulates to the gas industry and calcium carbide powder to the steel industry. It did not supply magnesium granulates.¹⁷
- (11) Carbide Sweden AB (and its predecessors) is the only producer of calcium carbide in Northern Europe. In order to supply customers in the steel industry in

⁸ See for instance [*]. Magnesium powder/granulate is an inflammable product. For security reasons, it is usually coated.

⁹ [*]. Magnesium has a high affinity for sulphur, and when injected into molten iron or steel, it will reduce the sulphur content dramatically. By using magnesium instead of calcium carbide, the steel plant can speed up the production process. As a consequence, magnesium becomes more attractive when the demand for steel products is high. However, magnesium cannot be injected by itself. It needs a bulk carrier for which most often quicklime is used. The ratio of quicklime to magnesium is approximately 3:1 or 4:1.

¹⁰ [*]. A number of factors are of relevance to steel factories when choosing a desulphurisation agent: the process time, cost of the agent, design of the factory, the pig iron quality and the desired quality of the steel product.

¹¹ [*]

¹² Estimation for 2006. Average calculated [*].

¹³ [*].

¹⁴ As of 1.11.2005. [*].

¹⁵ Between 1.1.2004 and 31.10.2005. [*].

¹⁶ Until 1.1.2004. [*]

¹⁷ [*]

continental Europe, Carbide Sweden AB (and its predecessors) called upon the services of the non-ferrous metal powders supplier Ecka¹⁸.

- (12) The total worldwide turnover of Akzo Nobel NV in the last full business year before this Decision was EUR 15 400 million.¹⁹ Sales of calcium carbide in the EEA - except Spain, Portugal, Ireland and the UK - in the last full year of the infringement amounted to EUR [between 10 and 20] million.²⁰

II.2.2. Almamet

- (13) Almamet GmbH (registered as 'Almamet GmbH Handel mit Spänen und Pulvern aus Metall') is a trader of magnesium granulates and calcium carbide powder for the steel industry, located in Ainring, Germany.²¹ It sources magnesium granulates mainly from China and calcium carbide powder mainly from Novácke chemické závody in Slovakia²².
- (14) Almamet and Novácke chemické závody signed a "Skeleton Agreement for technical and commercial co-operation" according to which both parties agreed to enter into a long-term partnership with distinct rights and obligations in relation to sales of calcium carbide powder within the EEA²³. Under the agreement, Almamet provides, inter alia, technical know-how in order to set up a specific production site, advises on product specifications including the development of future new types and processes for their production and application, is responsible for effective market survey research, indicating existing and expected future needs of customers with regard to quantity, quality and price and for selling the product via sales contracts. For all of these services, Almamet receives a fee which is set up as a function of products sold.
- (15) The total worldwide turnover of Almamet GmbH in the last full business year before this Decision was EUR [between 40 and 50] million.²⁴ Sales of calcium carbide powder and magnesium granulates in the EEA - except Spain, Portugal, Ireland and the UK - in the last full year of the infringement amounted to EUR [between 20 and 30] million.²⁵ The undertaking is hereinafter referred to as 'Almamet'.

¹⁸ See recital (20).

¹⁹ [*]

²⁰ [*]

²¹ [*] In addition Almamet also supplies magnesium based products for the chemical industries.

²² In relation to calcium carbide powder Almamet has a co-operation agreement with NCHZ [see recitals (14) and (22)] which relates only to calcium carbide powder for desulphurisation purposes. Almamet bought carbide powder for desoxidation from other sources, representing [*] of its calcium carbide trade.

²³ [*]

²⁴ [*]

²⁵ [*]

II.2.3. Donau Chemie

- (16) Donau Chemie AG is an Austrian chemical company, with its seat in Vienna, Austria. It produces calcium carbide in Landeck in Tirol.²⁶ Donau Chemie AG supplies calcium carbide granulates to the gas industry and calcium carbide powder to the steel industry.²⁷ Donau Chemie AG purchases some magnesium granulateto add to its calcium carbide powder, but does not supply magnesium granulates separately.
- (17) The total worldwide turnover of Donau Chemie AG in the last full business year before this Decision was EUR 257 million.²⁸ Sales of calcium carbide powder and granulates in the EEA - except Spain, Portugal, Ireland and the UK - in the last full year of the infringement amounted to EUR [between 10 and 20] million²⁹ The undertaking is hereinafter referred to as 'Donau Chemie'.

II.2.4. Ecka

- (18) The Ecka Granules group is a manufacturer of non-ferrous metal powders, headed by ECKA Granulate GmbH & Co KG in Fürth in Germany.³⁰
- (19) Its wholly owned subsidiary Aluma GmbH in Fridolfing in Germany produced and sold magnesium granulates for the steel industry.³¹ This business was transferred as of 1 January 2006 to non ferrum Metallpulver Gesellschaft mbH & Co KG, a wholly owned subsidiary of Aluma GmbH located in St. Georgen in Austria³².
- (20) Non ferrum Metallpulver Gesellschaft mbH & Co KG also acted as a sales agent for Carbide Sweden AB for selling calcium carbide powder to the steel industry.³³
- (21) The total worldwide turnover of Ecka Granulate GmbH & Co KG in the last full business year before this Decision was EUR [between 900 and 1000] million.³⁴ Sales of magnesium granulates for the steel industry in the last full year of the infringement amounted to [between EUR 10 and 20 million]³⁵ in the EEA - except Spain, Portugal, Ireland and the UK. The turnover made on the sales of calcium carbide power of Akzo Nobel in their period of participation to the infringement for this product segment amounted to EUR [*].³⁶ The undertaking is hereinafter referred to as 'Ecka'.

26 [*]

27 [*]

28 [*]

29 [*]

30 See www.ecka-granules.com

31 [*]

32 [*]

33 [*] See also recital (11). [*]

34 [*]

35 [*]

36 [*]

II.2.5. NCHZ

- (22) Novácke chemické závody, a.s. (hereinafter 'NCHZ') is a chemical company in Novaky, Slovakia, which produces, inter alia, calcium carbide. It is an important supplier of calcium carbide granulates to the gas market for which it has its own marketing organisation. Within the steel industry, it sells calcium carbide powder to Almamet with whom it has a cooperation agreement.³⁷ NCHZ does not supply magnesium granulates separately.
- (23) During the period of the infringement, more than 70% of NCHZ was owned, directly or indirectly³⁸, by I.garantovaná, a.s. (Slovakia), an investment company with economic activities throughout Slovakia.³⁹ I.garantovaná, a.s. divested its shareholding in NCHZ in 2007 to its subsidiary G1 Investments Limited (Cyprus).⁴⁰ In 2008, Disor Holdings Limited (Cyprus) acquired 100% of NCHZ.⁴¹
- (24) The total turnover of NCHZ in the last full business year before this Decision amounted to EUR 205 million.⁴² The total turnover of I.garantovaná in the last relevant business year amounted to EUR 229 million.⁴³ NCHZ's sales of calcium carbide in the EEA - except Spain, Portugal, Ireland and the UK - in the last full year of the infringement amounted to EUR [between 20 and 30] million.⁴⁴

II.2.6. SKW-Stahl Metallurgie (SKW)

- (25) SKW Stahl-Metallurgie GmbH, located in Unterneukirchen, Germany, is a provider of specialty chemicals. It is one of the main European suppliers of calcium carbide powder and magnesium granulates to the steel industry.⁴⁵
- (26) SKW-Stahl Metallurgie GmbH is nowadays a 100% subsidiary of SKW Stahl-Metallurgie Holding AG. Both entities are referred to hereinafter as 'SKW'.
- (27) In 2004, up to and including 30 August, SKW Stahl-Technik GmbH & Co. KG, the predecessor of SKW Stahl-Metallurgie GmbH, was directly owned to 100% by Degussa AG (now Evonik Degussa GmbH and hereinafter referred to as "Degussa").⁴⁶
- (28) Degussa produced and sold calcium carbide through its subsidiary SKW Stahl-Technik GmbH. The vast majority of the product was used in-house for the

³⁷ See recital (14). [*]

³⁸ [*]

³⁹ See www.garantovana.sk and [*].

⁴⁰ Press release of I.garantovaná a.s. of 7.6.2007 [*]

⁴¹ [*]

⁴² [*]

⁴³ [*] See also recital (334).

⁴⁴ [*]

⁴⁵ [*] and www.skw-steel.com.

⁴⁶ [*]

⁴⁶ [*] Degussa AG became Degussa GmbH and is now Evonik Degussa GmbH. See also recital (31).

production of calcium cyanamide.⁴⁷ In 2003, Degussa separated the external sales of calcium carbide from the production, in view of a possible divestiture of the calcium carbide sales business. Production remained with SKW Stahl-Technik GmbH and external sales were transferred to the new entity SKW Stahl-Technik GmbH & Co. KG.

- (29) As of 30 August 2004⁴⁸, Arques AG (now ARQUES Industries AG and hereinafter referred to as "Arques"), an undertaking with restructuring expertise which focuses on the acquisition of companies in special situations⁴⁹, acquired SKW Stahl-Technik GmbH & Co. KG via the intermediary entity Arques BeteiligungsgesellschaftmbH.⁵⁰
- (30) Arques reorganised SKW: SKW Stahl-Technik GmbH & Co. KG became SKW Stahl-Metallurgie GmbH⁵¹ and Arques BeteiligungsgesellschaftmbH became SKW Stahl-Metallurgie Holding GmbH and later SKW Stahl-Metallurgie Holding AG.⁵² Arques remained the owner of 100% of SKW until 30 November 2006, when SKW Stahl-Metallurgie Holding AG was quoted on the stock market, and kept the majority of the shares until 20 July 2007.⁵³
- (31) After the divestiture of the SKW calcium carbide sales business to Arques, Degussa continued the production of calcium carbide through its subsidiary SKW Stahl-Technik GmbH which was reorganised to become SKW Metallurgie GmbH⁵⁴ and later AlzChem Hart GmbH.⁵⁵ Degussa also continued to supply calcium carbide powder to SKW, on the basis of a long term contract that was concluded before the transfer of the business to Arques.⁵⁶ All calcium carbide powder sold by SKW is therefore sourced from Degussa.⁵⁷
- (32) The total worldwide turnover of SKW in the last full business year before this Decision was EUR 377 million.⁵⁸ The sales of calcium carbide and magnesium of SKW in the EEA - except Spain, Portugal, Ireland and the UK - in the last full year of the infringement amounted to EUR [between 20 and 30] million.⁵⁹

⁴⁷ Cyanamide is a fertiliser. [*]

⁴⁸ [*]

The legal transfer of SKW from Degussa to Arques took place on 30.8.2004 [*]

⁴⁹ [*]

⁵⁰ SKW Stahl-Metallurgie GmbH became a 100% subsidiary of Arques BeteiligungsgesellschaftmbH which was wholly owned by Arques AG.

⁵¹ At the beginning of 2005. [*]

⁵² As from 26.5.2006. [*]

⁵³ [*]

⁵⁴ [*]

⁵⁵ [*]

⁵⁶ [*]

⁵⁷ From AlzChem Hart GmbH (and its predecessors). [*] Minor quantities of calcium carbide granulate were sourced from TDR. [*]

⁵⁸ [*]

⁵⁹ [*]

- (33) The total worldwide turnover of Degussa in the last full business year before this Decision was EUR 11 511 million.⁶⁰ The total worldwide turnover of Arques in the last full business year before this Decision was EUR 5 505 million.⁶¹

II.2.7. HSE/TDR

- (34) TDR-Metalurgija d.d. (hereinafter "TDR") is an electro-chemical manufacturer, located in Ruše (Maribor) in Slovenia. It was involved in the production of calcium carbide and ferroalloys.⁶² TDR supplied calcium carbide granulates to the gas industry as well as calcium carbide powder to the steel industry.⁶³
- (35) TDR was majority owned (74.4%) by the state-owned electricity company Holding Slovenske elektrarne d.o.o. (hereinafter "HSE").⁶⁴ HSE divested TDR to W & P Profil – Solarvalue holding d.o.o. on 20 December 2006.⁶⁵ TDR stopped the production of calcium carbide on 1 October 2007 and has been in state of bankruptcy since 28 April 2008.⁶⁶
- (36) The total worldwide turnover of the HSE group in the last full business year before this Decision was circa EUR 900 million.⁶⁷ The total worldwide turnover of TDR Metalurgija d.d. in the last full business year before the bankruptcy, was EUR 28.3 million.⁶⁸ The total sales of calcium carbide of TDR in the EEA - except Spain, Portugal, Ireland and the UK - in the last full year of the infringement amounted to EUR [between 10 and 20] million.⁶⁹

II.3 The description of the market (2000 – 2007)

II.3.1. The supply

- (37) There are a limited number of producers and suppliers of calcium carbide in the EEA. In addition to the seven producers/suppliers mentioned in recitals (9) to (33), there were seven other producers/suppliers with an estimated combined joint market share in the EEA of around 15% for calcium carbide powder and 31% for calcium carbide granulates.⁷⁰

⁶⁰ [*]

⁶¹ [*]

⁶² HSE, annual report 2006, p. 40.

⁶³ [*]

⁶⁴ Other substantial shareholders were the Slovenian railway company called Holding Slovenske železnice d.o.o. and TDR d.o.o. – v likvidaciji.

⁶⁵ TDR, annual report 2006, p. 23. W&P Profil – Solarvalue Holding d.o.o. acquired the combined shares of Holding Slovenske elektrarne d.o.o. (74.44%), Holding Slovenske železnice d.o.o. (8.37%) and TDR d.o.o. – v likvidaciji (7.83%).

⁶⁶ [*]

⁶⁷ [*]

⁶⁸ [*]

⁶⁹ [*]

⁷⁰ [*] The estimation of the market shares is based on data from the undertakings involved in this proceeding for 2006. See recitals (44) and (46).

- (38) The volumes supplied decreased from around 310 000 tons in 2003 to 260 000 tons in 2006 and there was overcapacity.⁷¹ The total sales value went up in this period from EUR 120 million to EUR 131 million, but it has to be noted that the cost of energy, which represents an important cost factor for producers, increased considerably in this period.⁷²
- (39) For magnesium granulates the estimated volumes supplied in the EEA increased from around 16 000 tons in 2003 to 22 000 tons in 2006 and the estimated total sales value went up in this period from EUR 29 million to EUR 45 million.⁷³ The greater part was imported, almost entirely from China.⁷⁴ The three largest suppliers of magnesium granulates to the steel industry in Europe were Almamet, Ecka, and SKW with a combined market share of around [60-80]%.⁷⁵ There were also other smaller dealers active on the market⁷⁶ and a growing number of direct exporters from China.⁷⁷

II.3.2. The demand

- (40) Customers of calcium carbide can be divided into those active in the steel industry (customers of calcium carbide powder) and those active in the gas industry (customers of calcium granulates). For both categories, the number of customers was limited, each with several plants in the EEA.
- (41) The customers of calcium carbide powder normally purchased from several suppliers. In areas with only one producer (such as Northern Europe) the customer primarily sourced the product from the supplier in its home market.
- (42) For the gas industry, the market was more stable, because a gas plant, for technical reasons, usually uses only one calcium carbide supplier.⁷⁸
- (43) The demand for calcium carbide has been decreasing due to economic and technical developments.⁷⁹ The rising cost of cokes and electricity also made magnesium a more attractive alternative. Some customers could easily switch from the use of calcium carbide powder to magnesium granulates, which was the trend. Furthermore, the consolidation in the European steel and gas industry has led to an increased market power of the customers.

⁷¹ [*]

⁷² [*]

⁷³ Source: averages calculated [*]

⁷⁴ The production process of magnesium is highly energy intensive. Ecka was the only producer left in the EEA, see recital (19); [*]

⁷⁵ Estimation on the basis of the data for 2006 used for the calculations in recitals (44) and (46).

⁷⁶ [*] Their individual sales volume was less than 1000 tons per year.

⁷⁷ [*]

⁷⁸ [*]

⁷⁹ The creation of more efficient steel plants and the increasing replacement of welding and cutting with acetylene by more efficient technologies.

11.3.3. The geographic scope of the calcium carbide and magnesium business

- (44) Calcium carbide is explosive and therefore relatively difficult to transport. Accordingly, the EEA is subdivided into four areas:
- the Nordic area;
 - Great Britain and Ireland;
 - the Iberian peninsula;
 - Continental Europe.⁸⁰
- (45) For magnesium granulates, the volumes required are substantially smaller than calcium carbide powder and the product was mainly imported from China.⁸¹ The suppliers largely followed the geographical pattern as given in recital (44) for calcium carbide.
- (46) The estimated market shares in 2006 on the EEA market for calcium carbide granulates for the gas market, calcium carbide powder for the steel market and magnesium granulates for the steel market were as follows.

Table 1: Market shares⁸²

2006	Calcium carbide powder (%)	Calcium carbide granulates (%)	Magnesium granulates (%)
Akzo Nobel	[15-25%]	[< 10%]	/
Almamet	[15-25%]	/	[15-25%]
Donau Chemie	[10-15%]	[< 10%]	/
Ecka	[< 10%]*	/	[25-35%]
NCHZ	[10-15%]**	[25-35%]	/
SKW	[25-35%]	[< 10%]	[15-25%]
TDR	[10-15%]	[15-25%]	/
Others	[15-20%]	[30-35%]	[30%]
Total	100%	100%	100%

(*) = sales of Akzo Nobel through Ecka

(**) = sales through Almamet

III. PROCEDURE

- (47) Akzo Nobel submitted an application for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (hereafter "the 2002 Leniency Notice")⁸³ on [*]The application concerned cartel practices for calcium carbide powder for the steel industry and calcium carbide granulates for the gas

⁸⁰ [*]

⁸¹ See recitals (7) and (39).

⁸² Sources: Replies to Request for Information [*] on the relevant product turnover, in combination with data on the size of the EEA market and market shares of other companies active in the EEA, in particular [*].

In comparison to the table of the Statement of Objections, that was not contested, only the turnover data of the undertakings involved in this proceeding have been updated.

⁸³ OJ C 45, 19.2.2002, p. 3.

industry.⁸⁴ Akzo Nobel was granted conditional immunity on 20 December 2006.⁸⁵

- (48) On 16 January 2007 the Commission conducted on-the-spot investigations in Austria, Germany, Slovakia and Slovenia based on Decisions pursuant to Article 20(4) of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereafter "inspection decision" and "Regulation No 1/2003") at the premises (of subsidiaries) of Almamet, Donau Chemie, Ecka, NCHZ, SKW and TDR.⁸⁶
- (49) Donau Chemie, Almamet, Degussa and NCHZ submitted applications for immunity from fines or a reduction of fines pursuant to the Commission Notice on immunity from fines and reduction of fines in cartel cases (hereafter "the 2006 Leniency Notice")⁸⁷ [*]. The applications of Almamet and NCHZ covered only calcium carbide powder. The application of Degussa covered also magnesium granulates⁸⁸ and the application of Donau Chemie covered calcium carbide powder, calcium carbide granulates and magnesium granulates.⁸⁹ On 20 June 2008, Donau Chemie and Degussa were informed that their submissions met the criteria to qualify for a reduction of fines.⁹⁰ Almamet and NCHZ were informed on the same day that their submissions did not meet the criteria to qualify for a reduction of fines.⁹¹
- (50) The Commission sent out Requests for Information pursuant to Article 18(2) of Regulation No 1/2003 between 11 July 2007 and 9 March 2009.⁹²
- (51) On 24 June 2008 the Commission adopted a Statement of Objections and sent it to the parties on 25 June 2008.⁹³ All parties requested and received a CD-ROM containing the accessible documents in the Commission's file.⁹⁴ Most parties also consulted the documents and statements that were accessible at Commission premises only.⁹⁵
- (52) With the exception of TDR Metalurgija d.d., all addressees of the Statement of Objections submitted written comments.⁹⁶ An Oral Hearing was held on 10 and 11 November 2008.⁹⁷

84 [*]

85 In accordance with point 8(a) of the 2002 Leniency Notice. [*]

86 Inspection decisions [*]. An additional investigation was carried out on 13.12.2007 at the premises of another undertaking. Inspection decision [*].

87 OJ C 298, 8.12.2006, p.17.

88 [*]

89 [*]

90 [*]

91 [*]

92 Request for Information of [*].

93 [*]

94 [*]

95 [*] 1.garantovaná a.s., Arques, Holding Slovenske elektrarne d.o.o. and TDR Metalurgija d.d. did not make use of this right.

96 [*] TDR Metalurgija only informed the Commission that it was in state of bankruptcy [*].

IV. DESCRIPTION OF THE EVENTS

- (53) The suppliers of calcium carbide powder, calcium carbide granulates and magnesium granulates described in Chapter II.2. had regular contacts with each other, on a multilateral and as bilateral basis, with the object of limiting competition with respect to their supplies of calcium carbide powder, calcium carbide granulates and magnesium granulates. They made arrangements in the form of market sharing, quotas, customer allocation, price fixing and exchanges of sensitive commercial information on a substantial part of the EEA market. These arrangements lasted from at least 7 April 2004 until 16 January 2007.⁹⁸

IV.1 Calcium carbide powder

- (54) Since the beginning of the 21st century the price of calcium carbide powder for the steel industry has been under pressure, while costs increased and demand shrunk.⁹⁹ These developments formed the basis for the meetings between the main European suppliers of calcium carbide powder¹⁰⁰. According to the participants, the principal goal of the arrangements made at these meetings was to stabilise the market by agreeing on fixed market shares and prices¹⁰¹. It is considered, for the purpose of this Decision, that these arrangements related to customers within the EEA, except Spain, Portugal, Ireland and the UK¹⁰².

IV.1.1. Organisation

- (55) At least 12 multilateral meetings were organised or planned for calcium carbide powder in the period between 22 April 2004 and 9 January 2007.¹⁰³
- (56) The meetings were scheduled for the mornings and lasted 2-3 hours. It was also common to meet for dinner the night before.¹⁰⁴ The meetings were mostly organised in conference rooms of hotels/restaurants located centrally in Europe. The first two meetings were organised at the premises of Almamet.¹⁰⁵ The existence of the meetings was kept secret.¹⁰⁶ Generally no official invitations,

⁹⁷ All addressees of the Statement of Objections participated in the oral hearing, with the exception of TDR Metalurgija d.d. and I.garantovaná a.s. TDR Metalurgija did not ask for an oral hearing and I.garantovaná only submitted a request for an oral hearing after the oral hearing had taken place [*]. The request was rejected by the Hearing Officer on 17.11.2008. After the hearing Almamet submitted on 6.1.2009 a follow-up paper answering some questions asked by the Commission at the Oral Hearing [*].

⁹⁸ See Chapter VII of this Decision concerning the individual duration for each addressee.

⁹⁹ See Chapter II.3.

¹⁰⁰ [*]

¹⁰¹ [*]

¹⁰² See recital (44) and inspection documents [*]

¹⁰³ See Chapter IV.1.3. for detailed evidence on the specific meetings.

¹⁰⁴ [*] inspection document [*]

For this reason, evidence in the Commission file sometimes refers to the day before the date of the meeting that is used in evidence for the meeting in this Decision.

¹⁰⁵ See recitals (64) and (67).

¹⁰⁶ [*]

agenda or minutes were made. The meetings were usually organised by a different participant, who informed the others of the exact location by telephone a few weeks in advance.¹⁰⁷ If, for instance, someone communicated meetings by e-mail he was immediately criticised by the others.¹⁰⁸ Travel records of the participants often falsely referred to visits of suppliers or customers.¹⁰⁹ Documents concerning the meetings were kept to a minimum and no official memoranda of the meetings were produced.¹¹⁰ In general, the participants already agreed in meetings on the date and location of the next meeting.¹¹¹

(57) Overall, a consistent group of people participated in these meetings:¹¹²

- Akzo Nobel usually participated via [*] of Akzo Nobel Surface Chemistry AB, later [*] of Carbide Sweden AB.¹¹³ Occasionally, he was accompanied by [*] of Carbide Sweden's for the steel industry.¹¹⁴
- Almamet GmbH participated via [*]¹¹⁵
- Donau Chemie AG participated via [*]¹¹⁶.
- Ecka participated via [*] of Ecka Granulate GmbH & Co KG.¹¹⁷
- NCHZ participated via [*] of Novácke chemické závody, a.s.¹¹⁸
- SKW participated via [*] of SKW Stahl-Technik GmbH & Co. KG (later SKW Stahl-Metallurgie GmbH) and [an employee] of SKW Stahl-Technik GmbH (later SKW Metallurgie GmbH)¹¹⁹, later replaced by [*] of SKW Stahl-Metallurgie GmbH.¹²⁰ [*] of SKW remained an employee of SKW Stahl-Technik GmbH (later SKW Metallurgie GmbH) but *de facto* worked for and therefore participated in the cartel on behalf of SKW Stahl-Technik GmbH & Co KG (now SKW Stahl-Metallurgie GmbH).¹²¹

¹⁰⁷ [*]

¹⁰⁸ [*]

¹⁰⁹ [*]

¹¹⁰ [*]

¹¹¹ [*]

¹¹² See Chapter IV.1.3. [*]

¹¹³ [*]

¹¹⁴ [*]

¹¹⁵ [*]

¹¹⁶ [*]

¹¹⁷ [*]

¹¹⁸ [*]

¹¹⁹ Now AlzChem Hart GmbH.

¹²⁰ [*] SKW's calcium carbide [*] remained, until his retirement in September 2006, employed by the Degussa subsidiary SKW Stahl-Technik GmbH, later SKW Metallurgie GmbH (and now AlzChem Hart GmbH). His successor was employed by the Arques subsidiary SKW Stahl-Metallurgie GmbH.

¹²¹ This fact is accepted by by both SKW Stahl-Metallurgie GmbH and Degussa GmbH. [*]

- TDR participated via [*] of TDR Metalurgija d.d., often accompanied by [*] of TDR Metalurgija d.d.¹²²
- (58) In addition, the participants had regular contacts, often by telephone, for the implementation of the agreements on specific points such as the price level for specific customers.¹²³ These bilateral contacts existed already before the start of the multilateral meetings.¹²⁴

IV.1.2. Content

- (59) During the multilateral meetings and other contacts the participants shared the market, allocated customers and fixed prices. They decided to freeze the percentages of deliveries and to coordinate future supplies and price increases. In a kick-off meeting, they informed each other of their production capacities and volumes supplied to individual customers in the steel industry and turned this information into a market sharing table that served as basis for a status quo on the market.¹²⁵
- (60) During all subsequent multilateral meetings the market shares were monitored by updating the market table (covering the sales up to the date of the meeting and the estimated sales for the period to come) and by comparing these updates with the market division agreed upon.¹²⁶ Discussions took place in case the agreed market shares were exceeded or circumvented, including possible compensation remedies.¹²⁷ Demands for extra volume were rejected in case this would lead to a breach of the quota agreed upon.¹²⁸ The Commission file contains several copies of these market sharing tables.¹²⁹
- (61) The market tables were described as follows by various parties involved in this proceeding:
- Akzo Nobel: [*]¹³⁰
 - Donau Chemie: [*]^{131 132}

¹²² [*]

¹²³ [*]

¹²⁴ In the Commission file, various examples of bilateral contacts can be found. For instance:

- between SKW and TDR: [*]
- between Akzo Nobel and Donau Chemie: [*]
- between Ecka and SKW: [*]
- between SKW and Akzo Nobel: [*]
- between SKW and Donau Chemie: [*]
- between TDR and NCHZ: [*]
- between Akzo Nobel and TDR: [*]
- between Akzo Nobel and NCHZ/Almamet: [*]

¹²⁵ See the description of the meeting of 22.4.2004 in recital (65) and the description of the meeting of 7.9.2004 in recital (68).

¹²⁶ [*]

¹²⁷ See for instance [*] See also recitals (86) or (130).

¹²⁸ See recital (109).

¹²⁹ [*]

¹³⁰ [*]

¹³¹ [*]

- Almamet: [*]¹³³
 - Degussa: [*]¹³⁴
 - NCHZ: [*]¹³⁵
- (62) In various meetings, the participants, aside from market sharing, discussed and agreed upon general price increases for calcium carbide powder.¹³⁶ The Commission has evidence that prices and price increases were discussed and/or agreed upon during at least six of the twelve meetings.¹³⁷ Usually the amount of the price increase rather than the actual end price¹³⁸ was fixed for six months.¹³⁹
- (63) The price increases agreed upon were usually implemented. [*].¹⁴⁰ Prices and volumes to individual customers were further discussed and/or coordinated in bilateral (telephone) contacts.¹⁴¹ [*]¹⁴²

IV.1.3. Chronological overview

IV.1.3.1. 22 April 2004

- (64) The first meeting relevant to the purposes of this Decision was organised on 22 April 2004 at the premises of Almamet in Ainring, Germany.¹⁴³ The participants were Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁴⁴
- (65) The aim of this meeting was to reach an agreement about the increase in the price of calcium carbide.¹⁴⁵ [*]¹⁴⁶ Other participants also gave their description of the market and the problems faced.¹⁴⁷ Subsequently, the participants provided individual market data on the basis of which a market sharing table was made with suggested future production volumes.¹⁴⁸ [*]¹⁴⁹ They also agreed that the

¹³² [*]

¹³³ [*]

¹³⁴ [*]

¹³⁵ [*]

¹³⁶ [*]

¹³⁷ [*] inspection documents [*] inspection documents [*]. See also Chapter IV.1.3.

¹³⁸ [*]

¹³⁹ [*] inspection document [*].

¹⁴⁰ [*]

¹⁴¹ [*]

¹⁴² [*] inspection document [*]

¹⁴³ See for instance [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*]

¹⁴⁴ Idem.

¹⁴⁵ [*] inspection document [*] reply of [*] to Request for Information [*]

¹⁴⁶ [*]

¹⁴⁷ [*] inspection document [*]

¹⁴⁸ [*] inspection document [*] The volumes for Akzo Nobel were estimated by a participant.

¹⁴⁹ [*]

price in general had to be increased, and as a result a price increase was suggested for immediate implementation.¹⁵⁰ [*]¹⁵¹

(66) [*]¹⁵²

IV.1.3.2. 7 September 2004

(67) The second meeting took place on 7 September 2004, again at the premises of Almamet in Ainring, Germany.¹⁵³ The meeting was attended by representatives of Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁵⁴

(68) The participants reported and discussed volumes and prices for calcium carbide for the fourth quarter of 2004.¹⁵⁵ They also discussed volume allocation to individual customers and the price level for the year 2005, taking into account the cost of electricity and cokes.¹⁵⁶ [*]¹⁵⁷ [*]¹⁵⁸ The participants agreed to increase the price and to maintain this level for the next six months.¹⁵⁹ [*]¹⁶⁰

(69) [*]¹⁶¹

IV.1.3.3. 3 November 2004

(70) A third meeting took place on 3 November 2004 at the Gasthof Mossleitner, Freilassing, Germany.¹⁶² It was attended by representatives of Akzo Nobel, Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁶³

(71) Participants brought along their sales volumes.¹⁶⁴ The market sharing table was updated and prices were discussed.¹⁶⁵ [*]¹⁶⁶ It was suggested to keep the market shares stable in order not to "kill" the price level.¹⁶⁷ [*]¹⁶⁸ [*]¹⁶⁹

¹⁵⁰ [*] inspection document [*]

¹⁵¹ [*]

¹⁵² [*]

¹⁵³ [*] inspection document [*] inspection document [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

¹⁵⁴ Idem.

¹⁵⁵ [*] inspection document [*]

¹⁵⁶ [*] inspection document [*]

¹⁵⁷ [*]

¹⁵⁸ [*]

¹⁵⁹ [*] inspection document [*]

¹⁶⁰ [*]

¹⁶¹ [*]

¹⁶² [*] inspection document [*] inspection documents [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

¹⁶³ Idem.

¹⁶⁴ [*]

¹⁶⁵ [*] inspection documents [*]

¹⁶⁶ [*]

IV.1.3.4. 24 January 2005

- (72) A fourth meeting took place on 24 January 2005 at the Sporthotel Penz in Innsbruck, Austria.¹⁷⁰ The participants were Akzo Nobel, Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁷¹
- (73) [*]¹⁷² Volumes, customers and prices relevant to the steel industry were discussed.¹⁷³ [*].¹⁷⁴ [*].¹⁷⁵ [*].¹⁷⁶

IV.1.3.5. 7 April 2005

- (74) A fifth multilateral meeting was organised by NCHZ on 7 April 2005 at the Best Western Hotel Sergijo, Piešťany, Slovakia.¹⁷⁷ The participants were Akzo Nobel, Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁷⁸
- (75) Volumes were reported and customers and prices were discussed.¹⁷⁹ [*]¹⁸⁰ Prices and/or volumes were fixed for several individual customers.¹⁸¹ Market trends such as how the rising price of electricity would be reflected in the calcium carbide price and the risk of individual customers changing desulphurisation method were discussed.¹⁸²

IV.1.3.6. 12 July 2005

- (76) A sixth meeting was organised by TDR on 12 July 2005 in Maribor, Slovenia.¹⁸³ Participants were Akzo Nobel, Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁸⁴

¹⁶⁷ [*]The market sharing table made during this meeting was found during the inspections at [*] and was later provided by several other participants.

¹⁶⁸ [*]

¹⁶⁹ [*]

¹⁷⁰ [*] inspection document [*] inspection documents [*] and reply of [*] to Request for Information [*] inspection documents [*] and reply of [*] to Request for Information [*] and reply of [*] to Request for Information [*] and reply of [*] to Request for Information [*].

¹⁷¹ See references in footnote 170.

¹⁷² [*] inspection document [*]

¹⁷³ [*] inspection document [*]

¹⁷⁴ [*]

¹⁷⁵ [*]

¹⁷⁶ [*] inspection documents, [*]

¹⁷⁷ [*] inspection documents [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*]. The evening before, the participants had dinner together.

¹⁷⁸ See references in footnote 177.

¹⁷⁹ [*] inspection documents [*]

¹⁸⁰ [*]

¹⁸¹ [*] inspection documents [*]

¹⁸² [*] inspection document [*]

¹⁸³ [*] inspection documents [*] inspection documents [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

- (77) Customers and prices were discussed and volumes for the first half of the year and forecasts for the rest of the year were reported.¹⁸⁵ The market sharing table was updated.¹⁸⁶ The date and place of the next meeting was already agreed upon.¹⁸⁷

IV.1.3.7. 22 November 2005

- (78) A seventh meeting was organised by Donau Chemie on 22 November 2005 in Hotel Schild in Vienna, Austria.¹⁸⁸ The participants were Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁸⁹
- (79) TDR's minutes of this meeting reveal that volumes for 2005 and 2006 and prices for individual customers were discussed.¹⁹⁰ [*]¹⁹¹ [*]¹⁹² .¹⁹³ A price increase was agreed upon.¹⁹⁴ For this price increase, the low price of the alternative product was considered a problem.¹⁹⁵ The special problems of Donau Chemie following the destruction of its power plant were also discussed.¹⁹⁶ [*]¹⁹⁷

IV.1.3.8. 21 February 2006

- (80) An eighth meeting was organised by SKW on 21 February 2006 in Hotel Gersbergalm in Gaisberg bei Salzburg, Austria.¹⁹⁸ The meeting was attended by representatives of Akzo Nobel, Almamet, Donau Chemie, NCHZ, SKW and TDR.¹⁹⁹
- (81) [*]²⁰⁰ [*]²⁰¹ [*]²⁰² [*]²⁰³ Prices were fixed for some individual customers.²⁰⁴ [*]²⁰⁵

¹⁸⁴ See references in footnote 183.

¹⁸⁵ [*] inspection documents [*] inspection documents [*]

¹⁸⁶ [*] inspection document [*]

¹⁸⁷ [*] inspection documents [*]

¹⁸⁸ [*] inspection document [*] inspection documents [*] inspection documents [*] inspection documents [*] inspection document [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

¹⁸⁹ See references in footnote 188.

¹⁹⁰ [*] inspection document [*].

¹⁹¹ [*]

¹⁹² [*]

¹⁹³ [*]

¹⁹⁴ [*] inspection document [*]

¹⁹⁵ [*] inspection document [*] and reply of [*] to Request for Information [*]

¹⁹⁶ Idem

¹⁹⁷ [*]

¹⁹⁸ [*] inspection documents [*] inspection documents [*] inspection document [*] inspection documents [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

¹⁹⁹ See references in footnote 198.

²⁰⁰ [*]

²⁰¹ [*]

²⁰² [*]

²⁰³ [*]

(82) [*]²⁰⁶

IV.1.3.9. 25 April 2006

(83) A ninth multilateral meeting was organised by NCHZ on 25 April 2006 in Hotel Pod Zámkom, Bojnice, Slovakia.²⁰⁷ Participants were Almamet, Donau Chemie, NCHZ, SKW and TDR.²⁰⁸ [*].²⁰⁹ Ecka was again made aware of the existence of this meeting.²¹⁰

(84) As usual, the market table was updated comparing the estimated and actual consumption of the customers and the shares of the suppliers.²¹¹ Price increases for individual customers were also discussed and agreed upon.²¹²

IV.1.3.10. 11 July 2006

(85) A tenth multilateral meeting was organised by TDR on 11 July 2006 in Hotel Piran, Piran, Slovenia.²¹³ Participants were Akzo Nobel, Almamet, Donau Chemie, Ecka, SKW and TDR.²¹⁴ [*]²¹⁵

(86) [*]²¹⁶ [*]²¹⁷ [*]²¹⁸ [*]²¹⁹ [*]²²⁰

(87) [*]²²¹

IV.1.3.11. 10 October 2006

(88) An eleventh multilateral meeting was organised by Ecka on 10 October 2006 in Restaurant Magazin, Salzburg, Austria.²²² Participants were Akzo Nobel, Almamet, Donau Chemie, Ecka, NCHZ, SKW and TDR.²²³ [*].²²⁴

²⁰⁴ [*] inspection document [*]

²⁰⁵ [*]

²⁰⁶ [*]

²⁰⁷ [*] inspection documents [*] inspection documents [*] inspection documents [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

²⁰⁸ See references in footnote 207.

²⁰⁹ [*]

²¹⁰ [*] inspection documents [*]

²¹¹ [*] inspection documents [*]

²¹² [*] inspection document [*]

²¹³ [*] inspection documents [*] inspection documents [*] inspection documents [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

²¹⁴ See references in footnote 213 and [*].

²¹⁵ [*] reply of [*] to Request for Information [*]

²¹⁶ [*]

²¹⁷ [*]

²¹⁸ [*]

²¹⁹ [*]

²²⁰ [*]

²²¹ [*]

- (89) [*]²²⁵ [*]²²⁶ [*]²²⁷ [*]²²⁸ Magnesium related issues were also touched upon, at least between some of the participants.²²⁹

IV.1.3.12. 9 January 2007

- (90) It was agreed at the meeting of 10 October that the next meeting would take place on 9 January 2007 in Vienna.²³⁰ [*]²³¹
- (91) [*]²³² [*]²³³ [*] [*]²³⁴ Apparently due to these signals, it was decided to cancel the upcoming meeting.²³⁵

IV.2 Calcium carbide granulates

IV.2.1. Organisation

- (92) Akzo Nobel, Donau Chemie, NCHZ and TDR, the producers of calcium carbide, were not only supplying calcium carbide powder to the steel industry, but also calcium carbide granulates to the gas industry.²³⁶ Sales to the gas market, faced by-and-large the same problems as their sales to the steel industry.²³⁷
- (93) The persons responsible for the sales of calcium carbide granulates to the gas industry were also responsible for the sales of calcium carbide powder to the steel industry and participated in the multilateral and bilateral meetings described in recitals (54) to (91).²³⁸

²²² [*] inspection documents [*] inspection documents [*], inspection document [*] inspection document [*] inspection document [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*]. Most participants spent the night in Hotel Gmachl in Bergheim. Several bilateral (NCHZ and TDR) or trilateral (Akzo Nobel, Ecka and SKW) meetings took place on the evening before. [*]

²²³ See references in footnote 222.

²²⁴ [*] inspection documents [*].

²²⁵ [*]

²²⁶ [*]

²²⁷ [*]

²²⁸ [*]

²²⁹ [*] inspection document [*]

²³⁰ [*] inspection documents [*] inspection documents [*] inspection document [*] inspection documents [*] reply of [*] to Request for Information [*] reply of [*] to Request for Information [*]

²³¹ [*]

²³² [*]

²³³ [*]

²³⁴ [*]

²³⁵ [*] reply of [*] to Request for Information [*]

²³⁶ [*]

²³⁷ [*]

²³⁸ [*]

- (94) When discussing their conduct on the steel market in a multilateral meeting, it was logical that they discussed the gas market as well.²³⁹ The four undertakings supplying calcium carbide to both the steel and the gas market also exchanged commercially sensitive information in respect of calcium carbide granulates, fixed prices and/or made anti-competitive arrangements with respect to individual customers in the gas industry.
- (95) Even though the collusion regarding calcium carbide for the gas market was a logical extension of the collusion for the steel market, the fact that the competitors on the market for calcium carbide granulates for the gas industry were partly different, and the fact that participants in the arrangements for calcium carbide powder, such as SKW and Almamet, were not actively involved in the gas market, meant that it was not possible to simply use the multilateral meetings for the steel industry for the gas market as well.²⁴⁰ [*].²⁴¹ As a consequence, the anticompetitive contacts for calcium carbide granulates were less structured in comparison to the agreements that were made for calcium carbide powder.²⁴² Calcium Carbide for the gas industry was discussed either during meetings, or, for the most part, via telephone.²⁴³
- (96) [*]²⁴⁴ [*]²⁴⁵ [*]²⁴⁶
- (97) On 26 March 2004, [*] referred to an upcoming meeting of the calcium carbide producers in the near future to agree on a price increase.²⁴⁷ Since the document refers to the calcium carbide producers, it indicates that the dealers of calcium carbide were not involved. From this fact it can be deducted that the reference to a price increase must have related to calcium carbide granulates because an agreement on a price increase for calcium carbide powder without the involvement of the dealers SKW and Almamet would not have been likely.
- (98) TDR organised the meeting on 7 April 2004 in Hotel Aréna in Maribor (Slovenia).²⁴⁸ [*]²⁴⁹ The meeting was attended by [an employee] of Donau Chemie, [employees] of TDR and [employees] of NCHZ.²⁵⁰
- (99) Other such 'gas meetings' between Donau Chemie, NCHZ and TDR [*]²⁵¹ [*]²⁵², [*].

239 [*]

240 [*]

241 [*]

242 [*]

243 [*]

244 [*]

245 [*]

246 [*] inspection documents [*]

247 [*] inspection document [*]

248 [*] inspection documents [*]

249 [*]

250 [*] inspection documents [*] All of them equally involved in calcium carbide powder. See recital (57).

251 [*]

252 [*]

- (100) Akzo Nobel did not participate but was informed afterwards by telephone.²⁵³ [*]²⁵⁴ [*]²⁵⁵
- (101) Often, the discussions about calcium carbide granulates were combined with the multilateral meetings for calcium carbide powder. [*]²⁵⁶ [*]²⁵⁷ The participants expected that calcium carbide granulates would be discussed in the framework of these meetings.²⁵⁸
- (102) As for calcium carbide powder, the participants also contacted each other bilaterally, often by telephone, to discuss individual prices and customers.²⁵⁹ In their bilateral contacts, the discussion was not limited to calcium carbide powder or granulates, but covered both the gas market and the steel market²⁶⁰.

IV.2.2. Content and chronological overview

- (103) In contrast to calcium carbide powder, where a steel plant is often served by several suppliers simultaneously, it is customary in the case of calcium carbide granulates that a gas plant, for reasons of quality, is supplied from one source.²⁶¹ For the same quality reasons, changing supplier is not very frequent.
- (104) [*]²⁶² [*]²⁶³ [*]²⁶⁴ [*]²⁶⁵ It is considered, for the purpose of this Decision, that these arrangements related to customers within the EEA, except Spain, Portugal, Ireland and the UK.
- (105) [*]²⁶⁶ [*]²⁶⁷
- (106) [*]²⁶⁸ [*]²⁶⁹
- (107) In the meeting of 7 April 2004, price increases as of 1 May were discussed, because of rising energy costs, and the allocation and protection of customers [*].²⁷⁰ References to calcium carbide powder suggest that this meeting was also

253 [*]

254 [*]

255 [*]

256 [*]

257 [*]

258 [*] inspection document [*]

259 [*] See also recital (58), in particular footnote 124.

260 [*] inspection documents [*]

261 [*]

262 [*].

263 [*]

264 [*]

265 [*]

266 [*]

267 [*]

268 [*]

269 [*]

270 [*] inspection document [*]

used to discuss this product and as a preparation for the upcoming meeting on the steel market.²⁷¹ [*]²⁷²

- (108) Further 'gas meetings' took place in the aftermath of the 'steel meetings'.²⁷³ [*]²⁷⁴ Handwritten notes of the meetings of 3 November 2004, and 12 July 2005 also reveal that customers in both the steel and gas industry were discussed²⁷⁵ [*]²⁷⁶
- (109) The suppliers to the gas market usually agreed to follow the price increase agreed upon for the steel industry.²⁷⁷ [*]²⁷⁸
- (110) [*]²⁷⁹ [*]²⁸⁰
- (111) [*]²⁸¹ [*]²⁸²
- (112) Bilateral discussions continued even after that date.²⁸³ The content of these discussions varied depending on the suppliers and the respective customers involved.²⁸⁴

IV.3 Magnesium granulates

- (113) As explained in recital (7), magnesium granulates can be used as an alternative product for calcium carbide powder for desulphurisation purposes in the steel industry. Many steel plants use both calcium carbide powder and magnesium granulates. Even though the demand for magnesium granulates – in comparison to calcium carbide powder – was growing, the suppliers also felt the increased market power of their customers.²⁸⁵ In addition, they also felt growing pressure from new (Chinese) entrants on the market.²⁸⁶
- (114) The three largest suppliers of magnesium granulates for desulphurisation purposes to the steel industry in the EEA are Almamet, Ecka and SKW.²⁸⁷ SKW and Almamet were involved in the anticompetitive arrangements for calcium

²⁷¹ [*] idem.

²⁷² [*]

²⁷³ [*]

²⁷⁴ [*]

²⁷⁵ [*] inspection documents [*] See also recital (100).

²⁷⁶ [*]

²⁷⁷ [*]

²⁷⁸ [*]

²⁷⁹ [*]

²⁸⁰ [*]

²⁸¹ [*]

²⁸² [*]

²⁸³ [*]

²⁸⁴ [*]

²⁸⁵ See recital (43).

²⁸⁶ See recital (39).

²⁸⁷ See recital (46).

carbide powder described in recitals (54) to (91) since 2004.²⁸⁸ Ecka was also made aware of these arrangements and joined in 2006.²⁸⁹ These three undertakings coordinated their supplies of magnesium granulates during at least five meetings in 2005 and 2006.²⁹⁰ It is considered, for the purpose of this Decision, that these arrangements related to customers within the EEA, except Spain, Portugal, Ireland and the UK.

IV.3.1. Organisation

- (115) [*]²⁹¹ [*]²⁹². The invitations came by telephone, and the meetings were organised and paid for by the companies taking turns.²⁹³ Apart from multilateral meetings, there were also bilateral contacts via telephone.²⁹⁴
- (116) The same individuals who attended the multilateral meetings for calcium carbide powder participated in the subsequent meeting for magnesium granulates.²⁹⁵ For Ecka also [an employee] of *non ferrum Metallpulver Gesellschaft mbH & Co KG* participated.²⁹⁶
- (117) The arrangements for calcium carbide served as an example.²⁹⁷ The market sharing tables used for magnesium granulates²⁹⁸ had a very similar template to the market tables that were used for calcium carbide powder.²⁹⁹ Both set of tables contain a complete overview of the supplies, in tonnes, of every individual supplier for every individual customer and give the market shares, in percentage, of the different suppliers with a reference to the market share agreed upon. Since the product name was not mentioned and many customers for calcium carbide powder and magnesium granulates are the same, it was not possible during the inspections to distinguish between market sharing tables for calcium carbide and magnesium. Only later, when the full scope of the cartel became clear, was it deductible from the names of the suppliers involved and/or the market shares agreed upon whether a given table related to calcium carbide powder or magnesium granulates.

²⁸⁸ The other participants in the multilateral meetings for calcium carbide powder (Akzo Nobel, Donau Chemie, NCHZ and TDR) were producers of calcium carbide and only used magnesium for adding to their calcium carbide mixture.

²⁸⁹ See recitals (82), (83), (85) and (88).

²⁹⁰ See recitals (125)-(135).

²⁹¹ [*] See also recitals (127), (129), (131) and (133).

²⁹² [*]

²⁹³ [*]

²⁹⁴ [*]

²⁹⁵ [*]

²⁹⁶ [*]

²⁹⁷ [*]

²⁹⁸ [*] inspection documents [*] and reply of [*] to Request for Information [*]

²⁹⁹ Both set of tables refer to the suppliers in the first horizontal line. The suppliers involved in calcium carbide powder and magnesium granulate appear in both tables. The customers are mentioned in the first vertical column.

IV.3.2. Content

- (118) For the supplies of magnesium granulates for desulphurisation purposes to the steel industry, the market shares were frozen by means of agreeing on a market sharing table that served as basis to establish the status quo.³⁰⁰ [*]³⁰¹ The arrangements for magnesium granulates were therefore built along the example of the pre-existing arrangements for calcium carbide powder.³⁰²
- (119) The customers that were subject to these arrangements for magnesium granulates were to a large extent the same steel plants as the customers mentioned in market sharing tables for calcium carbide powder.³⁰³ [*]³⁰⁴ This market division was confirmed by contemporaneous documents.³⁰⁵
- (120) The market table was updated in subsequent multilateral meetings in order to monitor the implementation and/or adjust the quota.³⁰⁶
- (121) For individual customers, the market sharing arrangement could be different. Handwritten notes of a cartel meeting show individual quota for individual customers.³⁰⁷ [*]small tables were made where the planned volumes ([*]) for the different magnesium suppliers were offset against the volumes supplied ([*]).³⁰⁸ Supplies to customers were allocated.³⁰⁹
- (122) [*]³¹⁰ [*]³¹¹
- (123) In addition to the multilateral meetings, there were bilateral contacts, usually via telephone, where the prices offered to individual customers were exchanged and the agreed target prices were confirmed.³¹²

IV.3.3. Chronologic overview

- (124) At least five multilateral meetings with respect to magnesium granulates for the steel industry took place in the period 2005-2007.

300 [*]

301 [*]

302 [*]

303 [*] inspection documents [*] and reply of [*] to Request for Information [*]

304 [*]

305 [*] inspection documents [*] and reply of [*] to Request for Information [*]. The market division [*] also refers to market shares of other companies. In view of the available evidence the involvement of these undertakings in the cartel could not be established to the appropriate standard, in spite of their mention.

306 [*] inspection documents [*] and reply of [*] to Request for Information [*]

307 [*] inspection documents [*] and reply of [*] to Request for Information [*]

308 [*] idem [*] and reply of [*] to Request for Information [*]

309 [*] idem [*] and reply of [*] to Request for Information [*]

310 [*]

311 [*]

312 [*]

IV.3.3.1. 14 July 2005

- (125) A multilateral meeting took place on 14 July 2005³¹³ between Almamet³¹⁴, Ecka³¹⁵ and SKW³¹⁶ in Hotel Residenz Heinz Winkler in Aschau im Chiemgau³¹⁷. [*]³¹⁸
- (126) [*]³¹⁹ [*] handwritten notes, made on the papers of the hotel demonstrate that magnesium granulates volumes to individual customers, allocations and individual market shares were discussed.³²⁰ [*]³²¹

IV.3.3.2. 23 November 2005

- (127) Another multilateral meeting took place on 23 November 2005³²² in Hotel Hubertushof in Anif – Salzburg.³²³ [*]³²⁴ The notes of [*] of this meeting in Vienna reveal that magnesium was already mentioned there.³²⁵
- (128) [*]³²⁶ The handwritten notes from [*] (on the paper of the hotel) demonstrate that planned and actual volumes per customer and market shares of the different suppliers were discussed.³²⁷

IV.3.3.3. 2 May 2006

- (129) A fourth multilateral meeting took place on 2 May 2006³²⁸ [*]³²⁹ [*]³³⁰ Participants were Ecka³³¹, Almamet³³², and SKW.³³³
- (130) [*]³³⁴

³¹³ [*] also situates the meeting in the first half of 2005.

³¹⁴ [*] inspection documents [*]

³¹⁵ [*] inspection documents [*] and replies of [*] to Request for Information [*]

³¹⁶ [*] inspection documents [*]

³¹⁷ [*] inspection document [*] and reply of [*] to Request for Information [*] reply of [*] to Request for Information [*].

³¹⁸ [*]

³¹⁹ [*]

³²⁰ [*] inspection documents [*] and reply of [*] to Request for Information [*]

³²¹ [*]

³²² [*] inspection documents [*] and reply of [*] to Request for Information [*] inspection documents [*].

³²³ [*] inspection documents [*] and reply of [*] to Request for Information [*] inspection documents [*]

³²⁴ See recital (78).

³²⁵ See recital (79); [*] inspection document [*].

³²⁶ [*].

³²⁷ [*] inspection documents [*] and reply of [*] to Request for Information [*]

³²⁸ [*] inspection documents [*] inspection documents [*] and reply of [*] to Request for Information [*]

³²⁹ [*]

³³⁰ [*]

³³¹ [*] inspection Document [*] reply to Request for Information [*]

³³² [*] inspection document [*] reply of [*] to Request for Information [*]

³³³ [*] The official reason for this visit was false in order to hide the existence of the arrangements. [*]

³³⁴ [*]

IV.3.3.4. 12 July 2006

- (131) A fifth meeting took place on 12 July 2006 in the Romantikhotel Gerbergs Alm in Salzburg.³³⁵ Again, the meeting took place the day following the multilateral meeting for calcium carbide powder in Slovenia.³³⁶ According to [*] magnesium was already mentioned in that meeting in Slovenia.³³⁷
- (132) Participants were again Ecka³³⁸, Almamet³³⁹ and SKW³⁴⁰ [*].³⁴¹

IV.3.3.5. 13 October 2006

- (133) The last multilateral magnesium granulates meeting took place on 13 October 2006³⁴² in Gasthof Maria Plain in Bergheim near Salzburg³⁴³, that is, a few days after the multilateral meeting for calcium carbide powder in Salzburg of 10 October 2006.³⁴⁴ A reference to magnesium granulates was already found in the contemporaneous notes [*] on this meeting.³⁴⁵
- (134) [*]³⁴⁶ Handwritten notes [*] with the market shares agreed also refer to the 2007 market forecast.³⁴⁷
- (135) Another multilateral meeting was planned for 15 January 2007, but was cancelled in December together with the meeting for calcium carbide foreseen for 9 January 2007.³⁴⁸

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

V.1 The relevant competition rules

- (136) Article 81(1) of the Treaty and Article 53 of the EEA Agreement apply.

³³⁵ [*] inspection document [*]

³³⁶ See recital (85).

³³⁷ See recital (86).

³³⁸ [*] inspection document [*]

³³⁹ [*] inspection documents [*]

³⁴⁰ [*] inspection documents [*]

³⁴¹ [*]

³⁴² [*] The existence of this meeting is corroborated by an agenda reference from [*] also acknowledges its participation to this meeting in its reply to the Statement of Objections [*]

³⁴³ [*] See reply of [*] to the Statement of Objections [*]

³⁴⁴ See recital (88).

³⁴⁵ See recital (89).

³⁴⁶ [*]

³⁴⁷ This reference to 2007 indicates that this document was made at the magnesium granulate meeting of October 2006. See [*] inspection documents [*] and reply of [*] to Request for Information [*].

³⁴⁸ [*] reply of [*] to Request for Information [*]. See also recital (90). This planned meeting is also mentioned by [*] in its reply to the Statement of Objections [*].

V.2 The nature of the infringement

V.2.1. Agreements and concerted practices

V.2.1.1. **Principles**

- (137) Article 81 of the Treaty and Article 53 of the EEA Agreement prohibit anticompetitive *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.
- (138) An 'agreement' can be said to exist when the parties adhere to a common plan which limits their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of 'agreement' in Article 81 of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.
- (139) In its judgment in the *PVC II* case³⁴⁹, the Court of First Instance stated that "it is well established in the case law that for there to be an agreement within the meaning of Article 81 [EC] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".³⁵⁰
- (140) Also, it is well established case law that "the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings".³⁵¹ Such distancing should take the form of an announcement by the company, for instance, that it wants to take no further part in the meetings (and therefore does not wish to be invited to them).
- (141) Although Article 81 of the Treaty and Article 53 of the EEA Agreement draw a distinction between the concept of 'concerted practices' and 'agreements between undertakings', their object is to prohibit a form of co-ordination between

³⁴⁹ Joined Cases T-305/94 etc., *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II) [1999] ECR II-931, paragraph 715.

³⁵⁰ 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 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, as well as Case E-1/94 of 16.12.1994, recitals 32-35. References in this text to Article 81 of the Treaty therefore apply also to Article 53 of the EEA Agreement.

³⁵¹ Case T-334/94, *Sarrió v Commission* [1998] ECR II-01439, paragraph 18. See also Case T-141/89, *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89, *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 232; and Case T-25/95, *Cimenteries CBR v Commission* [2000] ECR II-491, paragraph 1389.

undertakings which, without necessarily having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.³⁵²

- (142) The criteria of co-ordination and co-operation laid down by the case law of the Community courts, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators whose object or effect 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.³⁵³
- (143) Thus conduct may fall under Article 81 of the Treaty and Article 53 of the EEA Agreement as a 'concerted practice' even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.³⁵⁴
- (144) Although under Article 81 of the Treaty the concept of a 'concerted practice' requires not only coordination but also conduct on the market resulting from the coordination and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a coordination and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the coordination occurs on a regular basis and over a long period. Such a concerted practice is caught by Article 81 of the Treaty even in the absence of anti-competitive effects on the market.³⁵⁵
- (145) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.³⁵⁶

³⁵² Case 48/69, *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

³⁵³ Joined Cases 40-48/73 etc., *Suiker Unie and others v Commission* [1975] ECR 1663, paragraphs 173 and 174.

³⁵⁴ Case T-7/89, *Hercules v Commission* [1991] ECR II-1711, paragraphs 255-261.

³⁵⁵ Case C-199/92, *P Hüls v Commission* [1999] ECR I-4287, paragraphs 158-167 and Case C-49/92 P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraphs 121-125.

³⁵⁶ 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* [1995] ECR II-1057, 1063, and 1191 respectively, paragraph 72.

- (146) 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 collusion. The concepts of 'agreement' and 'concerted practice' are fluid and may overlap. Indeed, it may not even be possible realistically to make any such distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while 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.
- (147) In its PVC II judgment,³⁵⁷ the Court of First Instance stated that “[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [81] of the Treaty”. This approach has been confirmed by the Court of Justice.³⁵⁸
- (148) In the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgment of the Court of First Instance, has pointed out, it follows from the express terms of Article 81 of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.³⁵⁹ The Court of Justice has also held that when "the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole"³⁶⁰ and that the existence of an 'overall plan' (and thus a single infringement) can be established by a finding that the participants to a series of practices and/or agreements collusively aimed at restricting (price) competition between them.³⁶¹
- (149) According to the case law, the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 81 of the Treaty. It is however not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the

³⁵⁷ Joined Cases T-305/94 etc., *Limburgse Vinyl Maatschappij N.V. and others v Commission* (PVC II) [1999] ECR II-931, paragraph 696.

³⁵⁸ For example Case C-49/92P, *Commission v Anic Participazioni SpA* [1999] ECR I-4125, paragraphs 132-133.

³⁵⁹ Case C-49/92P, *Commission v Anic Participazioni SpA* [1999] ECR I-4125, paragraph 81.

³⁶⁰ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v Commission* [2004] ECR I-123, paragraph 258; Case C-113/04 P, *Technische Unie v Commission* [2006] ECR I-8831, paragraph 178. In this judgment, the Court of Justice also pointed out that the different arrangements and practices "pursued the same anti-competitive object, consisting of maintaining prices at a supra-competitive level" (see paragraph 180).

³⁶¹ Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-08725, paragraphs 162-163.

infringement. Instead, it is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. It is in fact normal that agreements and practices prohibited by Article 81 of the Treaty assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.³⁶²

V.2.1.2. Application in the present case

- (150) Chapter IV shows that the undertakings concerned by this Decision entered into multilateral as well as bilateral contacts during which they coordinated their conduct on the market via market sharing, fixing of quotas and prices, allocating customers and exchanging sensitive commercial information in relation to the supply of calcium carbide powder, calcium carbide granulates and magnesium granulates. Contemporaneous documents [*] for instance, clearly refer to terms like 'agreement' and 'fixed'.³⁶³ In their statements, the majority of participants also referred to these terms.³⁶⁴
- (151) The Commission considers that the behaviour of the undertakings concerned can be characterised as a complex infringement consisting of various actions which can be either classified as an agreement or concerted practice, within which the competitors knowingly substituted practical co-operation between them for the risks of competition. Furthermore, the Commission considers that the participating undertakings in such coordination have taken account of the information exchanged with competitors in determining their own conduct on the market, in particular as the coordination occurred regularly.³⁶⁵ The Commission therefore considers that the behaviour in this case presents all the characteristics of an agreement and/or a concerted practice in the sense of Article 81 of the Treaty as well as Article 53 of the EEA Agreement.

V.2.1.3. Arguments of the parties

- (152) The existence of and participation in anticompetitive agreements and concerted practices with respect to calcium carbide powder, calcium carbide granulates and magnesium granulates is not contested by the undertakings involved in this proceeding, except for Almamet in relation to magnesium granulates.
- (153) Almamet claims that the Commission used inadmissible evidence³⁶⁶. Moreover, Almamet argues that the Commission did not establish to the requisite standard

³⁶² Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v Commission* [2004] ECR I-123, paragraphs 53-57. See also Joined Cases C-403/04 P and C-405/04 P, *Sumitomo and Nippon Steel v Commission* [2007] ECR I-729, paragraph 51.

³⁶³ [*] in recital (62) or (97).

³⁶⁴ See for instance Akzo Nobel in recital (61), Degussa in recital (61), Donau Chemie in recital (104), NCHZ in recital (61), Degussa in recital (118).

³⁶⁵ See recital (63).

³⁶⁶ Almamet, reply of [*] to the Statement of Objections [*].

of proof that it participated in the alleged infringement.³⁶⁷ It argues that the magnesium meetings only served legitimate purposes, such as magnesium or scrap recycling or technical working groups³⁶⁸. It also contests the probative value of the statements from [*] and holds that they are a misrepresentation of the facts and insufficiently corroborated by other evidence³⁶⁹.

- (154) The Commission rejects these arguments and observes that (i) the evidence used was admissible and (ii) that it has presented a body of evidence that is sufficiently precise and consistent to support the firm conviction that the alleged infringement took place, for calcium carbide as well as for magnesium granulates.³⁷⁰

Admissibility of evidence

- (155) Almamet argues that evidence found on magnesium granulates during inspections [*] exceeds the subject matter of the inspection decision and is therefore inadmissible.³⁷¹ The use of this evidence, according to Almamet, would violate their rights of defence: the inspection decision refers to calcium carbide and the Commission therefore should not have obtained and used that evidence on magnesium.
- (156) The Commission considers that – without it needing to go into the question of the basis on which the documents were copied during the inspection [*]- it was entitled to use the evidence and that Almamet's rights of defence were not violated.
- (157) On 11 July 2007, the Commission explicitly asked [*] by request for information pursuant to Article 18 of Regulation No 1/2003, to submit pre-existing documents concerning magnesium.³⁷² In that formal request, the Commission clarified that the subject matter and purpose comprised magnesium for the steel industry.
- (158) [*] submitted the inspection documents anew by means of referral in its reply to the request for information.³⁷³ Furthermore, the Commission asked and obtained

³⁶⁷ Almamet, idem [*].

³⁶⁸ Almamet, idem [*].

³⁶⁹ Almamet, idem [*].

³⁷⁰ For the standard of proof in cartel cases, see for example Joined Cases T-25/95 etc., *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 3708; Joined Cases T-305/94 etc., *Limburgse Vinyl Maatschappij NV and others v Commission* [1999] ECR II-931, paragraphs 768-778; Joined Cases T-67/00 etc., *JFE Engineering Corp v Commission* [2004] ECR II-2501, paragraphs 179-180.

³⁷¹ Almamet, reply of [*] to the Statement of Objections [*]. It concerns in particular documents found at the premises of [*]. See Chapter IV.3

³⁷² Request for information of 11.7.2007 [*].

³⁷³ [*] answered the Commission's request of 11.7.2007 for the submission of specific existing date related documents by means of a general referral to the inspection documents in possession of the Commission. The accessible version of these inspection documents was provided in the same document as the accessible version of this reply to the Request for Information. See [*] reply of [*] to Request for Information of 11.7.2007 [*]. Moreover, [*] reply to a subsequent question from the Commission in the same Request for Information on the submission of further documents was answered negatively. This

further information on the documents at stake via another request for information pursuant to Article 18 of Regulation No 1/2003.³⁷⁴ [*] never considered that the inspection documents were taken illicitly.³⁷⁵

- (159) The evidence was therefore lawfully included in the case file and Almamet's rights of defence were not violated.
- (160) It is noted that an almost identical request for information was sent to Almamet and made it evident to Almamet that the scope of the investigation also covered magnesium. In its reply, Almamet stated that it had no further information available apart from the evidence with respect to calcium carbide already submitted.³⁷⁶ It did not claim that its rights of defence were violated by these questions concerning magnesium. Almamet had access to all evidence in the Commission file with respect to magnesium and was able to defend itself against the objections made. It is noted that none of the other addressees of the Statement of Objections contested the facts in relation to magnesium.

Standard of proof

- (161) As explained in Chapter IV.3, the evidence used for the establishment of anticompetitive behaviour with respect to magnesium granulates follows from the voluntary evidence provided by [*] and [*] and the evidence obtained during inspections and/or in reply to requests for information from the participants to the cartel.
- (162) The evidence provided by [*] consists of statements and documents and is precise.³⁷⁷ As it was submitted by a direct participant to the cartel meetings the evidentiary value of the evidence is high.³⁷⁸ The credibility is enhanced by its level of detail.³⁷⁹ On its own, its probative value already attests to the existence of the infringement.³⁸⁰ The existence of the anticompetitive practices with respect to magnesium granulates was also confirmed by the statements of [*]³⁸¹

negative answer demonstrates that the earlier referral to the inspection documents covered them in their entirety. [*] confirmed such interpretation by answering all subsequent factual questions on the documents concerned, without limitation.

³⁷⁴ Request for Information of 26.2.2008 [*] replied to on [*]. The documents at stake were annexed to the Request for Information.

³⁷⁵ Not during or after the inspection, neither during the administrative investigation (including the various replies to the requests for information concerning these documents), nor in the reply to the Statement of Objections, or at the Oral Hearing.

³⁷⁶ Almamet, reply of [*] to Request for Information [*].

³⁷⁷ See for instance the quotation in recital (61) and (122).

³⁷⁸ [*] See Joined Cases T-67/00 etc, *JFE Engineering Corp v. Commission* [2004] ECR II-2501, paragraph 207.

³⁷⁹ Opinion by AG Vesterdorf in Joined Cases T-1/89 etc, *Rhône-Poulenc SA and others v Commission* [1991] ECR II-867, section I.E.4.

³⁸⁰ For the evidential value of a single piece of evidence, see Joined Cases T-25/95 etc, *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 1838; Joined Cases, T-67/00 etc, *JFE Engineering Corp v Commission* [2004] ECR II-2501, paragraph 148.

³⁸¹ [*]

- (163) Almamet is not able, apart from simply contesting their content, to prove the statements factually wrong or to provide a credible alternative explanation. The content of the contemporaneous documents in possession of the Commission clearly demonstrate that sensitive commercial information such as prices, quotas, customers and volumes was exchanged and discussed between cartel participants. These documents do not contain references to the subjects mentioned by Almamet, namely magnesium or scrap recycling or technical working groups.³⁸²
- (164) In addition, the market sharing tables and handwritten notes of cartel meetings [*] are also explicit and precise.
- (165) It also has to be noted in this respect that the agreements were informal and all organised in the vicinity of Salzburg, that is, not far from the undertakings concerned. The number of participants was limited and they knew each other quite well. The arrangements were set up with the example of calcium carbide powder in mind. All this enabled the parties not to leave much traces and to make it extremely difficult to uncover the evidence of the cartel.
- (166) The evidence is furthermore consistent. The content of the statements provided is corroborated by contemporaneous evidence. This corroboration was provided independently and demonstrates the accuracy of the statements, even on small details. For instance, information in the statements on the agreed market shares matched the market shares found in contemporaneous documents exactly³⁸³; the dates and locations of several cartel meetings for magnesium granulates exactly matched the dates and locations mentioned in contemporaneous documents.³⁸⁴ The reconstructions of the (magnesium) market sharing table, provided by [*], resembles the contemporaneous version of these market sharing tables in the Commission's file.³⁸⁵ Other contemporaneous information – agenda references, including from Almamet itself - confirmed the accuracy of the statements.³⁸⁶
- (167) Lastly, as to the independent statements of [*] that the calcium carbide collusion, to which it participated, was part of a wider scheme including meetings between magnesium suppliers, the Commission has no reason to doubt the credibility of these statements. They are supported by the information of [*]. Almamet's argument that they lack plausibility because [*] is not a supplier of magnesium must be rejected. [*], as a supplier of calcium carbide and purchaser of magnesium, had no direct interest to picture falsely a wider scope of the cartel and to report such when deciding to cooperate with the Commission.

³⁸² See recital (153).

³⁸³ [*] in comparison with [*] inspection document [*] in comparison with [*].

³⁸⁴ See recitals (126) and (128).

³⁸⁵ [*]

³⁸⁶ [*]

V.2.2. Single and continuous infringement

V.2.2.1. **Principles**

- (168) Cartels usually consist of a complex arrangement of collusive contacts over an extended period of time, each of which on its own may be an infringement of Article 81 of the Treaty. It would be artificial and contrary to the spirit of Article 81 to split this web of collusive conduct into a series of separate infringements, which progressively would manifest themselves in both agreements and concerted practices, when the reality is that they are merely constituent elements linked by a single ongoing economic objective.
- (169) For this purpose, the concept of the 'single continuous infringement' was applied. This concept includes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.³⁸⁷ It is constant case law of the Community Courts that “an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel”³⁸⁸.
- (170) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. Some participants may be more active than others and internal conflicts and rivalries, or even cheating, may still occur. 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 effect³⁸⁹.
- (171) The fact that an 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) of the Treaty. 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

³⁸⁷ Joined Cases T-25/95 etc, *Cimenteries CBR SA and others v Commission* [2000] ECR II-491, paragraph 3699.

³⁸⁸ See Cases T-147/89, *Société Métallurgique de Normandie v Commission* [1995] ECR II-1057; T-295/94, *Buchmann v Commission* [1998] ECR II-813, paragraph 121; T-304/94, *Europa Carton v Commission* [1998] ECR II-869, paragraph 76; T-310/94, *Gruber & Weber v Commission* [1998] ECR II-1043, paragraph 140; T-311/94, *Kartonfabriek de Eendracht v Commission* [1998] ECR II-1129, paragraph 237; T-334/94, *Sarrió v Commission* [1998] ECR II-1439, paragraph 169; T-348/94, *Enso Española v Commission* [1998] ECR II-1875, paragraph 223; T-9/99, *HFB Holding and Isoplus Fernwärmetechnik v Commission* [2002] ECR II-1487, paragraph 231; C-49/92 P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83; joined Cases T-101/05 and T-111/05, *BASF AG and UCB SA v Commission* [2007] ECR II-4949, paragraph 160.

³⁸⁹ See to this effect Case T-54/03, *Lafarge v Commission*, judgment of 8.7.2008, not yet published, paragraph 485.

disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

- (172) The concept of a single and continuous infringement cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 81 of the Treaty.³⁹⁰ Yet, when the different actions form part of an ‘overall plan’, the Commission is entitled – on objective grounds – to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.

V.2.2.2. Application in the present case

- (173) In the Statement of Objections, the Commission drew the provisional conclusion that the complex of agreements and/or concerted practices constituted a single and continuous infringement. At the same time, the Commission explained that the events would constitute an infringement of Article 81 of the Treaty and Article 53 EEA Agreement on their own if divided and analysed separately in relation to each product.
- (174) However, when it comes to the individual liability for this infringement and the remedies envisaged, the parties are in any case – with or without a single infringement - only held liable for the conduct and the duration for which they participated in the cartel and the fine will be calculated on that basis.³⁹¹
- (175) In their replies to the Statement of Objections, the majority of parties do not contest the analysis of the Commission and the conclusion on the nature of the infringement as a single complex scheme³⁹². Most parties confirmed that calcium carbide and magnesium granulates are to some degree substitutable products³⁹³ and some of them acknowledged that calcium carbide powder and magnesium granulates belonged to the same product market and/or that the anticompetitive events regarding these products formed part of a single infringement³⁹⁴.
- (176) Only Arques argued that the complex of agreements and/or concerted practices between the suppliers of calcium carbide powder, calcium carbide granulate and magnesium granulate, although related, nevertheless constituted three separate cartel infringements.³⁹⁵ Degussa confirmed that calcium carbide powder and magnesium granulates formed part of a single infringement, but held that calcium carbide granulate constituted a separate infringement.³⁹⁶ Also Donau Chemie

³⁹⁰ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 258; see also Case C-49/92 P *Commission v Anic Participazioni* [1999] ECR I-4125, paragraphs 78-81, 83-85 and 203, Case C-113/04 P *Technische Unie v Commission* [2006] ECR I-8831, paragraph 178 and most recently Case T-54/03 *Lafarge v Commission*, judgment of 8.7.2008, not yet published, paragraph 479;

³⁹¹ See Chapters VI and VIII.

³⁹² SKW [*], NCHZ [*], HSE [*], I. garantovana [*], Ecka [*], Donau Chemie [*], Almamet [*].

³⁹³ Donau Chemie [*], SKW [*], Degussa [*], Akzo [*], Almamet [*].

³⁹⁴ AlzChem [*], Degussa [*].

³⁹⁵ Arques, [*].

³⁹⁶ AlzChem Hart and Evonik Degussa, [*].

reminded that the infringement took place on two separate markets (steel and the gas industry), without drawing any further conclusion from this fact as to the existence of a single or separate infringement(s).³⁹⁷

- (177) The Commission acknowledges that the events which are the subject of this Decision took place on what may be considered two different markets and cover three products. As stated, the infringement for each of these products/markets would constitute an infringement on its own.³⁹⁸ But the Commission considers that there are sufficient grounds showing that the arrangements between the suppliers of calcium carbide powder, calcium carbide granulates and magnesium granulates constituted a complex of agreements and concerted practices that were tied together as a result of various objective elements linking the behaviour for the reasons set out in recitals (181) to (194). Thus they can be said to form part of a single and continuous infringement.
- (178) In its reply to the Statement of Objections Almamet submits that as far as cartel meetings in relation to calcium carbide powder are concerned it cannot be held liable because it *"is not an exclusive dealer but an agent of NCHZ", "with which it forms an economic unit"*³⁹⁹. Almamet submits that the *"exact qualification of a vertical relationship between the parties of a cartel is indeed crucial for determining the correct allocation of liability between the companies concerned"*⁴⁰⁰.
- (179) The Commission maintains that even if the bilateral contract between Almamet and NCHZ were to show that Almamet is a genuine agent⁴⁰¹ or a representative⁴⁰² such finding does not exclude liability for the overall infringement. Almamet participated in the calcium carbide meetings not only in relation to calcium carbide for desulphurization but also in relation to calcium carbide powder for desoxidation⁴⁰³ and thus for its own commercial interests. Furthermore, it also participated in meetings relating to magnesium granulates, which can be used as an alternative product for calcium carbide powder for desulphurisation purposes in the steel industry⁴⁰⁴. Almamet had an interest to be directly involved in cartel arrangements for all product applications as the effectiveness of the cartel insofar as it concerned magnesium granulates could be said to be linked to that of the meetings relating to calcium carbide powder. Moreover, it played an essential role in the functioning of the agreements⁴⁰⁵, had extensive knowledge on technical aspects of the products sold and a relevant commercial understanding of the market.⁴⁰⁶ Finally, the mere fact that as regards certain aspects of the infringement Almamet could be said to be an agent, even if demonstrated, cannot diminish liability for the overall infringement. An

³⁹⁷ Donau Chemie, [*].

³⁹⁸ See recital (173).

³⁹⁹ Almamet, [*].

⁴⁰⁰ Almamet, [*].

⁴⁰¹ As argued by Almamet [*].

⁴⁰² As argued by Almamet [*].

⁴⁰³ See recital (13).

⁴⁰⁴ See recitals (8) and (113).

⁴⁰⁵ See for example recitals (56), (64), (65), (67).

⁴⁰⁶ See recital (14).

undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could reasonably have foreseen it and was prepared to take the risk⁴⁰⁷.

- (180) The Commission also holds Ecka liable for the overall infringement as it was aware of calcium carbide meetings⁴⁰⁸, participated in calcium carbide meetings⁴⁰⁹ as well as magnesium meetings⁴¹⁰, organised meetings – for calcium carbide and magnesium –, each time at the same restaurant⁴¹¹, was seen by the other cartel participants as a regular participant, even for calcium carbide meetings⁴¹², had a commercial interest in both product segments⁴¹³ given that the steel industry may use them as alternatives⁴¹⁴, and was interested in buying the calcium carbide business from Akzo⁴¹⁵. The mere fact that as regards certain aspects of the infringement Ecka is a [*] cannot diminish liability for the overall infringement. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could reasonably have foreseen it and was prepared to take the risk⁴¹⁶.

1. Products

- (181) Seen from the demand side, steel customers may use magnesium granulates as an alternative to calcium carbide.⁴¹⁷ Both are desulphurisation reagents for the steel industry and it was logical for the suppliers of calcium carbide based reagents to widen the collusion to magnesium based reagents for those companies involved in the sale of both reagents and benefit from the collusion for calcium carbide powder for magnesium granulates.
- (182) Calcium carbide in granular form may have a different use as calcium carbide in powder form (gas industry / steel industry), but seen from the supply side, the products are very similar.⁴¹⁸ Only the finishing is different. The untreated

⁴⁰⁷ Case 49/92P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83.

⁴⁰⁸ See recitals (82) and (83).

⁴⁰⁹ See recitals (85) and (88).

⁴¹⁰ See recitals (125) to (135).

⁴¹¹ See recitals (88) and (129).

⁴¹² See recital (91).

⁴¹³ See recital (89).

⁴¹⁴ See recitals (8) and (113).

⁴¹⁵ Ecka, reply to the Statement of Objections [*].

⁴¹⁶ Case 49/92P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 83.

⁴¹⁷ See recital (7).

⁴¹⁸ See recitals (4) and (5).

product remains the same⁴¹⁹ and comes at the same price irrespective of use. As a consequence, the price evolution of the product in granular form is similar to some extent to the price evolution of the product in powder form, with a necessary alignment of the prices for both products in the end.⁴²⁰ It is very much due to this identical cost structure for the untreated product and the price similarity on the market that it was only logical for the companies to benefit from the collusion for calcium carbide powder for calcium carbide granulates.

- (183) Moreover, the agreements/concerted practices on calcium carbide powder for the steel industry affected the commercial behaviour of the undertakings involved for calcium carbide granulates for the gas market and vice versa. In bilateral meetings and telephone contacts the suppliers discussed volumes, clients and prices for the steel and the gas market simultaneously.⁴²¹ The trilateral meeting between Donau Chemie, NCHZ and TDR of 7 April 2004 on the gas market was also used to discuss the positions on the steel market.⁴²² [*] even suggested discussing products with both applications in one multilateral meeting.⁴²³
- (184) The agreements/concerted practices on calcium carbide powder for the steel industry equally affected the commercial behaviour of the undertakings involved for magnesium granulates and vice versa. Contemporaneous notes of [*] on the multilateral meetings for calcium carbide powder of 22 November 2005 and 10 October 2006 for example contain references to magnesium.⁴²⁴ Apparently, the competitive threat of the alternative product magnesium and lime was taken into account when deciding on a realistic price increase for calcium carbide powder.⁴²⁵ This was also confirmed by [*] for the meetings of 3 November 2004 and 11 July 2006.⁴²⁶ [*] also reports that the magnesium suppliers tried to convince [*] during the multilateral meeting for calcium carbide powder of 22 November 2005 to source its magnesium granulates from [*].⁴²⁷

2. Participants and participating undertakings

- (185) All undertakings addressed in this Decision participated in the cartel activities on calcium carbide powder. Four of them - Akzo Nobel, Donau Chemie, NCHZ and TDR - also participated in the cartel activities relating to calcium carbide granulates and therefore had direct knowledge of at least two legs of the single infringement. The legal entities involved were the same and the individual(s) that

⁴¹⁹ See recital (3).

⁴²⁰ See [*], reply of [*] to Request for Information [*] or [*] reply of [*] to Request for Information [*]. Prices for calcium carbide powder and calcium carbide granulate are only similar to some extent because they are not identical: calcium carbide powder is in principle more expensive due to the additional treatment for its preparation.

⁴²¹ See recital (102).

⁴²² See recital (107).

⁴²³ See recital (95).

⁴²⁴ See recital (79) for the meeting of 22.11.2005 and recital (89) for the meeting of 10.10.2006.

⁴²⁵ See recital (79).

⁴²⁶ See recital (86).

⁴²⁷ See recital (79).

represented the undertaking during the multilateral meetings for the steel industry equally participated in the discussions on the gas market.⁴²⁸

- (186) The three other undertakings that took part in the cartel activities relating to calcium carbide powder for the steel industry - Almamet, Ecka and SKW - also took part in the cartel activities on magnesium granulates for the steel industry and therefore had direct knowledge of at least two legs of the single infringement. The legal entities directly involved were usually the same and the individual(s) that represented the undertaking during the multilateral meetings for calcium carbide powder equally participated in the meetings for magnesium granulates.⁴²⁹
- (187) None of the undertakings involved had substantial sales in all three legs of the infringement, but this does not exclude the existence of a single infringement.
- (188) Furthermore, the existence of a third leg was not kept secret. [*], part of the arrangements for calcium carbide powder and granulates, but not a separate supplier of magnesium granulates, informed the Commission of the existence of a third leg of the single infringement.⁴³⁰ An e-mail from an employee of [*] to an employee of [*] also demonstrates that [*], being in the cartel for calcium carbide powder and magnesium granulates, but not a supplier of calcium carbide granulates, was aware that the anticompetitive arrangements also covered this product segment.⁴³¹ This document demonstrates that the discussions for the steel and the gas market were considered to form part of the same agreement.

3. The same timeframe within which the collusion occurred/related meetings

- (189) The first calcium carbide meeting considered as part of the infringement in this Decision is the meeting relating to the gas industry that took place on 7 April 2004.⁴³² A meeting relating to calcium carbide for the steel industry took place a few days later, on 22 April 2004⁴³³ and a meeting relating to magnesium granulates took place on 14 July 2005.⁴³⁴
- (190) The meetings on calcium carbide granulates and magnesium granulates were often held in the immediate aftermath of the multilateral meetings for calcium carbide powder for the steel industry. The discussion often continued directly following, or shortly after the discussion on calcium carbide powder for the steel industry had taken place.⁴³⁵ The discussions on the gas industry often took place

⁴²⁸ See recitals (57), (92) and (93).

⁴²⁹ See recitals (57) and (115).

⁴³⁰ See recital (167).

⁴³¹ [*] inspection document [*]

⁴³² See recital (98).

⁴³³ See recital (64).

⁴³⁴ See recital (125).

⁴³⁵ Meetings on 12.7.2005 and 14.7.2005 [see recitals (76) and (125)], 22.11.2005 and 23.11.2005 [see recitals (78) and (127)], 25.4.2006 and 2.5.2006 [see recitals (83) and (129)], 11.7.2005 and 12.7.2006 [see recitals (85) and (131)] and 10.10.2006 and 13.10.2006 [see recitals (88) and (133)]. Meetings planned for 9.1.2007 and 15.1.2007 [see recitals (90) and (135)].

immediately after leaving the room where the discussion on the steel industry had taken place⁴³⁶. For example, the supplies of calcium carbide based reagents to the steel industry were discussed on 10 October 2006 in a restaurant in Salzburg.⁴³⁷ The suppliers to the gas market continued the discussion for the gas market immediately after the meeting⁴³⁸ and the suppliers of magnesium granulates to the steel industry met each other again shortly afterwards in another restaurant in Salzburg.⁴³⁹

- (191) This overlap in timeframe and meeting dates show that the collusion on market shares and prices covered all three product areas and that the meetings existed in an interrelated fashion.

4. The identical mechanism

- (192) Although the meetings on the three different product groups were held separately in many instances, the suppliers used identical mechanisms: freezing market shares in a kick off meeting⁴⁴⁰ followed by agreeing and coordinating price increases vis-à-vis their customers.⁴⁴¹ If cartel participants needed written market sharing tables they used similar templates.⁴⁴²
- (193) The control and implementation mechanism – checking by means of follow-up meetings⁴⁴³ and/or bilateral (telephone) contacts⁴⁴⁴ whether the market shares and/or the price levels agreed upon were abided by – was identical for all three product groups.

5. Single anti-competitive aim

- (194) The collusion between the suppliers was in pursuit of a single anti-competitive aim. Due to consolidation on the demand side (steel and gas plants) all suppliers felt pressure from customers in the same way.⁴⁴⁵ All of them believed to operate on a declining market and/or saw their market volumes/shares decreasing.⁴⁴⁶ It was this business environment that welded the suppliers together. As described in Chapter IV, they decided to defend their position by combining forces rather than competing individually against each other. Their aim was to stabilise the market by dividing clients among them as well as agreeing on price increases. Prices being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at inflating

⁴³⁶ See recitals (100), (108) and (111).

⁴³⁷ See recitals (88) and (89). Several bilateral (NCHZ and TDR) or trilateral (SKW, Akzo Nobel and Akzo) contacts took place in the hotel on the eve of the meeting. [*]

⁴³⁸ See recital (100) and (111).

⁴³⁹ See recital (133).

⁴⁴⁰ See recitals (59), (65), (107), (118) and (126).

⁴⁴¹ See recitals (62), (108) and (121).

⁴⁴² See recital (117).

⁴⁴³ See recitals (60), (110) and (120).

⁴⁴⁴ See recitals (58), (63), (102) and (123).

⁴⁴⁵ See recitals (43), (92) and (113).

⁴⁴⁶ See recitals (37) - (39).

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

V.3 Restriction of competition

- (195) All undertakings subject to this procedure agreed upon market shares, quotas price increases, customer allocation and exchanged sensitive information (see Chapter IV). Agreeing upon such parameters restricts, prevents or distorts competition by its very nature as the quintessential aspects of competitive behaviour are eliminated. By engaging in these conducts, the undertakings aimed at eliminating or at least reducing the risk involved in competing freely on the market place. Therefore, the object of their behaviour was the restriction of competition.
- (196) It is settled case law that for the purpose of application of Article 81 of the Treaty and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects.⁴⁴⁷ In case of concerted practice it is sufficient for the Commission to provide concrete and credible indicators which show with reasonable probability that there was an impact on the market.⁴⁴⁸
- (197) However, the Commission considers that the facts established in Chapter IV of this Decision demonstrate that the agreements and/or concerted practices were implemented and therefore indicate the existence of anti-competitive effects of the cartel arrangements on the market. Cartel members, after having agreed on market sharing tables, implemented them by agreeing on the allocation of customers and price increases. Contemporaneous documents suggest that the cartel facilitated the collectively agreed passing on of the rising cost of energy to the customers. [*] for instance, reported internally on a cartel meeting, stating that it had managed to eliminate the price rise in coke by pushing up the calcium carbide prices.⁴⁴⁹ [*] wrote that [*]⁴⁵⁰ Further examples of implementation are provided in recital (63). The correct implementation of the agreed market shares was monitored by regular updates of the market sharing tables in multilateral meetings.
- (198) According to the case law, the Commission is not required to show systematically that the agreed prices allowed the cartel participants to obtain higher prices than in the absence of such agreements. It is sufficient that agreed prices serve as the basis for individual negotiations since they limit the clients' margin of negotiation.⁴⁵¹ The fact that an agreement having an anti-competitive

⁴⁴⁷ Case T-62/98, *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178.

⁴⁴⁸ Case T-54/03, *Lafarge v Commission*, judgment of 8.7.2008, not yet published, paragraph 584.

⁴⁴⁹ [*] inspection Documents [*]

⁴⁵⁰ [*]

⁴⁵¹ Joined Cases T-259 to 264 and 271/02, *Raiffeisen Zentralbank Österreich and others v Commission* [2006] ECR II-05169, paragraphs 285-286.

object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market.⁴⁵² Also, even when the cartel sets only price objectives and not fixed prices, it cannot be inferred from the fact that the undertakings sold below the reference prices that the cartel had no effects.⁴⁵³

V.4 Effect upon trade between Member States and EEA Contracting Parties

- (199) The Community Courts have consistently held that, in order that an agreement between undertakings may affect trade between Member States, "it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".⁴⁵⁴ Article 81 of the Treaty does not require that agreements have actually affected trade between Member States, but it does require that it be established that the agreements are capable of having that effect⁴⁵⁵.
- (200) The arrangements which are the subject of this Decision had an appreciable effect on trade between Member States and between the Contracting Parties of the EEA Agreement. As demonstrated in Chapter II.3.3 above, the supply of calcium carbide powder, calcium carbide granulates and magnesium granulates is characterised by substantial volumes of trade between Member States and there is also some trade between the Community and EFTA countries belonging to the EEA.
- (201) In the present case, it is considered, for the purpose of this Decision, that the cartel arrangements related to customers within the EEA, except Spain, Portugal, Ireland and the UK⁴⁵⁶, which represents a substantial part of the EEA. The existence of arrangements to fix prices, allocate customers and share the markets in these areas must have resulted, or can be expected to result, in the automatic diversion of trade patterns from the course they would otherwise have followed.

V.5 Articles 81(3) of the Treaty and Article 53(3) of the EEA Agreement

- (202) Pursuant to Article 1(2) of Regulation No 1/2003, an agreement, decision or concerted practice caught by Article 81(1) of the Treaty shall not be prohibited if it satisfies the conditions of Article 81(3) of the Treaty, that is, if it contributes to

⁴⁵² Case T-38/02, *Groupe Danone v Commission* [2005] ECR II-4407, paragraph 148.

⁴⁵³ Case T-64/02, *Heubach v Commission* [2005] ECR II-5137, paragraph 117.

⁴⁵⁴ Case 56/65, *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84, *Remia and Others v Commission* [1985] ECR 2545, paragraph 22; Joined Cases T-25/95 etc, *Cimenteries CBR and others v Commission* [2000] ECR II-491, paragraph 3930.

⁴⁵⁵ Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 17; and Case T-374/94, *European Night Services* [1998] ECR II-3141, paragraph 136.

⁴⁵⁶ See recitals (54), (104) and (114).

improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows customers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. The same applies, *mutatis mutandis*, with respect to Article 53 of the EEA Agreement.

- (203) Restriction of competition being the object of the arrangements concerning allocation of tenders, geographic market sharing, fixing of quotas, prices and sales conditions, and exchanging of commercially sensitive information which are the subject of this Decision, there is no indication that the agreements and/or concerted practices between the suppliers of calcium carbide powder, calcium carbide granulates and magnesium granulates entailed any benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of the present Decision, are, by definition, the most detrimental restriction of competition, as they benefit only the participating suppliers but not the consumers⁴⁵⁷.
- (204) According to Article 2 of Regulation No 1/2003 the burden of proving that the conditions of Article 81(3) are met is on the undertakings claiming the benefit of that provision. None of the parties to the present proceedings have claimed that the conditions of Article 81(3) are met, or provided evidence to that effect. On this basis, the conditions of Article 81(3) of the Treaty and Article 53(3) of the EEA Agreement are not fulfilled in this case.

VI. ADDRESSEES

VI.1 Liability for the infringement

VI.1.1. *Principles*

- (205) Based on the principle of personal responsibility, the Commission first identifies the legal person which was directly involved in the cartel activities. This entity is held liable for infringing Article 81 of the Treaty. If the latter belongs to a group of companies within which it may not determine its own conduct on the market, the Commission may impute the illicit behaviour to the legal person which actually determines the behaviour on the market because they are considered to be a single undertaking within the meaning of Article 81 of the Treaty. As a consequence the Commission may hold the legal person which determines the behaviour on the market jointly and severally liable for the payment of the fine

⁴⁵⁷ See also Communication from the Commission, Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/08, point 46.

which it may impose on the entity which was directly involved in the cartel activities⁴⁵⁸.

- (206) For the relationship between a parent company and its subsidiary the Commission assesses if the parent company exercised decisive influence on the conduct of the subsidiary on the market during the time of the infringement. In case a parent company holds – directly or indirectly - 100% of the capital of the subsidiary which infringed competition rules, the Commission, based on the case law⁴⁵⁹, applies the presumption that the parent company did exercise decisive influence over the conduct of the subsidiary and thus infers that they constitute a single undertaking within the meaning of Article 81 of the Treaty. In these circumstances, it is for the parent company to show that the subsidiary was able to determine its business policy autonomously, having regard in particular to the economic and legal links between them such as a unitary organisation of personal, tangible and intangible elements pursuing a specific economic aim on a long-term basis.
- (207) In case of a group of companies and for the specific case where the economic activity which was the object of cartel arrangements is transferred to another legal entity within the group, the Commission, based on consistent case-law⁴⁶⁰ and applying the criterion of economic continuity, may hold the transferee liable for the full period of the infringement, even if the transferor continues to exist.

VI.1.2. Akzo Nobel (Akzo Nobel NV, Carbide Sweden AB)

- (208) Within the Akzo Nobel group, two subsidiaries were directly involved in the agreements and/or concerted practices as described in Chapter IV of this Decision: Akzo Nobel Surface Chemistry AB during the period 3 November 2004 to 31 October 2005 and Carbide Sweden AB during the period 1 November 2005 to 20 November 2006.⁴⁶¹

⁴⁵⁸ Case T-405/06, *Arcelor Mittal et.al. v Commission*, judgment of 31.3.2009, paragraph 91; Case T-85/06, *General Química, SA et.al. v Commission*, judgment of 18.12.2008, paragraph 62; Case T-112/05, *Akzo et.al. v Commission* [2007] ECR II-5049, paragraph 62.

⁴⁵⁹ Case T-405/06, *Arcelor Mittal et.al. v Commission*, judgment of 31.3.2009, paragraph 89; Case T-85/06, *General Química, SA et.al. v Commission*, judgment of 18.12.2008, paragraph 62; Case T-69/04 *Schunk et.al. v Commission*, judgment of 8.10.2008, paragraph 56; Case T-112/05, *Akzo et.al. v Commission* [2007] ECR II-5049, paragraph 60; Joined Cases T-71/03 etc, *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 60; Case T-354/94, *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 80, upheld in case C-286/98P, *Stora Kopparbergs Bergslags v Commission*, [2000] ECR I-9925, paragraphs 27, 28 and 29; Case 107/82, *AEG v Commission*, [1983] ECR 3151, paragraph 50. See also the Opinion of AG Kokott in case C-97/08 - the appeal to the Akzo judgment in case T-112/05 - paragraphs 46-76.

⁴⁶⁰ Case T-405/06, *Arcelor Mittal et.al. v Commission*, judgment of 31.3.2009, paragraph 109; Case T-43/02, *Jungbunzlauer v Commission*, judgment of 27.9.2006, ECR II 3435, paragraph 131-133; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v. Commission* [2004] ECR I-123, paragraphs 354 – 360.

⁴⁶¹ See in particular recitals (57), (92) and (100). [*].

- (209) Throughout the infringement period both subsidiaries were owned by Akzo Nobel NV to 100%.⁴⁶² Based on the case law mentioned in recital (206) the Commission may rely on the 100% ownership in order to establish that Akzo Nobel NV actually exercised decisive influence over the business conduct of its subsidiaries Akzo Nobel Surface Chemistry AB and Carbide Sweden AB.
- (210) Notwithstanding, the Commission points out further elements which confirm the presumption that Akzo Nobel NV exercised decisive influence over the market conduct of Akzo Nobel Surface Chemistry AB, and later Carbide Sweden AB demonstrating that they therefore constituted a single undertaking:
- The Akzo Nobel group was organised on the basis of a two-layer structure: a "corporate centre" and directly underneath approximately 20 Business Units ("BUs"). The corporate centre co-ordinates the most important tasks with regard to general strategy of the group, finance, legal affairs and human resources. The BUs each have their own General Manager, management team and supporting services though the BU management operates within the limits of the financial and strategic targets set out by the corporate centre and is bound by the "Business Principles" and "Corporate Directives" applicable to the entire Akzo Nobel group.⁴⁶³
 - Economically, the calcium carbide business formed part of the sub-business unit 'Casco adhesives' within the business unit 'Industrial finishes' within the products group 'Coatings'.
 - The turnover of the calcium carbide business was consolidated with the total turnover of the Akzo Nobel group, headed by Akzo Nobel NV demonstrating that the income generated by the subsidiary contributed to the economic performance data of the parent.
 - The Akzo Nobel group, headed by Akzo Nobel NV, controlled the performance of its calcium carbide business and decided on that basis that [*] Akzo Nobel subsequently took all legal arrangements to [*].
 - In commercial contacts, Carbide Sweden is often still referred to as 'Casco' or 'Akzo Nobel'. Also the cartel market tables refer to 'Akzo Nobel' and not to 'Carbide Sweden'.⁴⁶⁴ Employees of Carbide Sweden AB also refer to the name 'Akzo Nobel', when speaking about their employer.⁴⁶⁵
 - The employees of Carbide Sweden AB (and its predecessors) who participated in the events described in Chapter IV signed the Akzo Nobel compliance program for antitrust.⁴⁶⁶
- (211) It follows that Akzo Nobel Surface Chemistry AB and later Carbide Sweden AB were not autonomous in their commercial policies, but were subject to the

⁴⁶² Akzo Nobel, reply of [*] to Request for Information [*].

⁴⁶³ AkzoNobel, reply of ,[*] to Request for Information [*].

⁴⁶⁴ See for instance [*]

⁴⁶⁵ See for instance [*]

⁴⁶⁶ See [*]

supervision and direction of Akzo Nobel NV. Therefore, they respectively formed one undertaking with the parent company.

- (212) Given that the production and the sale of calcium carbide was transferred from Akzo Nobel Surface Chemistry AB to Carbide Sweden AB within the Akzo Nobel group⁴⁶⁷ Carbide Sweden AB is liable for the whole period of the infringement, that is, from 3 November 2004 to 20 November 2006. Moreover and for the same period, liability for the infringement is also attributed to the parent company Akzo Nobel NV.

VI.1.3. Almamet (Almamet GmbH)

- (213) Almamet GmbH was directly involved⁴⁶⁸ in the agreements and/or concerted practices as described in Chapter IV of this Decision between 22 April 2004 until 16 January 2007 and is therefore held liable for the infringement of Article 81 of the Treaty and Article 53 EEA Agreement.

VI.1.4. Donau Chemie (Donau Chemie AG)

- (214) In the period from 7 April 2004 to 16 January 2007, Donau Chemie AG was directly involved in the agreements and/or concerted practices as described in Chapter IV of this Decision.⁴⁶⁹ Therefore, Donau Chemie AG is held liable for the infringement of Article 81 of the Treaty and Article 53 EEA Agreement.

VI.1.5. Ecka (Ecka Granulate GmbH & Co KG, non Ferrum Metallpulver GmbH & Co KG)

- (215) Employees and/or representatives of Aluma GmbH, non Ferrum Metallpulver GmbH & Co KG and Ecka Granulate GmbH & Co KG - during the period 14 July 2005 to 16 January 2007⁴⁷⁰ – were directly involved in a number of cartel agreements and/or concerted practices as described in Chapter IV of this Decision.
- (216) Ecka Granulate GmbH & Co KG, the company heading the Ecka undertaking is the 100% parent company of Aluma GmbH, which in turn holds 100% of non Ferrum Metallpulver GmbH & Co KG.⁴⁷¹
- (217) Given the 100% ownership the Commission may presume the actual exercise of decisive influence of Ecka Granulate GmbH & Co KG over the business policy of Aluma GmbH as well as non Ferrum Metallpulver GmbH & Co KG.
- (218) Notwithstanding, the Commission points out further elements which confirm the presumption that Ecka Granulate GmbH & Co KG exercised decisive influence

⁴⁶⁷ See recital (10).

⁴⁶⁸ See in particular recitals (57), (115), (178) and (179).

⁴⁶⁹ See in particular recitals (57), (92) and (98).

⁴⁷⁰ See in particular recitals (57), (115) and (180).

⁴⁷¹ See recitals (18) and (19).

over the market conduct of Aluma GmbH as well as non Ferrum Metallpulver GmbH & Co KG demonstrating that they therefore constituted a single undertaking: :

- contracts signed by non Ferrum Metallpulver GmbH & Co KG clearly refer in the operative articles to the Ecka group;⁴⁷²
- the turnover of Aluma GmbH and non Ferrum Metallpulver GmbH & Co KG is consolidated in the turnover of Ecka Granulate GmbH & Co KG demonstrating that the income generated by the subsidiaries contributed to the economic performance data of the parent;
- the calcium carbide business as well as the magnesium business reported to [*]Ecka Granulate GmbH & Co KG;⁴⁷³
- Ecka Granulate GmbH & Co KG confirms that its management had full confidence in the employee that attended the cartel meetings;⁴⁷⁴
- the employee who attended the cartel meetings signed contracts for non Ferrum Metallpulver GmbH & Co KG, but was employed by Aluma GmbH during 2005 and later by Ecka Granulate GmbH & Co KG.⁴⁷⁵

(219) Given that the production and the sale of magnesium granulates was transferred from Aluma GmbH to non Ferrum Metallpulver GmbH & Co KG within the Ecka Granulate GmbH & Co KG group on 1 January 2006.⁴⁷⁶ non Ferrum Metallpulver GmbH & Co KG is liable for the whole period of the infringement, that is, from 14 July 2005 to 16 January 2007. Moreover and for the same period, liability for the infringement is also attributed to the parent company Ecka Granulate GmbH & Co KG⁴⁷⁷.

VI.1.6. NCHZ (1.garantovaná a.s. and Novácke chemické závody, a.s.)

(220) In the period from 7 April 2004 to 16 January 2007, Novácke chemické závody, a.s. (NCHZ) was directly involved in the agreements and/or concerted practices as described in Chapter IV of this Decision⁴⁷⁸ and is therefore held liable for the infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(221) In this period, 1.garantovaná a.s. exercised decisive influence over the business policy of NCHZ, and they therefore constituted a single undertaking. This is demonstrated by the following structural and organisational links:

⁴⁷² Ecka, inspection documents [*].

⁴⁷³ Ecka, reply of [*] to Request for Information [*].

⁴⁷⁴ Ecka, reply of [*] to Request for Information [*].

⁴⁷⁵ Ecka, inspection documents [*]; reply of [*] to Request for Information [*]

⁴⁷⁶ See recital (19).

⁴⁷⁷ For Ecka's direct liability see recital (215).

⁴⁷⁸ See in particular recitals (57), (92) and (98).

- The General Assembly of NCHZ, which decides by a majority of 70% of the votes⁴⁷⁹, elects the Board of Directors. This Board has five members and decides by simple majority.⁴⁸⁰ Its chairman was at the same time the vice-chairman of the Board of Directors of l.garantovaná a.s. and its vice-chairman was at the same time the chairman of the Board of Directors of l.garantovaná a.s.⁴⁸¹ In the period from 2004 to 2007 there were 11 different members serving the Board, 9 out of which held functions in the l.garantovaná a.s. group⁴⁸².
 - The vast majority of the supervisory board of NCHZ consisted of representatives of l.garantovaná a.s.⁴⁸³.
 - The turnover of NCHZ. was consolidated with l.garantovaná a.s.⁴⁸⁴ demonstrating that the income generated by the subsidiary contributed to the economic performance data of the parent.
- (222) These links prove that there was a unitary organisation of personal, tangible and intangible elements that pursue a specific aim on a long term basis. Moreover l.garantovaná a.s held during the entire period of the infringement more than 70% of NCHZ's capital⁴⁸⁵. The elements mentioned in recital (221) fall under the normal business behaviour of an investor of this size. Therefore, the parent company exercised decisive control over the business policy of NCHZ. Based on the case law, l.garantovaná a.s and NCHZ are considered to form one undertaking and liability for the infringement is attributed to l.garantovaná a.s for the same period, that is, 7 April 2004 to 16 January 2007.
- (223) l.garantovaná a.s submits in its reply to the Statement of Objections that it never had an influence on the behaviour of those persons who directly participated in the cartel meetings and that they did not inform it about the cartel activities neither. It also points out that it currently holds no shares and exercises no control over NCHZ. Citing the case *Graphite electrodes*⁴⁸⁶ l.garantovaná a.s has requested that the Commission address this decision to NCHZ only⁴⁸⁷.
- (224) The argument that the parent company did not know about the cartel is based on a misconception of the attribution of the subsidiary's behaviour to the parent. If the parent company knew of or instructed the subsidiary to participate in cartel activities its liability would be established by direct involvement in the cartel. Moreover, the Commission is not obliged to demonstrate influence of the parent company on specific individuals in the subsidiary.

⁴⁷⁹ NCHZ, statutes, art. 4.

⁴⁸⁰ NCHZ, statutes, art. 10(2) and 10(8).

⁴⁸¹ NCHZ, reply of [*] to Request for Information [*]

⁴⁸² Idem.

⁴⁸³ Idem.

⁴⁸⁴ NCHZ, reply of [*] to Request for Information [*].

⁴⁸⁵ See recital (23).

⁴⁸⁶ Joined cases T-236/01, T-244/01 to T-246/01, T-251/01, T-252/01 Tokai Carbon and Others v Commission [2004] ECR II-1181, paragraphs 271-285.

⁴⁸⁷ l.garantovaná a.s, reply to Statement of Objections [*].

- (225) In line with the case law⁴⁸⁸, the Commission holds that 1.garantovaná did not adduce evidence to rebut that it actually exercised decisive influence over NCHZ during the period of the infringement. Therefore, 1.garantovaná may be held liable for the illegal behaviour of NCHZ and the decision is accordingly addressed to 1.garantovaná as well.

VI.1.7. SKW (SKW Stahl-Metallurgie GmbH, SKW Stahl-Metallurgie Holding AG, AlzChem Hart GmbH, Evonik Degussa GmbH, ARQUES Industries AG)

- (226) During the period of 22 April 2004 to 16 January 2007, employees of SKW Stahl-Technik GmbH & Co KG, as of 2005 called SKW Stahl-Metallurgie GmbH⁴⁸⁹, were directly involved in the cartel agreements and/or concerted practices as described in Chapter IV of this Decision⁴⁹⁰. Therefore, SKW Stahl-Metallurgie GmbH is held liable for the infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.
- (227) During the period mentioned in recital (226) this operative unit was 100% owned by different parent companies: first SKW Metallurgie AG (now AlzChem Hart GmbH) and ultimately Degussa AG (now Evonik Degussa GmbH), and subsequently Arques BeteiligungsGmbH (now SKW Stahl-Metallurgie Holding AG) and ultimately Arques AG (now ARQUES Industries AG). Based on the case law mentioned in recital (206), it may be presumed that the parent companies actually exercised decisive influence over the business policy of their subsidiary. Notwithstanding the 100% rule, and in relation to Arques for the period 30 November 2006 to 16 January 2007 when the subsidiary was no longer wholly-owned, the Commission points to elements which confirm that the respective parent companies, for their respective period, exercised decisive influence over the business policy of the subsidiary.

Liability for AlzChem Hart GmbH

- (228) From at least 22 April 2004 up to and including 30 August 2004 the then-named SKW Stahl-Technik GmbH & Co KG was 100% owned (through intermediary companies) by the then-named SKW Metallurgie AG, now AlzChem Hart GmbH⁴⁹¹. Therefore, based on the presumption of actually having exercised decisive influence, the Commission may attribute the illegal cartel behaviour of the subsidiary to the parent company AlzChem Hart GmbH for the same period.
- (229) Notwithstanding, the Commission points to further elements which confirm the presumption that the parent company exercised decisive influence over the market conduct of its subsidiary demonstrating that they therefore constituted a single undertaking:

⁴⁸⁸ See Section VI.1.1

⁴⁸⁹ See recital (30) and footnote 51.

⁴⁹⁰ See in particular recitals (57) and (115).

⁴⁹¹ See recital (27).

- at least during 2004 the CEO of SKW Stahl-Technik GmbH & Co KG was equally CEO of SKW Stahl Technik Verwaltungs GmbH ⁴⁹²;
 - the subsidiary needed the approval of its parent company for several business decisions or transactions⁴⁹³;
 - there was regular reporting on the subsidiary's economic performance⁴⁹⁴.
- (230) In its reply to the Statement of Objections the parent company AlzChem Hart GmbH brings forward that there are "*special reasons*" "*in this extraordinary case*"⁴⁹⁵ which merit a rejection of its liability. It submits that the examples in footnote 493⁴⁹⁶ do not concern daily decisions but decisions of "*essential importance*" "*in relation to the size of the subsidiary*"⁴⁹⁷. Accordingly, the parent company shall not have had any influence over the subsidiary.
- (231) In fact, those examples demonstrate that the parent company had to give its approval on aspects without which the company could not have run its business – adopting new business areas, entering into loans or litigations form part of and are ordinary decisions to be taken in the life of a business and therefore demonstrate the influence of the parent over the subsidiary.
- (232) AlzChem Hart GmbH submits that reporting on the economic performance should not be considered as an indicator to establish control. It supports its argument by reference to small investors which are also informed about the economic performance but are not held liable by the Commission for cartel infringements⁴⁹⁸. The Commission underlines that this indicator is evaluated in combination with the investor's position. In case of AlzChem Hart GmbH, this is a 100% shareholding. In such a constellation it is normal business behaviour to seek protection of the investments made and strive to take decisions in relations to this investment based on reported economic performance data.
- (233) AlzChem Hart GmbH submits several arguments identical to the ones from Degussa AG⁴⁹⁹, mentioned in recital (237) and replied to in recitals (238) - (243). The Commission refers to these recitals *mutatis mutandis* and concludes that none of the points raised by AlzChem Hart GmbH are considered sufficient to affect the conclusion of the Commission on the parental liability.
- (234) In line with the case law⁵⁰⁰ the Commission holds that AlzChem Hart GmbH did not adduce evidence to rebut that it actually exercised decisive influence over SKW Stahl-Technik GmbH & Co KG. Therefore AlzChem Hart GmbH may be

⁴⁹² See [*] in footnote 46.

⁴⁹³ [*]

⁴⁹⁴ SKW, reply of [*] to Request for Information [*]; Degussa, reply of [*] to Request for Information [*].

⁴⁹⁵ AlzChem Hart GmbH, reply to the Statement of Objections [*].

⁴⁹⁶ Footnote 464 in the Statement of Objections

⁴⁹⁷ AlzChem Hart GmbH, reply to the Statement of Objections [*].

⁴⁹⁸ AlzChem Hart GmbH, idem [*].

⁴⁹⁹ AlzChem Hart GmbH, idem [*].

⁵⁰⁰ See Section VI.1.1

held liable for the illegal behaviour of SKW Stahl-Technik GmbH & Co KG and the decision is also addressed to AlzChem Hart GmbH.

Liability for Evonik Degussa GmbH

- (235) From at least 22 April 2004, up to and including 30 August 2004 the then-named SKW Stahl-Technik GmbH & Co KG was indirectly 100% owned by the then-named SKW Metallurgie AG (now AlzChem Hart GmbH). The latter was indirectly 100% owned by Degussa AG (now Evonik Degussa GmbH)⁵⁰¹. Therefore, the Commission may attribute the illegal cartel behaviour of the subsidiary to the parent company Degussa for the same period.
- (236) Notwithstanding, the Commission points to further elements that confirm the presumption that the parent company exercised decisive influence over the market conduct of its subsidiary demonstrating that they therefore constituted a single undertaking:
- Economically, the calcium carbide business formed part of the business unit 'Metallchemie' which underlines the unitary organisation between the parent and the subsidiary⁵⁰².
 - The turnover of the calcium carbide business for the year 2004 accrued economically to the parent⁵⁰³.
 - In its reply to the Commission's Requests for Information Degussa refers to the calcium carbide business as having belonged to the Degussa-group;⁵⁰⁴
 - Degussa's decision to implement a divestiture programme as of 2001 and to sell non-core business activities, such as the metallurgic operations⁵⁰⁵, concerns the fundamental question of the economic survival of the subsidiary. This clearly shows that the management of the parent company made decisions concerning the commercial strategy of the operative subsidiary.
- (237) In its reply to the Statement of Objections Degussa argues that there are "*special reasons*" "*in this extraordinary case*"⁵⁰⁶ why it cannot be held liable for the

⁵⁰¹ See recital (27).

⁵⁰² In its reply to the Statement of Objections Degussa points out that the Commission used wrong words for the business unit. Instead of "Metallchemie" the Statement of Objections referred to the unit "metallurgical chemicals". The Commission is of the opinion that Degussa could have been able to understand that when the Statement of Objections, in point 241, referred to a "unit" in the parent company "for the calcium carbide business" it was most probably referring to "Metallchemie". The words "metallurgical chemicals" were sufficiently close in the given context that the Commission maintains that Degussa was still able to comprehend the allegations made against it.

⁵⁰³ See footnote 48. In its reply to the Statement of Objections Degussa highlights that it was incorrect in the Statement of Objections to speak of the subsidiary's turnover having been consolidated in the turnover of the parent company. The Commission maintains that the economic status of the parent company was positively influenced by the turnover of SKW in the sense that the latter's turnover entered into the price Degussa was able to negotiate for the sale. Therefore, the sales entered the accounts of Degussa indirectly.

⁵⁰⁴ Degussa, reply of [*] to Request for Information [*]

⁵⁰⁵ See recital (28).

⁵⁰⁶ Degussa AG, reply to the Statement of Objections [*].

behaviour of its subsidiary. Firstly, the subsidiary was sold with economic retroactive effect - on 1 January 2004 - and the sales contract foresaw that the buyer assumed liability for cartel behaviour. Secondly, the subsidiary participated in the cartel although it was explicitly instructed not to participate in cartels. Thirdly, the parent company had to be assimilated to a financial investor in 2004 and therefore the subsidiary was autonomous on the market at that time.

- (238) In response to the first argument, the Commission maintains that the decisive date for the subsidiary's sale is when the contract foresaw the change of legal ownership.⁵⁰⁷ Moreover, even if the sales contract could be construed to read that the new buyer accepted to assume liability for unidentified cartel behaviour that the seller might have committed in the past, then such a clause is not binding to the Commission. In this context Degussa refers to the Commission Decision of 21 January 1998 in Case IV/35.814 *Alloy surcharge*⁵⁰⁸. However, this case was not about a contract between private parties but a commitment from one party to the Commission in the framework of an ongoing cartel investigation in relation to an identified infringement.
- (239) Concerning the second argument⁵⁰⁹, a compliance programme and general instructions from the parent company to the subsidiary not to participate in cartels may not abate the parent company of its liability. If it were possible for parent companies to escape the consequences of letting their subsidiaries breach competition law by giving internal instructions on the illegal nature of cartels, the purpose of the absolute ban on cartel behaviour could easily be undermined. Signed self-incriminatory witness statements by their own employees admitting such internal breaches of the compliance programme and/or general orders made after the period of the infringement do not change the fact that an infringement took place. A failed compliance programme and/or general instructions should not constitute grounds not to hold the parent company liable for the illegal behaviour of a subsidiary.
- (240) In this context Degussa specifically refers to the judgment of the Court of Justice in the *BMW* case⁵¹⁰ and the underlying Commission Decision of 23 December 1997 in Case IV/29.146⁵¹¹ as well as the oral presentation of the Commission's agent during a hearing before the Court of First Instance in case *General Quimica*⁵¹² according to which the parent company shall not bear any liability because the subsidiary acted against the will and/or did not follow the instructions of the parent company.
- (241) Apart from the fact that the *BMW* case is not about a cartel infringement the facts relating to the misconduct are very different. The parent company did know about the illegal practices and therefore gave specific instructions which were not

⁵⁰⁷ See recital (29).

⁵⁰⁸ OJ 1998 L 100 55.

⁵⁰⁹ Degussa AG, reply to the Statement of Objections [*].

⁵¹⁰ Case 32/78 and others, *BMW v Commission* [1979] ECR I-2435, paragraph 24.

⁵¹¹ OJ 1978 L 46/33, recital 20.

⁵¹² For the full reference to the case see footnote 458; for the presentation of the agent see Degussa AG, reply to the Statement of Objections [*].

followed. This was documented by contemporaneous evidence⁵¹³. Applying those facts to this case would mean that the parent company Degussa knew about the cartel, which is contested by Degussa and has never been asserted by the Commission. The Commission is of the opinion that, as the *BMW* case shows, knowledge of the illegal measure is a necessary precondition to give targeted instructions in relation to identified, specific conduct. It is in any case considered insufficient if the parent company gives general instructions insisting on law-abiding behaviour.

- (242) In its third point, Degussa argues that it had to be "*assimilated to a financial investor*" "*which does not pursue any strategic aims but only holds a financial investment*"⁵¹⁴. It wanted to sell the subsidiary and classified it internally as a non-core business. According to Degussa this meant that it did not influence the behaviour of the company on the market anymore.
- (243) The Commission maintains that as a non-core business, and even if it were true that Degussa could be assimilated to a financial investor, this does not mean that all decisions about the subsidiary have been taken autonomously by the latter. The case at hand shows that strategic decisions in relation to the sale of the subsidiary - in particular if, when and how best to prepare the business - have been taken by Degussa⁵¹⁵. The fundamental decisions relating to economic survival within the Degussa group as well as the prospects for economic survival outside the Degussa group were clearly made by Degussa and were made in the interest of the Degussa group. This rebuts the argument that the subsidiary was totally independent⁵¹⁶.
- (244) In line with the case law⁵¹⁷, the Commission holds that Degussa did not adduce evidence to rebut the presumption that it actually exercised decisive influence over SKW Stahl-Technik GmbH & Co KG. Therefore, Degussa may be held liable for the illegal behaviour of SKW Stahl-Technik GmbH & Co KG and the decision is addressed to Degussa as well.

Liability of SKW Stahl-Metallurgie Holding AG

- (245) From 30 August 2004 and at least until 16 January 2007, SKW Stahl-Technik GmbH & Co KG, as of 2005 called SKW Stahl-Metallurgie GmbH⁵¹⁸ was 100% directly owned by SKW Stahl-Metallurgie Holding AG (previously SKW Stahl-Metallurgie Holding GmbH and Arques Beteiligungsgesellschaft mbH)⁵¹⁹. Therefore, the Commission may attribute the illegal cartel behaviour of the subsidiary to the parent company SKW Stahl-Metallurgie Holding AG for the same period.

⁵¹³ Case 32/78 and others, *BMW v Commission*, ECR [1979] I-2435, paragraphs 8-11.

⁵¹⁴ Degussa AG, reply to the Statement of Objections [*].

⁵¹⁵ See recital (28).

⁵¹⁶ Case T-69/04, *Schunk et.al. v Commission*, judgment of 8.10.2008, not yet published, paragraph 66.

⁵¹⁷ See Section VI.1.1.

⁵¹⁸ See recital (30) and footnote 51.

⁵¹⁹ See recital (29) and footnote 50.

(246) Notwithstanding, the Commission points to further elements which confirm the presumption that the parent company exercised decisive influence over the market conduct of its subsidiary demonstrating that they therefore constituted a single undertaking:

- the subsidiary formed part of the Powders and Granulates division of the parent company;⁵²⁰
- the parent company was involved in the daily business contacts of the subsidiaries;⁵²¹
- the executive director of the parent company knew about the exchange of sales prices between competitors;⁵²²
- the parent company was responsible for the strategic development of its subsidiary;⁵²³
- the parent company made decisions relating to central services, such as personnel, recruiting and financing;⁵²⁴
- the subsidiary reported financial data to the parent company on a monthly basis;⁵²⁵
- the subsidiary needed, inter alia, the signature of a board member of the parent company in order to enter into contracts with banks⁵²⁶;
- the turnover of the subsidiary was consolidated in the turnover of the parent company⁵²⁷ demonstrating that the income generated by the subsidiary contributed to the economic performance data of the parent company.

(247) In its reply to the Statement of Objections SKW Stahl Metallurgie Holding AG argues that it did not know⁵²⁸ or was not informed of⁵²⁹ the cartel activities. In reply, the Commission refers to recital (224).

(248) SKW Stahl Metallurgie Holding AG also explains that it did not have any economic interest in the cartel because it was a sales representative for Degussa. However, the Commission finds that this is not confirmed by the wording of the

⁵²⁰ SKW, inspection documents [*].

⁵²¹ SKW, idem [*]. Direct participation of a member of the board of SKW Stahl-Metallurgie Holding AG together with SKW (Stahl-Metallurgie GmbH) in the discussion with external parties in relation to insurance, possible purchase, price structure and profit of a competitor [*].

⁵²² SKW, inspection documents [*].

⁵²³ SKW idem [*] concerning the possible purchase of a competitor.

⁵²⁴ SKW, reply of [*] to Request for Information [*].

⁵²⁵ SKW, idem [*].

⁵²⁶ SKW, idem [*].

⁵²⁷ SKW, idem [*].

⁵²⁸ SKW, reply to the Statement of Objections [*].

⁵²⁹ SKW, idem [*].

Delivery and Service Agreement according to which no party negotiated on behalf of the other⁵³⁰.

- (249) In order to rebut the conclusion on the actual exercise of decisive influence the parent company points out that its role was that of a financial investor⁵³¹. When it bought the subsidiary several long-term contracts were already attached limiting the room of manoeuvre for SKW Stahl Metallurgie Holding AG⁵³². The parent company goes on to explain that the participation of one of its board members together with a representative of the subsidiary in order to potentially buy a competitor only took place because the subsidiary did not have the financial capacity to make such a decision on its own⁵³³. Given that the project fell through the parent company claims that decisive influence is not established. Equally, the co-signatures of one of its board members in relation to financial bank transactions for the subsidiary only happened from time to time and do not prove that all transactions with banks had to be co-signed⁵³⁴. Decisive influence is also not established as the services in the administrative area for running the business were merely provided as a support in certain, non central, areas⁵³⁵.
- (250) The points argued in recital (249) prove, and certainly do not rebut, the line of reasoning in relation to the decisive influence of the parent company over the subsidiary. In line with the case law⁵³⁶ the Commission holds that SKW Stahl-Metallurgie Holding AG did not adduce evidence to rebut the presumption that it exercised decisive influence over SKW Stahl-Metallurgie GmbH. Therefore, SKW Stahl-Metallurgie Holding AG may be held liable for the illegal behaviour of SKW Stahl-Metallurgie GmbH and the decision is addressed to SKW Stahl-Metallurgie Holding AG as well.

Liability for ARQUES Industries AG

- (251) From 30 August 2004 and at least until 16 January 2007 SKW Stahl-Technik GmbH & Co KG, as of 2005 called SKW Stahl-Metallurgie GmbH⁵³⁷ was directly 100% owned by the SKW Stahl-Metallurgie Holding AG⁵³⁸. The latter was owned until 30 November 2006 to 100% by Arques⁵³⁹. Therefore, the Commission may attribute the illegal cartel behaviour of the subsidiary to the parent company Arques for the same period.
- (252) Nonetheless, and for the period 30 November 2006 to 16 January 2007 during which the parent company held slightly more than 57%⁵⁴⁰, the Commission has

⁵³⁰ See recitals (28) and (31), in particular [*] in footnote 56.

⁵³¹ SKW, reply to the Statement of Objections [*].

⁵³² SKW, idem [*].

⁵³³ SKW, idem [*].

⁵³⁴ SKW, idem [*].

⁵³⁵ SKW, idem [*].

⁵³⁶ See Section VI.1.1.

⁵³⁷ See recital (30) and footnote 51.

⁵³⁸ See recital (29) and footnote 50.

⁵³⁹ See recital (29) and (30).

⁵⁴⁰ Arques, reply to the Statement of Objections [*].

several elements which demonstrate decisive influence of the parent company over the subsidiary and therefore show that they constituted a single undertaking:

- the relationship with the parent Arques was assured via Arques Beteiligungsgesellschaft GmbH (and its successors). The latter was the newly created intermediary holding and was set up by Arques with the aim to manage the newly bought subsidiary⁵⁴¹;
- In order to manage the intermediary holding company Arques appointed as executive director a person in whom they had confidence, that is, the employee who was, inter alia, responsible within Arques for the purchase of the subsidiary⁵⁴²;
- the executive director of the intermediary holding company reported regularly about the economic performance of the subsidiary to the parent company – development of turnover and result, cash-flow and liquidity planning, budget planning⁵⁴³;
- the executive director of the intermediary holding company informed Arques about the progress of the restructuring of the subsidiary and, once this was achieved, about the future development of the subsidiary, such as expanding the business by acquiring new companies⁵⁴⁴;
- contemporaneous documents demonstrate that the executive director of the intermediary holding company needed the approval of the CEO of Arques for strategic decisions that directly affected the profitability and growth of the subsidiary;⁵⁴⁵
- the executive director of the subsidiary could directly contact a member of the Board of Directors of Arques to discuss issues which directly affected the business of the subsidiary.⁵⁴⁶
- when meeting competitors, the executive director of the subsidiary was sometimes accompanied by a member of the Board of Directors of Arques.⁵⁴⁷
- the turnover of the subsidiary was consolidated in the turnover of Arques from 1 September 2004 until 20 July 2007⁵⁴⁸ demonstrating that the income generated by the subsidiary contributed to the economic performance data of the parent company.
- before placing the intermediary holding company on the stock market Arques reinforced its supervision by appointing several members of the Executive

⁵⁴¹ SKW, reply of [*] to Request for Information [*]; Arques, reply of [*] to Request for Information [*].

⁵⁴² Arques, reply of [*] to Request for Information [*].

⁵⁴³ Arques, idem [*].

⁵⁴⁴ Arques, idem [*].

⁵⁴⁵ SKW, inspection documents [*].

⁵⁴⁶ SKW, idem [*].

⁵⁴⁷ SKW, idem [*].

⁵⁴⁸ SKW, reply of [*] to Request for Information [*]. Arques, reply of [*] to Request for Information [*].

Board of Arques, including the Vice Chairman, to the Board of Management of the intermediary holding company⁵⁴⁹. They were therefore in a position to supervise the subsidiary directly. Moreover, the management structure from the past continued without interruption⁵⁵⁰.

- (253) Arques in its reply to the Statement of Objections rebuts each example of a decisive influence of the parent company over its subsidiary provided by the Commission. Firstly, it maintains that it never knew about or influenced the cartel activities⁵⁵¹, an argument which has been addressed in recital (224).
- (254) Concerning the influence of the parent company over the subsidiary Arques introduces the distinction between operative decisions on the one hand and strategic decisions on the other hand⁵⁵². It maintains that, as a financial investor, it never took any business decisions in the area of calcium carbide or magnesium given its lack of know-how and experience of the operative business⁵⁵³.
- (255) It is artificial to separate operative and strategic decision-making in a given company. Even more so if the legal consequence would be that a parent company is only held liable for the illegal behaviour of its subsidiary if it influenced operative decisions but not if it determined the strategic decision of the company on the market. The concept of the single economic unit cannot be reconciled with such an academic categorisation of business activities on the market place. This approach is also at odds with reality in the sense that strategic decisions determine the very essence of the behaviour of the company on the market. Strategic decisions concern the general development of the subsidiary, whether it shall survive on the market or not, whether its business activities shall be expanded or will be down-sized, whether investments or acquisitions⁵⁵⁴ shall be made and whether it shall be sold ⁵⁵⁵ and for which price⁵⁵⁶.
- (256) Arques also believes that the information it received on turnover, result, cash-flow and liquidity planning⁵⁵⁷ or on the progress of the restructuring process ⁵⁵⁸ of the subsidiary should not be an indicator of influence over business behaviour. However, the Commission considers that as a financial investor Arques needed to know about these data as they were crucial for its decisions relating to the business within its group and on the market in the future. The vital role of these data for the strategic decisions Arques takes is also the reason why the Commission is not convinced that the financial information was only passed on

⁵⁴⁹ SKW, idem [*].

⁵⁵⁰ SKW, idem [*].

⁵⁵¹ Arques, reply to the Statement of Objections [*].

⁵⁵² Arques, idem [*].

⁵⁵³ Arques, idem [*].

⁵⁵⁴ See for example Arques, reply to the Statement of Objections [*].

⁵⁵⁵ See for example Arques, idem [*].

⁵⁵⁶ See for example Arques, idem [*].

⁵⁵⁷ Arques, idem [*].

⁵⁵⁸ Arques, idem [*].

to the parent company because of a legal obligation⁵⁵⁹ without any economic value for it.

- (257) Arques does concede that the knowledge of the financial data might mean that Arques knew about the main aspects of the business policy of the subsidiary⁵⁶⁰. Arques also concedes that its approval was needed in order to sell the subsidiary but maintains that this has nothing to do with profitability and growth of the subsidiary⁵⁶¹. In this context the Commission points out that the decision whether the subsidiary should be sold, and for which price, is taken by the parent company based on the current and future profitability and growth prospects of the subsidiary. It was in this sense that the words profitability and growth were used.
- (258) The e-mail in relation to the sale of the subsidiary clearly shows that the subsidiary was indeed restricted when making decisions⁵⁶².
- (259) Another e-mail shows that the parent company was involved in the question of whether the subsidiary should acquire a supplier. In its rebuttal Arques reveals some of the economic insight it had into the operative business of the company it bought in order to restructure it: *"from the beginning the supply side has been identified as a weak point"*. Despite this expertise and know-how on the operative side Arques argues that the presence of the parent company during discussions with a potential future supplier does not show any influence on the daily business of the subsidiary⁵⁶³. However, it is undisputed that the subsidiary was accompanied by the parent company for an acquisition. This is further proof that the parent company not only influenced but in fact determined the business behaviour of the subsidiary.
- (260) Arques believes that the consolidation of the turnover is not enough to demonstrate influence⁵⁶⁴. This position, however, was never held by the Commission. Rather, this aspect was only one of several elements taken into account in order to show that the parent company exercised decisive influence over the business behaviour of the subsidiary on the market.
- (261) Arques argues that the change of corporate status – from a GmbH to an AG – automatically means that it could no longer influence the business behaviour of the subsidiary⁵⁶⁵. This argument is unconvincing given that the business model of Arques as a financial investor remained unchanged.
- (262) Based on the situation described in recital (252) the Commission holds that Arques had the interests of the group in mind when taking decisions in relation to its subsidiary in contrast to the claim that the latter was totally independent⁵⁶⁶.

⁵⁵⁹ Arques, idem [*].

⁵⁶⁰ Arques, idem [*].

⁵⁶¹ Arques, idem [*].

⁵⁶² Arques, idem [*].

⁵⁶³ Arques, idem [*].

⁵⁶⁴ Arques, idem [*].

⁵⁶⁵ Arques, idem [*].

⁵⁶⁶ Case T-69/04, *Schunk et.al. v Commission*, judgment of 8.10.2008, not yet published, paragraph 66.

Thus, the Commission in line with the case law⁵⁶⁷ holds that Arques did not adduce evidence to rebut the presumption that it actually exercised decisive influence over SKW Stahl-Metallurgie GmbH. Hence, Arques may be held liable for the illegal behaviour of SKW Stahl-Metallurgie GmbH and the decision is also addressed to Arques .

VI.1.8. TDR (TDR Metalurgija d.d. and Holding Slovenske elektrarne d.o.o.)

- (263) In the period from 7 April 2004 to 16 January 2007 TDR Metalurgija d.d. (TDR) was directly involved in the agreements and/or concerted practices as described in Chapter IV of this Decision⁵⁶⁸ and is therefore held liable for the infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.
- (264) Holding Slovenske elektrarne d.o.o. (HSE) exercised decisive influence over the conduct of TDR , at least during the period 7 April 2004 to 20 December 2006⁵⁶⁹ and these companies therefore constituted a single undertaking as demonstrated by the following structural and organisational links:
- HSE referred in its annual reports to TDR as one of the companies that comprises the HSE Group;⁵⁷⁰
 - HSE describes itself also as a single group: "In the structure of sales revenues, electrical energy accounted for 93% of net sales revenue, and other products and services accounted for 7% of net sales revenue of the HSE group. Other activities comprise, as their major part, the production of calcium carbide, ferrosilicon, and complex alloys."⁵⁷¹
 - TDR's turnover was also included in the consolidated financial statements of HSE⁵⁷² demonstrating that the income generated by the subsidiary contributed to the economic performance data of the parent.
 - TDR formed part of the multi-utility division of HSE;⁵⁷³
 - prior to the selling of TDR, HSE's supervisory board granted an approval for this sale;⁵⁷⁴
 - TDR's supervisory board consisted mainly of representatives of HSE. Two out of three members of TDR's supervisory board – including its president - were

⁵⁶⁷ See Section VI.1.1.

⁵⁶⁸ See in particular recitals (57), (92) and (98).

⁵⁶⁹ See recital (35).

⁵⁷⁰ HSE, annual report 2006, p. 30.

⁵⁷¹ HSE, *idem*, p. 56.

⁵⁷² HSE, *idem*, p. 140.

⁵⁷³ HSE, *idem*, p. 31.

⁵⁷⁴ HSE, *idem*, p. 23.

representatives of HSE.⁵⁷⁵ The third member was appointed by TDR's 'works council'. The representative of HSE that served as president of TDR's supervisory board wrote in 2004 in an article that was published on HSE's website: *"As president of the supervisory board of the company TDR-Metalurgija, which is part of the group HSE, I am happy with the collaboration we have with the management of the company TDR-Metalurgija d.d. I believe that the communication between us is good and the supervisory board has all the relevant information to perform its duty in a quality way."*⁵⁷⁶

- furthermore, HSE received periodic reports from TDR. These reports set out TDR's market situation; described price changes of raw materials in the past and the future and commented upon the impact of these factors on the production, sales and business in general of TDR. In addition TDR provided HSE with reports on its sales (effected and planned) per product. For calcium carbide, TDR also explained the volumes supplied to other suppliers, the main customers and the effect of (expected) price changes on the market.⁵⁷⁷
- moreover, inspection documents found at TDR prove that there was even more detailed reporting between TDR and its parent company HSE. Various reports were found that were made for management and for the supervisory board of HSE, explaining the situation on the calcium carbide market and the problems TDR was facing.⁵⁷⁸ These reports also describe the competitors of TDR on the market.
- TDR also confirmed that HSE had an influence in the appointment of its management personnel, and that it benefited from cheaper electricity prices during the period when it was controlled by HSE.⁵⁷⁹

(265) These structural and personal links prove that there was a unitary organisation and that HSE which, until 20 December 2006 owned the capital of TDR to 74.44%, actually exercised decisive control over the business conduct of TDR. The elements mentioned in recital (264) fall under the normal business behaviour of an investor of this size. Accordingly, it is held that during the period 7 April 2004 to 20 December 2006 TDR and HSE constituted a single undertaking. Therefore, the Commission has decided to address this decision to TDR Metalurgija d.d. and to Holding Slovenske elektrarne d.o.o.

(266) In its reply to the Statement of Objections⁵⁸⁰ HSE argues that it did not know or could have known about the illegal cartel activities. The Commission reply to this argument is set out in recital (224).

⁵⁷⁵ HSE representatives on TDR's supervisory board were [*] of HSE. See HSE, reply of [*] to Request for Information [*]; HSE, annual report 2002, p. 96; HSE, annual report 2006, p. 16 and 40; TDR, reply of [*] to Request for Information [*] and public information sources.

⁵⁷⁶ See http://www.hse.si/filelib/knjiznica/energija/2004/energija_marec_2004.pdf. In the original language: *"Kot predsednik nadzornega sveta družbe TDR-Metalurgija, ki je ena od družb v skupini HSE, sem s sodelovanje z njeno upravo zadovoljen, menim, da je vzpostavljena komunikacija dobra in da ima nadzorni svet družbe na voljo vse potrebne informacije za kakovostno opravljanje svojega dela."*

⁵⁷⁷ HSE, reply of [*] to Request for Information [*].

⁵⁷⁸ See TDR, inspection documents [*].

⁵⁷⁹ TDR, reply of [*] to Request for Information [*].

- (267) Moreover, HSE claims that it did not form a single economic unit with TDR, for several reasons: the inclusion of TDR in the annual report is due to legal obligations, TDR's sales played only a minor economic role in the group's overall turnover, the parent company never benefitted economically from the subsidiary, the prior approval of the parent company when selling the subsidiary is usual management practice for a company owning 74.44% of the subsidiary's capital, it is usual practice to have two out of three members of the parent company in the supervisory board of the subsidiary given the size of the parent company's stake holding; receiving periodic reports on the market situation of the subsidiary is normal practice, the parent company was only monitoring the subsidiary in order to have no doubts as to the correctness and success of the management of the subsidiary; and it is normal for an investor of the size of HSE to demand positive results and to monitor performance and diligence in order to keep losses to a minimum.
- (268) Almost all of these elements prove the Commission's position and none of them show that HSE did not have decisive influence. Even if it were true that TDR's sales played a minor role for the turnover, this in itself does not in any way prove that HSE allowed TDR complete autonomy in defining its conduct on the market⁵⁸¹. The indicators taken in their entirety reveal a permanent and intense monitoring of the economic position of TDR on the market by HSE, as indeed acknowledged by HSE in its reply to the Statement of Objections. Therefore, in line with the case law⁵⁸² it is held that HSE did not adduce evidence to rebut that it actually exercised decisive influence over TDR. Therefore, HSE may be held liable for the illegal behaviour of TDR and the decision is addressed to HSE as well.

VII. DURATION OF THE INFRINGEMENT

VII.1 Start of the infringement

- (269) As described in Chapter IV, the first multilateral meetings retained in this Decision were on 7 April 2004 for calcium carbide granulates, 22 April 2004 for calcium carbide powder and 14 July 2005 for magnesium granulates.⁵⁸³ Despite the existence of prior bilateral contacts,⁵⁸⁴ these dates are considered to mark the starting date of the cartel for the purpose of this Decision:
- the meeting of 7 April 2004, attended by representatives of Donau Chemie, NCHZ and TDR, is considered to be the first relevant date for these undertakings for calcium carbide granulates;

⁵⁸⁰ HSE, reply to the Statement of Objections [*].

⁵⁸¹ Joined cases T-109/02 et.al., *Bolloré et.al. v Commission*, ECR 2007, II-947, paragraph 144.

⁵⁸² See Section VI.1.1.

⁵⁸³ See recitals (64), (98) and (125).

⁵⁸⁴ See recital (58) and (125). [*] also placed the start of the cartel to mid 2003.

- the meeting of 22 April 2004, attended by representatives of Almamet, Donau Chemie, NCHZ, SKW and TDR, is considered to be the first relevant date for these undertakings in relation to calcium carbide powder;
 - the meeting of 14 July 2005, attended by representatives of Almamet, Ecka and SKW, is considered to be the first relevant date for these undertakings in relation to magnesium granulates.
- (270) For Akzo Nobel, the first proven participation in a meeting of the cartel dates back to 3 November 2004. This date is considered to be the first relevant date for Akzo Nobel in relation to calcium carbide powder and granulates.
- (271) For SKW, the relevant starting date varies for different legal entities within the undertaking, depending on the liability for each of these entities (see Chapter VI. 1.7.):
- for SKW Stahl-Technik GmbH & Co KG (now SKW Stahl-Metallurgie GmbH) and its then parent companies SKW Metallurgie AG (now AlzChem Hart GmbH) and Degussa AG (now Evonik Degussa GmbH) the starting date is held to be 22 April 2004 in relation to calcium carbide powder.⁵⁸⁵
 - for Arques Beteiligungs GmbH (now SKW Stahl-Metallurgie Holding AG) and ARQUES AG (now ARQUES Industries AG) the starting date in relation to calcium carbide powder is held to be 30 August 2004, the date of acquisition of SKW Stahl-Technik GmbH & Co KG (now SKW Stahl-Metallurgie GmbH).
 - As mentioned in recital (269), the first relevant date for SKW Stahl-Metallurgie GmbH, SKW Stahl-Metallurgie Holding AG and ARQUES Industries AG in relation to magnesium granulates is 14 July 2005.⁵⁸⁶

VII.2 End of the infringement

- (272) The last meetings of the cartel relating to calcium carbide (powder and granulates) took place on 10 October 2006 and on 13 October 2006 in relation to magnesium granulates.⁵⁸⁷ New meetings were planned for 9 and 15 January 2007 respectively but were cancelled in December 2006.⁵⁸⁸
- (273) Some parties (Almamet, Donau Chemie, SKW) argued that the date of the last cartel meetings, or the date when it was decided to cancel the next upcoming cartel meeting, determines the end of the cartel.
- (274) These arguments are rejected. At the last respective cartel meeting, the participants agreed on a new date for a subsequent meeting and thus the cartel was not ended. In general, price increases agreed upon were valid for a longer

⁵⁸⁵ See recital (269).

⁵⁸⁶ See recital (269).

⁵⁸⁷ See recital (88) for calcium carbide for the steel industry; recital (111) for calcium carbide for the gas industry; and recital (133) for magnesium for the steel industry.

⁵⁸⁸ See recitals (90) and (135).

period.⁵⁸⁹ It must therefore be assumed that the cartel continued to produce effects, unless it could be proven that the parties clearly distanced themselves from the cartel.⁵⁹⁰

- (275) Several parties argue that they made clear in December 2006 - when cancelling the respective meetings of January 2007 - that this would end their participation in general to the cartel and/or that this cancellation de facto ended the cartel.⁵⁹¹ No documentary evidence was however submitted to support that claim that said cancellation amounted to a clear and definitive distancing from the cartel. Contracts concluded in application of the agreements of the last meetings in principle continued to produce effects.⁵⁹²
- (276) In conclusion, no evidence has been adduced that the cartel was terminated and the end date of the cartel is therefore held to be on 16 January 2007, the date of the Commission intervention by unannounced inspections.⁵⁹³
- (277) In the case of Akzo Nobel only, participation in the cartel is deemed to have ended on [*].
- (278) In the case of HSE, liability for the conduct of TDR is deemed to have ended on 20 December 2006, when TDR Metalurgija d.d. was divested.
- (279) In the case of SKW Metallurgie AG (now AlzChem Hart GmbH) and Degussa AG (now Evonik Degussa GmbH), their liability is deemed to have ended on 30 August 2004, when SKW Stahl-Technik GmbH & Co KG was divested to Arques Beteiligungs GmbH.

VII.3 Conclusion on the duration of the infringement

- (280) In view of the above considerations on the respective periods of participation in the cartel and the company structures during that period, the Commission considers that the addressees of this Decision are liable for the infringement in relation to the following periods:

⁵⁸⁹ See recital (62).

⁵⁹⁰ The mere fact that a party has left a meeting cannot, in itself, be regarded as a public distancing from the cartel. It is for the party to provide evidence that the members of the cartel considered that he was ending its participation. See judgment of 19.3.2009, not yet published, Case C-510/06, *Archer Daniels Midland v. Commission*, paragraph 120.

⁵⁹¹ Donau Chemie, [*]; SKW, [*].

⁵⁹² Many contracts are quarterly or yearly. See for instance [*]

⁵⁹³ See recital (48); With respect to the individual liability for each legal entity involved, see recital (280).

Table 2: Duration

Addressees	Product	Start	End	Duration
Akzo Nobel NV and Carbide Sweden AB	Calcium carbide powder Calcium carbide granulates	03.11.04	[*]	2 y
Almamet GmbH	Calcium carbide powder Magnesium granulates	22.04.04 14.07.05	16.01.07	2y 8m 1y 6m
Donau Chemie AG	Calcium carbide powder Calcium carbide granulates	22.04.04 07.04.04	16.01.07	2y 8m 2y 9m
ECKA Granulate GmbH & Co KG and non ferrum Metallpulver GmbH & Co KG	Calcium carbide powder Magnesium granulates	11.07.06 14.07.05	16.01.07	6m 1y 6m
Novácke chemické závody a.s. and I.garantovaná a.s.	Calcium carbide powder Calcium carbide granulates	22.04.04 07.04.04	16.01.07	2y 8m 2y 9m
SKW Stahl-Metallurgie GmbH	Calcium carbide powder Magnesium granulates	22.04.04 14.07.05	16.01.07	2y 8m 1y 6m
of which: Evonik Degussa GmbH and AlzChem Hart GmbH	Calcium carbide powder	22.04.04	30.08.04	4m
of which : SKW Stahl-Metallurgie Holding AG and ARQUES Industries AG	Calcium carbide powder Magnesium granulates	30.08.04 14.07.05	16.01.07	2y 4m 1y 6m
TDR Metalurgija d.d.	Calcium carbide powder Calcium carbide granulates	22.04.04 07.04.04	16.01.07	2y 8m 2y 9m
of which: Holding Slovenske elektrarne d.o.o.	Calcium carbide powder Calcium carbide granulates	22.04.04 07.04.04	20.12.06	2y 7m 2y 8m

VIII. REMEDIES

VIII.1 Article 7 of Regulation No 1/2003

- (281) Where the Commission finds that there is an infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation No 1/2003.
- (282) While it appears that the infringement may be considered to have ended when the Commission inspected the undertakings involved on 16 January 2007, it is necessary to ensure that the infringement has been effectively terminated and is not re-commenced in the future. It is therefore indispensable for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

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

- (283) Under Article 23(2) of Regulation No 1/2003⁵⁹⁴, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 81 of the Treaty and/or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.
- (284) Pursuant to Article 23(3) of Regulation No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in that Regulation. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. The Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.
- (285) In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003⁵⁹⁵ (hereafter, “*the Guidelines on fines*”). Finally, the Commission will apply, as appropriate, the provisions of the 2002 Leniency Notice.
- (286) Concerning TDR, although it was directly involved in the cartel activities⁵⁹⁶, the Commission refrains from imposing a fine on it as it has been in liquidation for more than a year⁵⁹⁷. However, the Commission decides to impose the fine for its illegal behaviour on its former parent company HSE as it has been established that the latter formed a single undertaking with its subsidiary during the period of the infringement⁵⁹⁸.

VIII.3 The basic amount of the fines

VIII.3.1. Calculation of the value of sales

- (287) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales⁵⁹⁹, that is, the value of the undertaking's sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area. The Commission uses the sales made by the

⁵⁹⁴ Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty [...] shall apply *mutatis mutandis*”. (OJ L 305, 30.11.1994, p.6).

⁵⁹⁵ OJ C 210, 1.9.2006, p. 2.

⁵⁹⁶ See Chapter IV, in particular recitals (57), (92) and (98).

⁵⁹⁷ See recital (35). Recovery of the fine is considered impossible as TDR's trustee in bankruptcy declared that the deposit of claims against TDR's bankruptcy estate expired on 9.7.2008 [*].

⁵⁹⁸ See recitals (264) to (268).

⁵⁹⁹ Point 12 of the Guidelines on fines.

undertaking during the last full business year of its participation in the infringement (hereafter "value of sales").⁶⁰⁰

(288) The following is an overview of the relevant sales in the relevant geographic area of the EEA⁶⁰¹ taken into account for the undertakings involved in this proceeding:

- in the case of Akzo Nobel, the value of sales includes the sales of calcium carbide powder and calcium carbide granulates in 2005;
- in the case of Almamet, the value of sales includes the sales of magnesium granulates and calcium carbide powder in 2006 not originating from NCHZ.
- in the case of Donau Chemie, the value of sales includes the sales in 2006 of calcium carbide powder and calcium carbide granulates;
- in the case of Ecka, the value of sales includes the sales of magnesium granulates in 2006.
- in the case of Degussa, as the period of liability does not cover a full business year, a full business year is calculated by extrapolation of the value of sales of calcium carbide powder of its then subsidiary SKW Stahl-Technik GmbH & Co KG for the latter's period of participation (22 April 2004 – 30 August 2004).⁶⁰²
- in the case of NCHZ, the value of sales includes the sales of calcium carbide powder and calcium carbide granulates in 2006;
- in the case of SKW, the value of sales includes the sales of calcium carbide powder and magnesium granulates in 2006;⁶⁰³
- in the case of HSE, the value of sales includes TDR's sales of calcium carbide powder and calcium carbide granulates in 2005.

⁶⁰⁰ See Point 13-17 of the Guidelines on fines. Best available figures were used, submitted by the parties.

⁶⁰¹ See recitals (54), (104) and (114).

⁶⁰² The value of the sales of 131 days are divided by 131 and multiplied by 366.

⁶⁰³ The sales of calcium carbide granulates are not taken into account because [*]there is no conclusive evidence that SKW participated in the collusion for the gas industry.

Table 3: Value of sales (EUR million)⁶⁰⁴

Undertaking	Calcium carbide powder	Calcium carbide granulates	Magnesium granulates
Akzo Nobel	[*between 10 and 20]	[*between 1 and 10]	
Almamet	[*between 0 and 1]		[*between 1 and 10]
Donau Chemie	[*between 1 and 10]	[*between 1 and 10]	
Ecka			[*between 10 and 20]
Degussa	[*between 1 and 10]		
NCHZ	[*between 1 and 10]	[*between 20 and 30]	
SKW	[*between 10 and 20]		[*between 1 and 10]
HSE	[*between 1 and 10]	[*between 1 and 10]	

- (289) Almamet claims in its reply to the Statement of Objections that calcium carbide powder for desoxidation purposes must be excluded, since it forms part of a different product market that is not subject to this proceeding.⁶⁰⁵ Much of the evidence in possession of the Commission however relates to calcium carbide for the steel industry, without making any further distinction between desulphurisation or desoxidation purposes. Calcium carbide for desoxidation purposes is a relatively small application⁶⁰⁶, not priced significantly differently from calcium carbide powder for desulphurisation purposes. Several suppliers have no or only negligible sales of calcium carbide for desoxidation purposes⁶⁰⁷ and some others (including Almamet) cannot distinguish between calcium carbide for desulphurisation and desoxidation purposes in their balance sheet.⁶⁰⁸ The fact that calcium carbide for desulphurisation purposes is not used for desoxidation and vice versa is insufficient for arguing that it is not covered by the agreements and/or concerted practices.⁶⁰⁹ It is noted that Almamet initially informed the Commission that it was only active in the distribution of calcium carbide for desulphurisation purposes in the steel industry and did not mention that it also supplied calcium carbide for desoxidation purposes.⁶¹⁰ Later, in a reply to a Request for Information of the Commission, Almamet further explained that the quantity supplied for desoxidation purposes was insignificant and the market for both applications is the same⁶¹¹.
- (290) Degussa claims that it had no relevant calcium carbide sales in the period concerned, because the business had been sold, with retro-active economic

⁶⁰⁴ Sources: value of sales in the EEA minus sales in Spain, Portugal, Ireland and UK.
[*]

⁶⁰⁵ Almamet, reply of [*] to the Statement of Objections [*].

⁶⁰⁶ For desoxidation purposes, calcium carbide is not supplied in bulk but in units. See [*] reply of 31.8.2007 to Request for Information [*].

⁶⁰⁷ [*].

⁶⁰⁸ [*].

⁶⁰⁹ Calcium carbide for desulphurisation purposes cannot be used for desoxidation and vice versa because smaller quantities of active ingredients are added to the product for desulphurisation purposes.

⁶¹⁰ [*].

When requested to provide the turnover of calcium carbide for the steel industry, Almamet included the turnover of calcium carbide for desoxidation purposes.

⁶¹¹ Almamet, reply of [*] to Request for Information .

effect, to a date before the start of participation in the cartel⁶¹². The Commission however considers that the calcium carbide sales for the period April 2004 to September 2004 did accrue economically to Degussa via the price negotiated for the sale of the business⁶¹³.

VIII.3.2. Determination of the basic amount of the fine

- (291) The basic amount consists of an amount of between 0% and 30% of a company's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the company's participation in the infringement, and an additional amount of between 15% and 25% of the value of a company's sales, irrespective of duration.⁶¹⁴

VIII.3.2.1. Gravity

- (292) In order to determine the specific percentage of the basic amount of the fine, the Commission had regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.⁶¹⁵

1. Nature

- (293) The addressees of this Decision participated in a single, complex and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement, with the common objective to distort competition for calcium carbide powder, calcium carbide granulates and magnesium granulates.⁶¹⁶
- (294) The infringement was a multi-faceted cartel involving market sharing and customer allocation, fixing of horizontal prices and quotas and exchanges of sensitive information on prices, customers and volumes. Such infringement is by its very nature among the most harmful restrictions of competition, as it distorts competition on the main parameters of competition.⁶¹⁷
- (295) The Commission observes that, in accordance with point 23 of the Guidelines on fines, the fines for such infringement will, as a matter of policy, reflect the seriousness of the infringement.

⁶¹² See AlzChem Hart GmbH, reply of [*] to the Statement of Objections, [*] and Evonik Degussa GmbH, idem, [*].

⁶¹³ See footnotes 48 and 503. In any event, even if the parties agreed that the business was sold with retro-active economic effect to a date before the start of the participation in the cartel, Degussa exercised decisive influence over SKW in the period from 22.4.2004 up to 30.8.2004 and should thus be held liable for the participation of SKW in this period.

⁶¹⁴ See Points 19 – 26 of the Guidelines on fines.

⁶¹⁵ Point 21-22 of the Guidelines on fines.

⁶¹⁶ See also Chapter V.2. 'The nature of the infringement'.

⁶¹⁷ [*] See NCHZ, reply of [*] to the Statement of Objections [*].

- (296) All parties point to the fact that they have not taken part in all aspects of the anti-competitive scheme.⁶¹⁸ Some parties also point to the minor economic importance of the calcium carbide and/or magnesium business in general and/or relative to their total commercial activities.⁶¹⁹ The Commission observes that the economic importance of a specific business is translated in the value of sales. As it is this value which enters into the calculation of the basic amount of the fine no further adjustments are necessary.

2. Combined market share

- (297) The overall combined market share in the relevant geographic area within the EEA of the undertakings for which the infringement is established is estimated to be below 80%.⁶²⁰
- (298) Donau Chemie argues in its reply to the Statement of Objections that lime is an alternative to calcium carbide and magnesium for desulphurisation purposes in the steel industry.⁶²¹ The relevant market would therefore be wider and the combined market share of the cartel participants lower. It is correct that (quick) lime is traditionally added to the magnesium and/or calcium carbide based reagents for desulphurisation purposes. As a separate product, it is not, however, commonly used in Europe as an alternative for magnesium and/or calcium carbide-based reagents because it progresses the desulphurisation process very slowly.⁶²² There is no indication that the lime market was affected by the cartel arrangements. Furthermore, even if lime were to be taken into account in relation to the product market, the resulting changed market shares in this case would not have had any influence on the way the Commission takes this factor into account in order to assess the gravity of the infringement in this decision.

3. Geographic scope

- (299) It is considered, for the purpose of this Decision, that the cartel arrangements in relation to calcium carbide powder, calcium carbide granulates and magnesium granulates related to customers within the EEA, except Spain, Portugal, Ireland and the UK⁶²³.

⁶¹⁸ All undertakings participated for calcium carbide powder. In addition, Akzo Nobel, Donau Chemie, NCHZ (+ 1.garantovaná) and TDR (+ HSE) also participated for calcium carbide granulates; Almamet, Ecka and SKW (+ Arques) also participated for magnesium granulates.

⁶¹⁹ See for instance Ecka, reply of [*] to the Statement of Objections [*].

⁶²⁰ Estimation based on the value of sales provided by the parties (see recital (288) and footnote 604 in particular) and the data used for the table in recital (46).

⁶²¹ Donau Chemie, reply of [*] to the Statement of Objections.

⁶²² [*]

⁶²³ See recitals (54), (104) and (114).

4. Implementation

- (300) As described in Chapter IV⁶²⁴, the arrangements were in general implemented and monitored.

5. Conclusion on Gravity

- (301) Given the specific circumstances of this case, taking into account the criteria discussed in recitals (294) and (299) relating to the nature of the infringement⁶²⁵ and the geographic scope of the infringement, the proportion of the value of sales to be taken into account should be 17%.

VIII.3.2.2. Duration

- (302) The amount determined on the basis of the sales made by the undertaking during the last full business year of its participation in the infringement (value of sales) will be multiplied by the number of years of participation in the infringement in order to take fully into account the duration of the participation for each undertaking in the infringement individually.⁶²⁶
- (303) Recital (280) outlined the Commission's conclusions on the duration of the infringement as such and the duration of the individual participation of the undertakings and entities involved in the infringement. Where an undertaking has not taken part in all aspects of the anti-competitive scheme, the Commission does not consider this element material to the establishment of the existence of an infringement on its part, but takes it into account for the determination of the fine.⁶²⁷ As a consequence, in the specific circumstances of this case, taking into account that the infringement extended to different products for which the duration of the proven individual participation can be different, the duration must be differentiated according to the product involved. The sales made by the undertaking during the last full business year of its participation in the infringement in relation to each product will therefore be multiplied in relation to the individual duration of participation for the product in question.
- (304) The multipliers used for each entity are:

⁶²⁴ See for instance recitals (58), (63), (65), (102), (109), (110), (120) and (123). See also recitals (197), (198) and (318).

⁶²⁵ According to established case law of the Court of First Instance, price fixing and market sharing practices may be classified as very serious solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographical area or have a particular impact. See Joined Cases T-49/02 to T-51/02, *Brasserie nationale and others v. Commission* [2005] ECR II-3033, paragraphs 178 and 179; T-38/02, *Groupe Danone v. Commission*, [2005] ECR II-4407, paragraphs 147, 148 and 152 and Case T-241/01, *Scandinavian Airlines System v. Commission* [2005] ECR II-2917, paragraphs 84, 85, 122, 130 and 131.

⁶²⁶ Point 24 of the Guidelines on fines.

⁶²⁷ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v. Commission* [2004] ECR I-123, paragraph 86.

Table 4: Multipliers

Legal entity	Product	Multiplier
Akzo Nobel NV	Calcium carbide powder	2
	Calcium carbide granulates	
Almamet GmbH	Calcium carbide powder	2.5
	Magnesium granulates	1.5
AlzChem Hart GmbH	Calcium carbide powder	0.5
ARQUES Industries AG	Calcium carbide powder	2.5
	Magnesium granulates	1.5
Carbide Sweden AB	Calcium carbide powder	2
	Calcium carbide granulates	
Donau Chemie AG	Calcium carbide powder	2.5
	Calcium carbide granulates	3
ECKA Granulate GmbH & Co KG	Calcium carbide powder	
	Magnesium granulates	1.5
Evonik Degussa GmbH	Calcium carbide powder	0.5
I. garantovaná a.s.	Calcium carbide powder	2.5
	Calcium carbide granulates	3
Holding Slovenske elektrarne d.o.o.	Calcium carbide powder	2.5
	Calcium carbide granulates	2.5
non ferrum Metallpulver GmbH & Co KG	Calcium carbide powder	
	Magnesium granulates	1.5
Novácke chemické závody a.s.	Calcium carbide powder	2.5
	Calcium carbide granulates	3
SKW Stahl-Metallurgie GmbH	Calcium carbide powder	2.5
	Magnesium granulates	1.5
SKW Stahl-Metallurgie Holding AG	Calcium carbide powder	2.5
	Magnesium granulates	1.5

VIII.3.3. The percentage to be applied for the additional amount

- (305) In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission includes in the basic amount a sum of between 15% and 25% of the value of sales in order to deter undertakings from even entering into horizontal price-fixing and market-sharing agreements.⁶²⁸
- (306) Given the specific circumstances of this case, taking into account the criteria discussed above relating to the nature of the infringement and the geographic scope of the infringement, the percentage to be applied for the additional amount should be 17%.
- (307) SKW argues that the additional amount for deterrence purposes should only apply to the legal entity that directly participated in the infringement.⁶²⁹ But fines are imposed on undertakings and the Commission, after establishing the infringement, determines a fine and identifies the legal entities within the

⁶²⁸ Point 25 of the Guidelines on fines.

⁶²⁹ SKW, reply of [*] to the Statement of Objections [*]. The same reasoning is used for pleading mitigating circumstances for SKW Stahl-Metallurgie Holding AG.

undertaking that are held liable for the payment of this fine. It does not differentiate between these legal entities for calculating the fine.⁶³⁰

VIII.3.4. Calculation and conclusion on basic amounts

- (308) Based on the criteria explained above, the basic amount of the fine is calculated as follows:

Table 5: Basic amount

Undertaking Legal entity	Basic amount (EUR)
Akzo Nobel Carbide Sweden AB and Akzo Nobel NV	8 700 000
Almamet GmbH	3 800 000
Donau Chemie AG	7 700 000
Ecka non ferrum Metallpulver GmbH & Co KG and ECKA Granulate GmbH & Co KG	6 400 000
Holding Slovenske elektrarne d.o.o.	9 100 000
NCHZ Novácke chemické závody a.s. and I.garantovaná a.s.	19 600 000
SKW - SKW Stahl-Metallurgie GmbH, SKW Stahl-Metallurgie Holding AG and ARQUES Industries AG - Evonik Degussa GmbH and AlzChem Hart GmbH	13 300 000 3 900 000

VIII.4 Adjustments to the basic amount

VIII.4.1. Aggravating circumstances

VIII.4.1.1. Recidivism

- (309) Akzo Nobel and Degussa have already been addressees of previous Commission decisions concerning infringements of Article 81 of the Treaty prior or during the infringement which is the subject of the present Decision and that started or continued after those decisions had been adopted.⁶³¹

⁶³⁰ Only the duration of participation can vary for the different legal entities involved, with an effect on the amount of the fine for which they are held liable.

⁶³¹ For Akzo Nobel, the Commission takes into account the following decisions: Commission decisions of 19 March 2002 in case COMP/36/756 (*Sodium Gluconate*), 10 December 2003 in case COMP/37.857 (*Organic Peroxide*), 9 December 2004 in case COMP/37.533 (*Choline Chloride*), and 19 January 2005

- (310) The fact that they repeated cartel behaviour, albeit in a different sector from those in which they had previously incurred penalties, shows that the first penalties did not sufficiently prompt them to change their conduct. This constitutes an aggravating circumstance. This aggravating circumstance leads to an increase of 100% for Akzo Nobel and 50% for Degussa in the basic amount of the fine to be imposed⁶³². The latter companies are held liable for the payment of the amount linked to recidivism separately.
- (311) AlzChem Hart GmbH claims⁶³³ that the aggravating circumstance in relation to Degussa does not apply to it. The Commission rejects this argument as recidivism may be adduced against a subsidiary within one group with reference to a past infringement by a different subsidiary within the same group.⁶³⁴
- (312) Degussa's claim that no extra deterrence is needed since it already put a strict compliance programme in place after the previous Commission decision for cartel activities must also be rejected.⁶³⁵ The Commission observes that the re-occurrence of anticompetitive behaviour demonstrates that the implementation of this compliance program did not prevent an infringement from occurring.

VIII.4.2. Mitigating circumstances

VIII.4.2.1. Limited participation and no risk of repetition

- (313) As previously mentioned in recital (296), all parties point to the fact that they did not take part in all aspects of the cartel. In addition, some undertakings add that they are small undertakings, that their contribution was minor given their status as agents⁶³⁶ and/or claim they were reluctant followers with a very limited role in the cartel. They point to the absence of a leading role in the cartel, their absence of experience with competition rules and the alleged absence of a risk of repetition.⁶³⁷
- (314) These claims are rejected. Where the Guidelines on fines foresee that the fine for undertakings with a particularly large turnover can be increased to ensure adequate deterrence, this does not necessarily mean that the fines of smaller undertakings should be lowered. Likewise, the absence of aggravating circumstances is not considered a mitigating circumstance.

in case COMP/37.773 (*Monochloroacetic acid*). For Degussa, the Commission takes into account the Commission decision of 2 July 2002 in case COMP/37.519 (*Methionine*).

⁶³² Point 28 of the Guidelines on fines.

⁶³³ AlzChem, reply of [*] to the Statement of Objections, para. 151 [*].

⁶³⁴ And this even if the parent company was not an addressee of the prohibition decision. See Case T-203/01, *Michelin v Commission* [2003] ECR II-4071, paragraph 290.

⁶³⁵ Degussa, reply of [*] to the Statement of Objections, para. 181 [*] and AlzChem, *idem*, para. 173 [*].

⁶³⁶ Ecka, reply to Statement of Objections [*], Almamet, reply to the Statement of Objections [*].

⁶³⁷ See for instance Donau Chemie, reply of [*] to the Statement of Objections [*]; Ecka, reply of [*] to the Statement of Objections [*]; Arques Industries, reply of [*] to the Statement of Objections [*]; I.garantovaná, reply of [*] to the Statement of Objections; NCHZ, reply of [*] to the Statement of Objections [*].

- (315) The non-participation in part of the cartel does not relieve undertakings from their responsibility for an infringement of Article 81 of the Treaty.⁶³⁸ Moreover, these aspects are duly taken into account when setting the fine on the basis of the value of sales.
- (316) All undertakings subscribed to the overall scheme that was implemented employing the same mechanisms and pursuing the same common objective of restricting competition. The Commission considers that under the Community's competition rules, there can be no excuse for participating in illegal price fixing and market sharing agreements. As to the alleged inexperience of NCHZ, it should be noted that when NCHZ was trying to enforce a price increase, it was Alamet that informed NCHZ that the only possible way to achieve this aim was to organise a meeting with all of the producers and suppliers of calcium carbide. Despite this warning, NCHZ insisted on the price increase [*].⁶³⁹ NCHZ was at the very least negligent and any absence of knowledge of the law cannot lead to mitigation.

VIII.4.2.2. Non implementation or absence of benefit

- (317) Some undertakings argue that the agreements were not or not entirely implemented, that cheating took place, and that the aimed stabilisation of the market was never achieved.⁶⁴⁰ They argue that this factor should be considered as an attenuating circumstance. Another undertaking argued that these elements meant that the agreements could not have caused any harm and should even prevent the Commission from imposing a fine.⁶⁴¹
- (318) As mentioned in recital (193), implementation of agreements between the calcium carbide and magnesium suppliers took place. Throughout the duration of the cartel, the parties exchanged sensitive commercial information, allocated customers, agreed to implement price increases agreed upon and discussed the implementation of the quota agreements by updating their market sharing tables. The agreements did not exclude all further competition between the participants, and the existence of rivalry and cheating does not in any case alter the conclusion that the agreements were implemented and did restrict competition among the suppliers of calcium carbide and magnesium granulates.⁶⁴²
- (319) Furthermore, none of the participants have claimed that they avoided all implementation in practice of the unlawful agreements. In particular, no participant has provided evidence that it avoided implementing the agreements by adopting competitive conduct or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel

⁶³⁸ Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, *Aalborg and others v Commission*, [2004] ECR I-123, paragraph 86.

⁶³⁹ [*]

⁶⁴⁰ AlzChem Hart, reply to the Statement of Objections, [*] and Degussa, idem, [*];[Ecka,*] reply to the Statement of Objections [*].

⁶⁴¹ Donau Chemie, reply of [*] to the Statement of Objections [*].

⁶⁴² Case T-308/94, *Cascades v Commission* [1998] ECR II-925, paragraph 230.

to the point of disrupting its very operation.⁶⁴³ Cheating never led to a denial of the arrangements made, but always started by taking the arrangements agreed into account. It was heavily discussed in the cartel meetings and compensated if needed.⁶⁴⁴

- (320) With respect to the argument of absence of benefit, this factor cannot lead to any reduction in the fine. In this respect, it suffices for the Commission to note that for an undertaking to be classified as a perpetrator of an infringement it is not necessary for it to have derived any economic advantage from its participation in the cartel in question.⁶⁴⁵ It follows that the Commission is not required, for the purpose of fixing the amount of fines, to establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where it applies, the fact that no profit was derived from the infringement in question.⁶⁴⁶ Therefore, the absence of any benefit from the agreements, even if this could be proven by the parties that make this claim, would not be a reason for the Commission to mitigate the level of the fine to be imposed on these undertakings.

VIII.4.2.3. Effective co-operation outside the 2002/ 2006 Leniency Notice

- (321) Several undertakings point to their co-operation during the inspection, when answering the Requests for Information and/or by acknowledging the facts.⁶⁴⁷ Some argue that this cooperation should be regarded as an attenuating circumstance.⁶⁴⁸
- (322) Those arguments cannot be accepted. First of all, cooperation during the inspection or when answering Requests for Information cannot constitute an attenuating circumstance. The undertakings are required to submit to inspections ordered by Commission Decision and to answer Requests for Information and are subject to penalties in case they do not submit to the inspection or provide the Commission with incorrect or misleading answers to a Request for Information.⁶⁴⁹ Moreover, none of the parties has provided the Commission with additional self-incriminating information in reply to the Requests for Information that should be regarded as evidence that is provided on a voluntary basis.
- (323) Equally, the fact that some undertakings, after receiving the Statement of Objections, informed the Commission that they did not substantially contest the facts does not constitute an attenuating circumstance.

⁶⁴³ Case T-26/02, *Daiichi Pharmaceutical v Commission* [2006] ECR II-713, paragraph 113.

⁶⁴⁴ See recitals (60), (86) and (130) .

⁶⁴⁵ Case T-304/94, *Europa Carton v Commission* [1998] ECR II-869, paragraph 141 and Case T-109/02, *Bolloré v Commission*, [2007] ECR II-947, paragraphs 671-672.

⁶⁴⁶ Case T-241/01, *Scandinavian Airlines System AB v Commission* [2005] ECR II-2917, paragraph 146 and Case T-53/03, *BPB v Commission* [2008] ECR II-1201, paragraphs 441-442.

⁶⁴⁷ Arques, reply of [*] to the Statement of Objections [*]; NCHZ, reply of [*] to the Statement of Objections [*].

⁶⁴⁸ NCHZ, reply of [*] to the Statement of Objections [*].

⁶⁴⁹ Article 20(4) and Article 23(1)(a) and (c) of Regulation No 1/2003.

- (324) Several undertakings⁶⁵⁰ also argued that they should receive a reduction for having (introduced) compliance programmes, for the disciplinary measures taken and/or for increasing staff awareness of competition rules. Degussa also pointed to the various applications for immunity and/or reduction of fines it has submitted to the Commission in other proceedings and to the fact that no employees of the parent company were directly involved in the anticompetitive conduct.
- (325) Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements and to report infringements to the competent authorities, such measures cannot change the reality that infringement occur and need to be sanctioned⁶⁵¹. These compliance programmes and disciplinary measures cannot exempt parent companies from liability.⁶⁵²
- (326) Degussa argues that the submission of information with respect to magnesium granulates must be rewarded with a reduction outside the Leniency Notice, because Degussa cannot be held liable for events that started after the divestiture of SKW Stahl-Technik.⁶⁵³ However, the events reported form part of a single infringement and the Commission has assessed the information under the Leniency Notice. There is no need for an additional assessment outside the Leniency Notice.⁶⁵⁴
- (327) Taking into account all the facts of this case, the Commission therefore considers that there are no exceptional circumstances present in this case that could justify granting a reduction for effective cooperation falling outside the Leniency Notice.

VIII.4.2.4. Economic situation

- (328) Many undertakings⁶⁵⁵, in their reply to the Statement of Objections or other submissions, point to the difficult economic situation of the suppliers of calcium carbide and magnesium in the period up to and during the infringement: shrinking demand leading to overcapacity in combination with a rising cost price, increased market power of the customers and increased competition from companies from Eastern Europe.⁶⁵⁶ All this happened while the steel industry, as

⁶⁵⁰ See for instance Degussa, reply of [*] to the Statement of Objections, [*]; AlzChem Hart, idem, [*]; Ecka, reply of [*] to the Statement of Objections [*]; Donau Chemie, reply of [*] to the Statement of Objections [*].

⁶⁵¹ See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission* [2004] ECR II-1181, paragraph 343.

⁶⁵² See also recital (239).

⁶⁵³ Degussa, reply to the Statement of Objections, [*]; AlzChem Hart, idem, [*].

⁶⁵⁴ See hereafter recitals (321) - (331).

⁶⁵⁵ See for instance Degussa, reply of [*] to the Statement of Objections, [*]; AlzChem Hart, idem, [*]; Donau Chemie, reply of [*] to the Statement of Objections [*], NCHZ, reply of [*] to the Statement of Objections [*]. The difficult economic situation is also mentioned in other documents in the Commission file. See for instance Akzo Nobel, [*] and reply of [*] to Request for Information [*]; SKW, inspection documents [*] and reply of [*] to Request for Information [*]; Donau Chemie, [*], NCHZ, [*].

⁶⁵⁶ The difficult economic position was also mentioned in paragraph 41 of the Statement of Objections.

a whole, flourished⁶⁵⁷ and the suppliers of calcium carbide and magnesium granulates saw their customers making record profits.⁶⁵⁸

- (329) Donau Chemie also points to its particularly difficult economic situation following the destruction of its power plant in 2005 and to the subsequent social reasons for continuing the calcium carbide business (including the continued participation in the cartel).⁶⁵⁹
- (330) These arguments may explain why the suppliers of calcium carbide and magnesium granulates may have preferred to limit competition, but do not justify cartel behaviour. As to the destruction of Donau Chemie's electricity plant, it is noted that this event took place at a moment when the cartel was already established and, in any case, the cartel agreements were not related to this event.
- (331) Almamet refers to precedents where the Commission has granted a reduction for crisis cartels⁶⁶⁰, but the fact that the Commission may have considered that certain factors have constituted mitigating circumstances for determining the amount of the fine in previous decisions does not mean that it is obliged to make the same assessment in a subsequent decision.⁶⁶¹ Although in the past the Commission accepted "crisis cartels", it has rejected such claims recently⁶⁶². Furthermore the Court of First Instance has confirmed that the Commission is not obliged to accept the poor economic state of the industry concerned as an attenuating circumstance⁶⁶³.

VIII.4.3. Conclusion on adjustments of the basic amount

- (332) As a result of aggravating circumstances, the fines of Akzo Nobel (Carbide Sweden AB and Akzo Nobel NV) and Degussa (Evonik Degussa GmbH and AlzChem Hart GmbH) are increased by 100% and 50% to respectively EUR 17 400 000 and EUR 5 850 000.

⁶⁵⁷ SKW, reply of [*] to the Statement of Objections [*].

⁶⁵⁸ Donau Chemie, reply of [*] to the Statement of Objections [*].

⁶⁵⁹ Donau Chemie, reply of [*] to the Statement of Objections [*].

⁶⁶⁰ Commission decision (2003/382/EC) of 8.12.1999 in Case COMP/35.860, *Seamless Steel Tubes* or Commission decision (98/247/EC) of 21.1.1998 in Case COMP/35.814, *Alloy surcharge*.

⁶⁶¹ Case T-7/89, *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 53, confirmed on appeal in Case C-51/92P, *Hercules Chemicals v Commission* [1999] ECR I-4235, and the case law cited therein; Case T-347/94, *Mayr-Melnhof Kartongesellschaft v. Commission* [1998] ECR II-1751, paragraph 368; Case T-23/99, *LR AF 1998 v. Commission* [2002] ECR II-01705, paragraph 337. Case C-510/06 P, *Archer Daniels Midland Co. v Commission*, judgment of 19.3.2009, not yet published, paragraph 82.

⁶⁶² See Commission decisions of 18.7.2001 in case COMP/E-1/36.490, *Graphite Electrodes* OJ 2002 L100/1, paras 197 and 238.

⁶⁶³ Case T-16/99, *Lögstör Rör v Commission* [2002] ECR II-1633, paragraphs 319-320; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon and others v Commission* [2004] ECR II-1181, paragraph 345; Case T-109/02, *Bolloré v. Commission* [2007] ECR II-947, paragraphs 461-462 and 657-666 and Case T-30/05, *Prym and Others v. Commission* [2007] ECR II-107, paragraphs 207-208.

VIII.5 Application of the 10% turnover limit

- (333) Article 23(2) of Regulation No 1/2003 provides that the fine imposed on each undertaking shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision. In case the undertaking broke up before the date of the Commission decision the Commission calculates the 10% limit for each legal entity individually⁶⁶⁴. In determining the ‘preceding business year’, the Commission assesses, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No [1/2003], the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking’s real economic situation during the period in which the infringement was committed⁶⁶⁵.
- (334) Based on the case law mentioned in recital (333) 1.garantovaná is being assessed individually⁶⁶⁶. Furthermore, the shareholders of 1.garantovaná mandated the Board of Directors in 2007 to sell all assets (including NCHZ) with a view to terminating its activities and eventually distribute the income to its shareholders. This led to a decrease of turnover by more than 90% in 2008 if compared to the previous year. Therefore, the Commission decides to use 2007 as the reference year, and thus a turnover of EUR 229 million⁶⁶⁷.

VIII.6 Application of the 2002 Leniency Notice

VIII.6.1. Immunity from fines

- (335) As indicated in Chapter III, Akzo Nobel applied for immunity from fines on [*] on the basis of the 2002 Leniency Notice. Akzo Nobel was the first to inform the Commission about a secret cartel concerning calcium carbide powder and granulates. The information provided enabled the Commission to adopt a decision to carry out surprise inspections and Akzo Nobel was granted conditional immunity from fines, in accordance with point 8(a) of the 2002 Leniency Notice.
- (336) Akzo Nobel continued to provide the Commission with information in accordance with point 11 of the 2002 Leniency Notice throughout the administrative procedure.⁶⁶⁸ Akzo Nobel ended its involvement in the infringement no later than the time when it submitted evidence under point 8(a) of the 2002 Leniency Notice and had not taken steps to coerce other undertakings

⁶⁶⁴ Joined cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai v Commission* [2005] ECR II-10, paragraph 390.

⁶⁶⁵ Case C-76/06P, *Britannia Alloys & Chemicals Ltd v Commission* [2007] ECR I-4405, paragraph 25; Case T-33/02, *Britannia Alloys & Chemicals Ltd v Commission* [2005] ECR II-4973, paragraph 72 and 74; Commission decision *Electrical and Mechanical Carbon and Graphite Products* [2004] OJ L125/45, paragraph 318.

⁶⁶⁶ See recital (23).

⁶⁶⁷ See recital (24)

⁶⁶⁸ [*]

to participate in the infringement. The Commission therefore grants Akzo Nobel immunity from any fines that would otherwise have been imposed on it.

- (337) Ecka claims that it should benefit from the immunity application submitted by Akzo Nobel, as Akzo Nobel's agent. This claim must be rejected. Ecka is a separate undertaking with legal entities that engage in many different (other) activities.⁶⁶⁹ Akzo Nobel exercises no decisive influence over the commercial policy of Ecka. The fact that Article 81 of the Treaty may not apply to the vertical relationship between Ecka and Akzo Nobel as regards its sales of calcium carbide, does not mean that benefits of the 2002 Leniency Notice for Akzo Nobel would automatically accrue to Ecka. It must be considered that Ecka directly participated in the cartel. It played its own role with regard to magnesium granulates, independent from Akzo Nobel. In relation to calcium carbide powder, Ecka was not only Akzo Nobel's sales agent, but benefited from the cartel for its own business. The information received from the cartel on calcium carbide was relevant for the entire desulphurisation business. In addition, the information was equally relevant in view of a possible direct entrance through acquisition on the calcium carbide market.⁶⁷⁰

VIII.6.2. Reduction of fines

- (338) As indicated in Chapter III, Donau Chemie, Almamet, Degussa and NCHZ applied for immunity and/or reduction of their fines [*] under the 2006 Leniency Notice.
- (339) In accordance with point 37 of the 2006 Leniency Notice, the Commission continued to apply the 2002 Leniency Notice, because the first contact was established [*,] that is, before the 2006 Leniency Notice on 8 December 2006 entered into force.
- (340) With respect to calcium carbide powder, the submission of the immunity applicant, together with the documents found during the inspections provided sufficient evidence to find the infringement. None of the subsequent leniency applications therefore provided "significant added value" for this product segment.
- (341) The evidence in the Commission's possession with respect to calcium carbide granulates and magnesium granulates left room for further reductions of fines. The four submissions are hereafter analysed in chronological order.

VIII.6.2.1. Donau Chemie

- (342) Donau Chemie submitted an application for reduction of fines [*,] [*,] after the inspections⁶⁷¹ presenting evidence in relation to calcium carbide (powder and

⁶⁶⁹ In 2006, the commission fee of Ecka for the sales of calcium carbide powder represented <[*]% of the sales affected by the cartel. The sales affected by the cartel represented <[*]% of the total worldwide turnover of Ecka in that year.

⁶⁷⁰ Ecka, reply to the Statement of Objections [*,].

⁶⁷¹ [*,]

granulate). The Commission had already considerable evidence at its disposal for calcium carbide powder from Akzo and as gathered during the inspections. However, the application provided the Commission with corroboration and specific details on the events with respect to calcium carbide granulates. At that time, the evidence in possession of the Commission on this product segment was limited to (i) [*], and (ii) inspection documents with some sporadic information. The corroboration and evidence provided by Donau Chemie was instrumental to the establishment of the infringement.

- (343) It was the first undertaking to provide the Commission [*]. This evidence strengthened, by its very nature and by its level of detail, the Commission's ability to prove the facts in question.
- (344) Donau Chemie was also the first undertaking to report that [the collusion for calcium carbide was part of a wider anti-competitive scheme including magnesium granulates.
- (345) Donau Chemie terminated, before submitting its application, its involvement in the suspected infringement. Donau Chemie continued to cooperate by replying to requests for information, but did not provide any further evidence on a voluntary basis. In determining, in accordance with point 23 of the 2002 Leniency Notice, what percentage reduction of the fine Donau Chemie merits within the band of 30% to 50%, the Commission notes that Donau Chemie's reduction will affect the fine for calcium carbide granulates as well as calcium carbide powder. Donau Chemie provided significant added value only for calcium granulates, one of the two products for which a fine is imposed. The Commission notes that Donau Chemie reported the existence of a possibly wider anti-competitive scheme including magnesium granulates.
- (346) The Commission concludes that, taking these elements into account, Donau Chemie is entitled to a 35% reduction of the fine that would otherwise have been imposed.

VIII.6.2.2. Almamet

- (347) Almamet's submitted an application on [*], i.e. [*] after the inspections.⁶⁷² The application only related to calcium carbide powder. Since the Commission already had sufficient evidence in its possession, in particular with respect to this product segment, the application did not provide significant added value. The information provided by Almamet could no longer strengthen the Commission's ability to prove the facts. On the contrary, Almamet explicitly limited any information about the collusion to calcium carbide powder and tried to play down its own role in and its liability for the cartel, putting all the blame and liability on NCHZ.⁶⁷³ Almamet's information – even if it may have been useful

⁶⁷² [*]

⁶⁷³ [*].

occasionally for corroborating/ illustrating some facts⁶⁷⁴ - was marginal in view of the scope of the infringement⁶⁷⁵.

- (348) Almamet claims that it deserves a reduction of 20-30% because its submission preceded Degussa's submission. The Commission points out that this argument overlooks the fact that the decisive criterion is the significant added value of the submission and not the point in time of the submission. Almamet's submission failed to meet the threshold of significant added value, because, contrary to Almamet's allegations, the existence of the meeting of 22 April 2004 and its contents were already known to the Commission⁶⁷⁶ and the Commission was already in possession of sufficient evidence to prove the infringement with respect to calcium carbide powder for its full duration and in relation to all participants.⁶⁷⁷
- (349) In light of the above, Almamet shall not benefit from a reduction.

VIII.6.2.3. Degussa

- (350) Degussa GmbH (now Evonik Degussa GmbH) filed its application for immunity and/or reduction of a fine on [*].⁶⁷⁸ The application related to calcium carbide powder and magnesium granulates. The Commission had already considerable evidence at its disposal for calcium carbide powder from Akzo and as gathered during the inspections. However, Degussa provided significant added-value relating to magnesium granulates. The evidence provided by Degussa strengthened, by its very nature and by its level of detail, the Commission's ability to prove these facts.
- (351) Degussa reported [*] with respect to magnesium granulate. This information matched with the information on other documents in the Commission file and therefore enabled the Commission to prove these events for magnesium granulates by means of mutually corroborating sources. Degussa did not add much relevant contemporaneous evidence.
- (352) The evidence given by Degussa strengthened, by its very nature and by its level of detail, the Commission's ability to prove the facts with respect to magnesium granulates. In particular, as the information originated from [*].
- (353) Degussa described [*] for calcium carbide and magnesium based reagents in the metallurgic industry. This helped the Commission enlarging the scope of the established infringement to magnesium granulates.

⁶⁷⁴ As demonstrated by the number of references to the information provided by [*] in this decision.

⁶⁷⁵ Compare Joined Cases T-101/05 and T-111/05, *BASF and UCB v Commission* [2007] ECR II-4949, paragraph 116.

⁶⁷⁶ See recital (64) and the reference to the [*] inspection document in footnote 143 in particular.

⁶⁷⁷ On the basis of the information provided by [*], further evidence obtained during the inspections and corroboration from [*].

⁶⁷⁸ [*]

- (354) Following the submissions of [*], Degussa continued to cooperate by replying to requests for information. It did not provide any further significant evidence on a voluntary basis.
- (355) In determining, in accordance with point 23 of the 2002 Leniency Notice, what percentage reduction of the fine Degussa merits within the bandwidth of 20% to 30%, the Commission notes that Degussa's reduction will affect the fine for calcium carbide powder whereas the significant added value was provided for magnesium granulates. Hence its percentage is put at the low end.
- (356) The Commission concludes that Degussa shall be entitled to a 20% reduction of the fine that would otherwise have been imposed.
- (357) ARQUES Industries claims that SKW (including ARQUES Industries) should benefit from Degussa's leniency application, because the evidence provided by Degussa comes from [*]SKW during the time of the cartel.⁶⁷⁹ This claim must be rejected. Degussa filed the application in its own name and not on behalf of SKW.

VIII.6.2.4. NCHZ

- (358) NCHZ submitted an application for immunity and/or a reduction of fines on [*], [*] after the inspections and after receiving Requests for Information ⁶⁸⁰ The submission did not provide significant added value with respect to the evidence already in the Commission's possession at that time, because NCHZ only reported events on calcium carbide powder. The Commission already had sufficient evidence for this product segment in its possession. The information provided by NCHZ could no longer strengthen – by its very nature or by its level of detail - the Commission's ability to prove the facts. In light of the above, NCHZ shall not benefit from a reduction of fines.
- (359) 1.garantovaná's and NCHZ's claim that the submission deserves a reduction of 20% because the Commission makes use of the information provided is rejected. The criterion for a reduction is not whether the Commission used the information provided, but whether this information had a significant added value. Providing further information to what is already known, does not amount to adding significant value. Moreover, NCHZ did not mention that the anticompetitive behaviour extended to calcium carbide granulates, although its involvement is clearly documented.

VIII.6.3. Conclusion on the application of the 2002 Leniency Notice

- (360) As a result of the application of the 2002 Leniency Notice, the fine to be imposed on Akzo Nobel should be decreased by 100% to 0 EUR; the fine to be imposed on Donau Chemie AG and Degussa should be decreased by 35% and 20% to respectively EUR 5 000 000 and EUR 4 680 000.

⁶⁷⁹ Arques, reply of [*] to the Statement of Objections [*]

⁶⁸⁰ [*]

VIII.7 Conclusion: final amount of individual fines

(361) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

- | | | |
|-----|--|----------------|
| (a) | Almamet GmbH:
(Amount before reduction under
point 37 of the Guidelines on fines) | EUR 3 800 000 |
| (b) | Carbide Sweden AB and
Akzo Nobel NV
jointly and severally: | EUR 0 |
| (c) | Donau Chemie AG: | EUR 5 000 000 |
| (d) | non ferrum Metallpulver GmbH & Co KG and
ECKA Granulate GmbH & Co KG
jointly and severally: | EUR 6 400 000 |
| (e) | Novácke chemické závody a.s. and
I.garantovaná a.s.
jointly and severally: | EUR 19 600 000 |
| (f) | SKW Stahl-Metallurgie Holding AG,
ARQUES Industries AG and
SKW Stahl-Metallurgie GmbH ⁶⁸¹
jointly and severally: | EUR 13 300 000 |
| (g) | Evonik Degussa GmbH,
AlzChem Hart GmbH and
SKW Stahl-Metallurgie GmbH
jointly and severally: | EUR 1 040 000 |
| (h) | Evonik Degussa GmbH and
AlzChem Hart GmbH
jointly and severally: | EUR 3 640 000 |
| (i) | Holding Slovenske elektrarne d.o.o.: | EUR 9 100 000 |

VIII.8 Ability to pay

(362) According to point 35 of the Guidelines on fines, "...the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that the imposition of the fine as provided for in the Decision would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."

⁶⁸¹ Note that SKW Stahl-Metallurgie GmbH is held liable for a single fine and that its cumulative joint and several liability with any other addressee of the Decision does not exceed EUR 13 300 000, even if it is jointly and severally liable with several legal entities for different amounts.

- (363) Various undertakings evoked point 35 of the Guidelines on fines in their replies to the Statement of Objections and at the oral Hearing, referring to the difficult economic situation in general, and their individual difficulties in particular.
- (364) The Commission considered these claims. The undertakings possibly affected were invited in the request for information of 9 March 2009 to submit details about their individual financial situation and the specific social and economic context. A total of seven claims of inability to pay were received.
- (365) The claims with respect to the general competitive situation on the calcium carbide/magnesium markets in the period up to and during the infringement have been dealt with in recitals (328) to (331) in the analysis of possible mitigating circumstances.
- (366) In recitals (369) to (378), the individual financial position of the undertakings concerned is assessed in their specific social and economic context. Before dealing with these claims individually, it is noted that the financial situations are assessed at the same time as the fine is calculated and on the basis of the financial data submitted by the undertakings.
- (367) Insofar as the parties argue that the fine would lead to a poor financial situation, the Commission points to settled case law, according to which the Commission is not required, when determining the amount of the fine, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the market conditions⁶⁸².
- (368) Insofar as the parties argue that they are affected by the general economic crisis, it is noted that the Commission's analysis of the ability to pay is made on an individual basis and on the basis of the specific data as well as the factual elements demonstrating a specific economic and financial context provided by the undertakings. The Commission does not single out the impact the general crisis may have on an individual undertaking and must take into account the fact that granting a reduction to one undertaking is likely to have a distortive effect, favoring it over others. It is noted that in so far as the general economic crisis has had an impact, it has not been argued or demonstrated by the affected undertakings that this had a particular effect in the sector of calcium carbide and magnesium based reagents.

VIII.8.1.[*]

- (369) The analysis of the financial data provided by [*]⁶⁸³ leads to the conclusion that [*] is a viable undertaking with a low risk of bankruptcy. Taking into account the possible fine imposed on [*] as well as the financial data provided by it, in

⁶⁸² See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ International Belgium and Others v Commission* [1983] ECR 3369, paragraphs 54 and 55, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, paragraph 327, Case C-308/04 P, *SGL Carbon AG v Commission* [2006] ECR I-5977, paragraph 105.

⁶⁸³ [*]

particular [*], the Commission deduces that there is a risk that the impact of the fine would [*]. However, this does not necessarily mean that the economic viability of the undertaking would be irretrievably jeopardised, nor does it demonstrate that it would cause the assets to lose all their value. Indeed, the Commission notes that [*] has not put forward any tangible evidence demonstrating that its economic viability would be irretrievably jeopardised and that its assets would lose all their value, other than [*].

- (370) Moreover, according to point 35 of the Guidelines on fines [*]'s risk profile needs to be analysed in the specific social and economic context of the relevant market and sector concerned. [*] has not provided the Commission, in its claim on inability to pay, with concrete elements of fact or arguments pointing to such a specific social and economic context. Apart from referring in general terms to the current general economic crisis, [*] has merely stated that, first, its exit from the market would result in a lessening of competition in the market as a whole, [*]. Secondly, it indicated that demand is falling, [*].
- (371) It follows from the preceding objective elements that the imposition of the fine would not irretrievably jeopardise the economic viability of [*] and cause its assets to lose all their value.⁶⁸⁴ In these circumstances, it is not necessary to address the additional, rather generic arguments raised by [*] regarding the social and economic context.
- (372) Without prejudice to the previous analysis, the fact that [*] is a very small independent trader that does not belong to a large group of companies is also taken into account. [*] trades in high value materials with a rather low margin and has a relatively focused product portfolio. The fact that the imposed fine would have a relatively high impact on the financial situation of this type of company is also taken into account. Therefore, due to these special characteristics of [*], a reduction of the fine by 20% is appropriate, as it is considered that [*] will in any case be sufficiently deterred at that level of the fine⁶⁸⁵. In the light of this adaptation, the conclusion in recital (371) that the imposed fine is unlikely to irretrievably jeopardise the economic viability of [*] also remains valid.

VIII.8.2.[*]

- (373) The analysis of the financial data provided by [*⁶⁸⁶ leads to the conclusion that [*] is a viable undertaking with a low risk of bankruptcy. The impact of the fine is not considered to irretrievably jeopardise the economic viability of [*] and cause its assets to lose all their value. Therefore, [*]'s claim on the inability to pay the fine is not accepted.
- (374) [*] often referred to its catastrophic year in 2005, when [*], but this event no longer endangers the viability of the undertaking to the extent that it would be unable to pay the fine imposed by this Decision.

⁶⁸⁴ See point 35 of the Guidelines on Fines.

⁶⁸⁵ See point 37 of the Guidelines on Fines.

⁶⁸⁶ [*]

VIII.8.3. [∗]

- (375) Having examined the information presented by [∗]⁶⁸⁷, it is concluded that the information provided by [∗] does not demonstrate that the fine imposed by this Decision would irretrievably jeopardise the economic viability of [∗] and cause its assets to lose all their value. As a consequence, the claim relating to [∗]'s inability to pay is **not accepted**.

VIII.8.4. [∗]

- (376) The shareholders of [∗] mandated the Board of Directors in 2007 to sell all assets with a view to terminating its activities and eventually distribute the income to its shareholders. Under these circumstances analysing the viability of the company and the prospective risk of bankruptcy is not meaningful. Therefore, based on the information presented by [∗]⁶⁸⁸, the remaining financial reserves were considered in comparison to the amount of the fine and it is concluded that [∗] is able to absorb the fine. Thus, the claim from [∗] on the inability to pay the fine is **not accepted**.

VIII.8.5. [∗]

- (377) Having examined the information presented by [∗]⁶⁸⁹, it is concluded that the information provided by [∗] does not demonstrate that the fine imposed by this Decision would irretrievably jeopardise the economic viability of [∗] and cause its assets to lose all their value. Therefore, the claim regarding the inability to pay raised by [∗] is **rejected**.

VIII.8.6. [∗]

- (378) Having examined the information presented by [∗]⁶⁹⁰, it is concluded that the information provided does not show that the fine imposed by this Decision would irretrievably jeopardise the economic viability of [∗] and cause its assets to lose all their value. Therefore, the claim of [∗] on the inability to pay is **not accepted**.

687 [∗]

688 [∗]

689 [∗]

690 [∗]

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81 of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement in the calcium carbide and magnesium sectors covering the EEA except Spain, Portugal, Ireland and the United Kingdom, and which consisted of market sharing, fixing quotas, customer allocation, price fixing and the exchange of sensitive commercial information on prices, customers and sales volumes:

- (a) Almamet GmbH, from 22 April 2004 until 16 January 2007
- (b) Carbide Sweden AB and Akzo Nobel NV, from 3 November 2004 until 20 November 2006
- (c) Donau Chemie AG from 7 April 2004 until 16 January 2007
- (d) non ferrum Metallpulver GmbH & Co KG and ECKA Granulate GmbH & Co KG from 14 July 2005 until 16 January 2007
- (e) Novácke chemické závody a.s. and I.garantovaná a.s. from 7 April 2004 until 16 January 2007
- (f) SKW Stahl-Metallurgie GmbH from 22 April 2004 until 16 January 2007; Evonik Degussa GmbH and AlzChem Hart GmbH from 22 April 2004 until 30 August 2004; SKW Stahl-Metallurgie Holding AG and ARQUES Industries AG from 30 August 2004 until 16 January 2007
- (g) TDR Metalurgija d.d. from 7 April 2004 until 16 January 2007 and Holding Slovenske elektrarne d.o.o. from 7 April 2004 until 20 December 2006

Article 2

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

- | | | |
|-----|---|----------------|
| (a) | Almamet GmbH: | EUR 3 040 000 |
| (b) | Carbide Sweden AB and
Akzo Nobel NV
jointly and severally: | EUR 0 |
| (c) | Donau Chemie AG: | EUR 5 000 000 |
| (d) | non ferrum Metallpulver GmbH & Co KG and
ECKA Granulate GmbH & Co KG
jointly and severally: | EUR 6 400 000 |
| (e) | Novácke chemické závody and
I.garantovaná a.s.
jointly and severally: | EUR 19 600 000 |
| (f) | SKW Stahl-Metallurgie Holding AG,
ARQUES Industries AG and
SKW Stahl-Metallurgie GmbH
jointly and severally: | EUR 13 300 000 |
| (g) | Evonik Degussa GmbH,
AlzChem Hart GmbH and
SKW Stahl-Metallurgie GmbH
jointly and severally: | EUR 1 040 000 |
| (h) | Evonik Degussa GmbH and
AlzChem Hart GmbH
jointly and severally: | EUR 3 640 000 |
| (i) | Holding Slovenske elektrarne d.o.o.: | EUR 9 100 000 |

The fines shall be paid in EURO, within three months of the date of notification of this Decision, into bank account No 001-3953713-69 of the European Commission with FORTIS Bank, Rue Montagne du Parc 3, 1000 Bruxelles/Brussel (Code SWIFT: GEBABEBB – code IBAN BE71 0013 9537 1369). After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Article 3

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

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

Article 4

This Decision is addressed to

- Akzo Nobel NV, Strawinskylaan 2555, 1077 ZZ Amsterdam, Nederland
- Almamet GmbH, Gewerbestraße 5a, 83404 Ainring, Deutschland
- AlzChem Hart GmbH, Chemiepark Trostberg, Dr. Albert Frank Straße 32, 83308 Trostberg, Deutschland
- ARQUES Industries AG, Münchner Straße 15a, 82319 Starnberg, Deutschland
- Carbide Sweden AB, PO Box 13000, Stockviksverken, Sundsvall, 85013, Sverige
- Donau Chemie AG, Am Heumarkt 10, 1037 Wien, Austria
- ECKA Granulate GmbH & Co KG, Kaiserstraße 30, 90763 Fürth, Deutschland
- Evonik Degussa GmbH, Rellinghauser Straße 1-11, 45128 Essen, Deutschland
- I.garantovaná a.s., Lamačská cesta 3, 841 04 Bratislava 4, Slovenská republika
- Holding Slovenske elektrarne d.o.o., Koprška ulica 92, 1000 Ljubljana; Slovenija
- non ferrum Metallpulver GmbH & Co KG, Bürmooser Landesstraße 19, 5113 St. Georgen bei Salzburg, Austria
- Novácke chemické závody a.s., M.R. Štefánika 1, 97271 Nováky, Slovenská republika
- SKW Stahl-Metallurgie GmbH, Fabrikstraße 6, 84579 Unterneukirchen, Deutschland
- SKW Stahl-Metallurgie Holding AG, Fabrikstraße 6, 84579 Unterneukirchen, Deutschland
- TDR Metalurgija d.d. , Tovarniška c. 51, 2342 Ruše, Slovenija

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

Done at Brussels, 22.7.2009

For the Commission

[signed]
Algirdas ŠEMETA
Member of the Commission