



EUROPEAN COMMISSION  
Competition DG

## ***CASE AT.40178 – CAR EMISSIONS***

(Only the German text is authentic)

### **CARTEL PROCEDURE**

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

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Article 7 Regulation (EC) 1/2003

Date: 08/07/2021

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EUROPEAN  
COMMISSION

Brussels, 8.7.2021  
C(2021) 4955 final

## **COMMISSION DECISION**

**of 8.7.2021**

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

**(AT.40178 - Car Emissions)**

(Text with EEA relevance)

(Only the German text is authentic)

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# COMMISSION DECISION

of 8.7.2021

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

(AT.40178 - Car Emissions)

(Text with EEA relevance)

(Only the German text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

Having regard to the Agreement on the European Economic Area<sup>2</sup>,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>3</sup>, and in particular Article 7 and Article 23(2) thereof,

Having regard to 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 EC Treaty<sup>4</sup>, and in particular Article 10a thereof,

Having regard to the Commission decision of 18 September 2018 to initiate proceedings in this case,

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<sup>1</sup> OJ, C 115, 9.5.2008, p.47. For the purposes of this Decision, although the United Kingdom withdrew from the European Union as of 1 February 2020, according to Article 92 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ L 29, 31.1.2020, p. 7), the Commission continues to be competent to apply EU competition law as regards the United Kingdom for administrative procedures which were initiated before the end of the transition period.

<sup>2</sup> For the purposes of this Decision, the EEA is understood to cover the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the United Kingdom, as well as Iceland, Liechtenstein and Norway. Accordingly, any references made to the EEA in this Decision are meant to also include the United Kingdom (UK).

<sup>3</sup> OJ L 1, 4.1.2003, p.1.

With effect from 1 December 2009, Article 81 of the EC Treaty became Article 101 of the Treaty on the Functioning of the European Union ('the Treaty'). Both provisions are, in substance, identical. For the purposes of this Decision, references to Article 101 of the Treaty should be understood as references to Articles 81 of the EC Treaty where appropriate.

<sup>4</sup> OJ L 123, 27.4.2004, p. 18.

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 (EC) No 1/2003 and Article 11(1) of Regulation (EC) No 773/2004,

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:

## 1. INTRODUCTION

- (1) The addressees of this Decision participated in a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement.
- (2) On 18 September 2018, the Commission formally initiated proceedings due to the suspicion that German car manufacturers Daimler AG ('DAIMLER'), Volkswagen-group, with its operative group companies Volkswagen Aktiengesellschaft ('Volkswagen' or 'Volkswagen AG'), Audi Aktiengesellschaft ('Audi' or 'Audi AG') and Dr. Ing. h.c. F. Porsche Aktiengesellschaft ('Porsche' or 'Dr. Ing. h.c. F. Porsche AG')<sup>5</sup> (Volkswagen, Audi and Porsche together 'VW')<sup>6</sup>, as well as Bayerische Motoren Werke Aktiengesellschaft ('BMW' or 'BMW AG') had coordinated their market conduct in the European Economic Area ('EEA') with the aim to limit the technical development and competition on innovation in the area of car emission cleaning technologies for passenger cars, thereby violating Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement (case AT.40178 – *Car Emissions*).
- (3) On 5 April 2019, the Commission adopted a Statement of Objections in this case in the ordinary procedure, in which the Commission set out collusive conduct in connection with, on the one hand, the development and introduction of selective catalytic reduction ('SCR')-systems for passenger cars<sup>7</sup> with diesel engine and, on the other hand, particulate matter filters (Otto-Partikel-filter - 'OPF') for passenger cars with petrol engine. The Commission now adopts in this case the following Decision, which closes the proceedings.
- (4) This Decision concerns anti-competitive conduct in connection with the development of SCR-systems for diesel passenger cars. The anti-competitive conduct took place from 25 June 2009 to 1 October 2014 ('the relevant period').
- (5) DAIMLER, VW and BMW (together 'the parties') coordinated their market conduct in respect of SCR-systems used in passenger cars with diesel engine. For the European Economic Area ('EEA')<sup>8</sup> they coordinated the AdBlue tank sizes and

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<sup>5</sup> 'Porsche' refers to Dr. Ing. h.c. F. Porsche AG, as well as the company of which Dr. Ing. h.c. F. Porsche AG is the economic successor, see below paragraphs (27) and (189) - (192).

<sup>6</sup> In the period from 25 June 2009 to 6 December 2009 Volkswagen AG did not exercise decisive influence over Porsche, see below paragraphs (28) and (189) - (192).

<sup>7</sup> Passenger cars are category M vehicles: Motor vehicles with at least four wheels designed and constructed for the carriage of passengers (Directive 2007/46/EC, Annex II)

<sup>8</sup> For the purposes of this Decision, the EEA is understood to cover the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta,

ranges between two refills and exchanged information about assumed average AdBlue-consumption.

- (6) This Decision is addressed to the following companies:
- DAIMLER: Daimler AG
  - VW: Volkswagen AG, Audi AG and Dr. Ing. h.c. F. Porsche AG
  - BMW: BMW AG
- (7) The conduct was by its very nature capable of restricting competition with regard to product characteristics of their new diesel passenger car models as concerns AdBlue tank sizes and refill ranges and as concerns Nitrogen Oxide (NO<sub>x</sub>)-cleaning beyond regulatory requirements and, thereby, of limiting technical development in the field of NO<sub>x</sub>-cleaning with SCR-systems for new diesel passenger cars in the EEA and of limiting customer choice.
- (8) This procedure is independent from proceedings by national registration authorities or public prosecutors' offices against individual parties with regard to respecting registration provisions under public law. Accordingly, no findings are made here concerning the following matters: (a) the question on the use made by individual car manufacturers of prohibited defeat devices, (b) the question if and to what extent individual car manufacturers respected the regulatory requirements for NO<sub>x</sub>-cleaning and (c) the question if models of individual car manufacturers exceeded the regulatory requirements for NO<sub>x</sub>-cleaning. The Commission has no indications that the parties would have coordinated the use of prohibited defeat devices to manipulate car emission tests.
- (9) The cars with SCR-systems manufactured and marketed by the parties in the relevant period and in subsequent years did not have uniform AdBlue tank sizes or ranges. The tank sizes and ranges were largely well above the figures discussed by the parties. Furthermore, the technical solutions of the parties for implementing SCR-systems differed. BMW used twin-tank systems (with a total volume of more than 20 litres) in various vehicle models and combined the SCR-system with a NO<sub>x</sub>-storage catalyst. DAIMLER mainly used AdBlue tank systems with volumes well above the 8 litres originally discussed, usually more than 20 litres. VW used tank systems for vehicles fitted with SCR-technology, which comprised large single-tank or twin-tank solutions as of market launch, usually with volumes two or three times greater than 8 litres.
- (10) This procedure exclusively concerns a coordination concerning technical aspects, and not concerning prices, costs or quantities.

## **2. THE INDUSTRY CONCERNED**

- (11) This cartel procedure relates to the conduct of the parties concerning their SCR-systems for diesel passenger cars, which they developed for, produced for and sold in the EEA.

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Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) and the United Kingdom, as well as Iceland, Liechtenstein and Norway. Accordingly, any references made to the EEA in this Decision are meant to also include the United Kingdom (UK).

## 2.1. The product concerned

- (12) The conduct described in Section 4 relates to the manufacture and sale of passenger cars with diesel engines fitted with a liquid SCR-system to comply with European emissions standards Euro 5 and Euro 6.<sup>9</sup> SCR-systems are used to remove NO<sub>x</sub> from the exhaust gas flow by means of SCR with the help of a chemical process based on the injection of liquid urea ('liquid SCR-system'). The urea mixture injected in this context was registered as trademark by the German Verband der Automobilindustrie ('VDA' – [in English: Association of the Automotive Industry]) under the trade name AdBlue® ('AdBlue').
- (13) Representatives of the car manufacturers met in various technical meetings at different levels in the so-called 'circles of 5'.

## 2.2. The undertakings subject to the proceedings

### 2.2.1. DAIMLER

- (14) Daimler AG is the ultimate parent company of an automotive group active worldwide in the development, production and sale of passenger cars and utility vehicles.<sup>10</sup>
- (15) Daimler AG has its headquarters in Stuttgart (Germany). On 1 November 2019, Daimler AG transferred its trucks and bus business to Daimler Truck AG and the business with passenger cars and with vans to Mercedes-Benz AG.
- (16) The DAIMLER group is active in the following business areas:
- Mercedes-Benz Cars (passenger cars of the *Mercedes-Benz* brand, the performance brand *Mercedes-AMG*, the luxury brand *Mercedes-Maybach*, as well as the *smart* brand);
  - Daimler Trucks;
  - Mercedes-Benz Vans;
  - Daimler Buses;
  - Daimler Financial and Mobility Services.
- (17) Development, production, purchasing and sales / distribution of passenger cars of the brands *Mercedes-Benz* and *smart* are carried out by the business unit Mercedes-Benz AG since October 2019. In the relevant period, this unit was part of business division Mercedes-Benz Cars ('MBC') which had no legal personality and was a dependent part of Daimler AG. The area 'Group Research & Mercedes-Benz Cars Development' came under the responsibility of a board member between 2004 and 2017 and was a dependent part of Daimler AG, too. This division had overall responsibility for the development of new MBC passenger cars. As part of the restructuring in October 2019, the passenger car development department of Daimler AG was transferred to Mercedes-Benz AG.
- (18) In the relevant period, the participants in 'circles of 5' meetings delegated by DAIMLER belonged to the MBC division and were therefore directly employed by Daimler AG.

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<sup>9</sup> See Section 4.

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

- (19) In 2020, DAIMLER had a worldwide turnover of approx. EUR 154 billion.
- 2.2.2. VW
- (20) VW forms an automotive group, which is active worldwide in the development, production and sale of passenger cars and utility vehicles.<sup>11</sup>
- (21) Volkswagen AG has two business areas: ‘Automobile’ and ‘Financial Services’. Business area ‘Automobile’ consists of the passenger cars, utility vehicles and power engineering divisions and covers development of vehicles and engines, production and distribution of passenger cars, light utility vehicles, lorries, buses and motorbikes, as well as the corresponding after markets (original components) and also business areas for big diesel engines, turbomachinery, special gearboxes, drive components and test systems. Volkswagen AG has its headquarters in Wolfsburg (Germany).
- (22) The majority of ordinary shares with voting rights in Volkswagen are currently held by Porsche Automobil Holding SE, which built up this holding continually since 2007. The Federal State of Lower Saxony held 20% of shares with voting rights and was entitled to appoint two members of the supervisory board. Porsche Automobil Holding SE can appoint 8 of the 20 members on the supervisory board of Volkswagen. Also staff can appoint members of the supervisory board. Volkswagen’s shareholder structure is currently as follows: Porsche Automobil Holding SE (53.3% voting rights / 31.3% capital), Lower Saxony (20% / 11.8%), Qatar Holding LLC (17% / 14.6%), remainder free floating (9.7% / 42.3%).
- (23) The passenger car division of Volkswagen includes notably the following brands: *Volkswagen*, *Volkswagen Nutzfahrzeuge* (utility vehicles), *Audi*, *SEAT* (including *Cupra*), *ŠKODA*, *Bentley*, *Bugatti*, *Lamborghini* and *Porsche*. The original brand *Volkswagen* was created by Volkswagen, while the other brands (with the exception of Porsche) were acquired by Volkswagen before 2009. Each brand operates through multiple companies in different locations and/or with different functions (e.g.: production or research and development).
- (24) Audi AG (Audi) was a nearly wholly owned subsidiary of Volkswagen (shareholding of 99.55% since 2008) throughout the relevant period. Audi AG has its headquarters in Ingolstadt (Germany).
- (25) [...].
- (26) [...].
- (27) As a result, the operational business was run by:  
Porsche AG 2007 from 13 November 2007 to 29 November 2009 and  
Dr. Ing. h.c. F. Porsche AG from 30 November 2009.  
These companies are referred to as ‘Porsche’ in this document.
- (28) With effect from 7 December 2009, Volkswagen acquired 49.9% of the shares in Porsche Zwischenholding GmbH (100% parent company of Dr. Ing. h.c. F. Porsche AG) from Porsche Automobil Holding SE. The other 50.1% of shares in Porsche Zwischenholding GmbH remained property of Porsche Automobil Holding SE.

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<sup>11</sup> [...].

- (29) With effect from 1 August 2012, Volkswagen indirectly acquired the other 50.1% of Dr. Ing. h.c. F. Porsche AG by taking over Porsche Holding Stuttgart GmbH (formerly known as Porsche Zweite Zwischenholding GmbH), the legal successor of Porsche Zwischenholding GmbH. Since 1 August 2012, both Porsche Holding Stuttgart GmbH and Dr. Ing. h.c. F. Porsche AG are therefore wholly owned subsidiaries of Volkswagen.
- (30) The term ‘VW’ below refers for the entire relevant period to Volkswagen, Audi and Porsche. The term ‘Volkswagen’ refers to VW without Audi and Porsche. The participants in ‘circles of 5’ meetings i) who worked for Volkswagen were directly employed by Volkswagen AG, ii) who worked for Audi were directly employed by Audi AG, and iii) who worked for Porsche were directly employed by Porsche AG 2007 until 29 November 2009 and by Dr. Ing. h.c. F. Porsche AG from 30 November 2009.
- (31) In 2020, VW had a worldwide turnover of approx. EUR 222 billion.
- 2.2.3. *BMW*
- (32) BMW AG is the ultimate parent company of an automotive group active worldwide in the development, production and sale of passenger cars.<sup>12</sup> BMW AG has its headquarters in Munich (Germany).
- (33) The BMW group is divided into the following business areas: ‘Automobile’, ‘Motorbikes’, ‘Financial Services’ and ‘Miscellaneous companies’. In the ‘Automobile’ area, BMW develops, produces and sells passenger cars of the brands *BMW*, *MINI* and *Rolls-Royce Pkw*, as well as spare parts, accessories and mobility services.
- (34) The participants in ‘circles of 5’ meetings delegated by BMW were directly employed by BMW AG.
- (35) In 2020, BMW had a worldwide turnover of approx. EUR 98 billion.

### 2.3. The market concerned

- (36) In the EEA, around half of all passenger cars were fitted with diesel engines and the other half with petrol engines in the relevant period.<sup>13</sup>
- (37) DAIMLER, Audi, Porsche and BMW had the reputation of being the main German premium car manufacturers in the relevant period.<sup>14</sup> Volkswagen had the reputation

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<sup>12</sup> [...].

<sup>13</sup> European Parliament, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy: *Comparative study on the differences between the EU and US legislation on emissions in the automotive sector* (drawn up for the EMIS Committee, 2016), p. 31 (illustration 2). The study is publicly available at:  
[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587331/IPOL\\_STU\(2016\)587331\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587331/IPOL_STU(2016)587331_EN.pdf).  
 [...].

<sup>14</sup> See, for example, article in *WirtschaftsWoche* of 21 May 2014 under the title *Audi, BMW, Mercedes – Die Strategien der Premiumhersteller* [Audi, BMW, Mercedes – The strategies of the premium manufacturers] (by Rebecca Eisert), available at:  
<https://www.wiwo.de/unternehmen/auto/audi-bmw-mercedes-die-strategien-der-premiumhersteller/9919538.html>, [...].

of being the leading quality provider among high volume car manufacturers.<sup>15</sup> In the relevant period, DAIMLER, Volkswagen, Audi and BMW played a significant role in the development of diesel engines. Porsche did not develop, produce or apply data in its own SCR-systems in the relevant period, but sourced diesel engines (including SCR-systems) from Audi.<sup>16</sup>

- (38) Diesel passenger cars are a speciality of the European car market where they achieved high market shares in the relevant period due to their low fuel consumption and also to tax advantages enjoyed in some countries.<sup>17</sup>
- (39) The German car industry placed particular emphasis on producing and selling passenger cars with diesel engines for a long time and presented itself as a world leader in the area of diesel passenger cars.<sup>18</sup>
- (40) Diesel passenger cars with SCR-system have been sold in the EEA by Volkswagen since 2008, by DAIMLER and Audi since 2010, by BMW since 2011 and by Porsche since 2014.<sup>19</sup>

#### **2.4. The legal framework concerning EU emissions standards for passenger cars (from Euro 5)**

- (41) The legal framework for type-approval<sup>20</sup> for passenger cars in the EEA with respect to emissions is Directive 2007/46/EC of the European Parliament and of the Council, establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive).<sup>21</sup> This Framework Directive stipulates that for motor vehicles an application must be made for type-approval with respect to emissions. For this case, the EU provisions on emissions standards after Euro 4 are relevant :

**Euro 5** (2009) for passenger and light commercial vehicles, and

**Euro 6** (2014) for passenger and light commercial vehicles.

- (42) The upper limits of emission standards Euro 5 and Euro 6 were known partly to the car manufacturers in June 2007 already, as the standards were established years

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<sup>15</sup> See, for example, *Strategie und Technik des Automobilmarketing* [Strategies and techniques for marketing cars], Franz-Rudolf Esch (Ed.), 2013, page 66.

<sup>16</sup> Given this background, only the manufacturers of diesel engines and SCR-systems, i.e. DAIMLER, Volkswagen, Audi and BMW, are referred to wherever ‘manufacturers’ are mentioned below.

<sup>17</sup> See [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587331/IPOL\\_STU\(2016\)587331\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/587331/IPOL_STU(2016)587331_EN.pdf), pages 15 and 31.

<sup>18</sup> Excerpt from a 2013 VDA-brochure: “*Die deutsche Automobilindustrie ist damit weltweit Vorreiter bei sicheren und zuverlässigen Autos mit sauberen und effizienten Antrieben*“ (translated to English: ‘*The German car industry is a global pioneer in safe and reliable cars with clean and efficient drive systems*’), [...].

<sup>19</sup> [...].

<sup>20</sup> ‘Type-approval’ means the procedure whereby a Member State certifies that a type of vehicle satisfies the relevant administrative provisions and technical requirements (Article 3(3) of Directive 2007/346/EC).

<sup>21</sup> Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (OJ L 263, 9.10.2007, p. 1).

before they entered into force in order to give manufacturers sufficient time to make the necessary technical adaptations and to ensure that newly introduced models would meet the standards. The basic regulation with the Euro 5 emission standard, which was valid from 2009, and the Euro 6 (first stage) emission standard, which was valid from 2014, was adopted in June 2007 (Regulation (EC) No 715/2007 of the European Parliament and of the Council<sup>22</sup>). However, some elements of this Regulation<sup>23</sup> were not enacted until 2012. The RDE (Real Driving Emissions) test procedures were not set out until 2016.

- (43) Compliance with the emission standards is checked by the competent national authorities relying on test procedures set out in EU provisions. For emission standards to actually lead to reduced emissions, exhaust gas cleaning under real driving conditions is key.
- (44) The test procedure applicable in the relevant period was the New European Driving Cycle (NEDC), which was developed in the 1980s. On 1 September 2017, this test was replaced by the Worldwide Harmonized Light Vehicles Test Procedure (WLTP) for new type-approvals.<sup>24</sup> From 1 September 2018, WLTP also applied to the first registration of previously type-approved models. The test procedure incorporates strict test specifications (road load, gear shift, total weight, fuel quality, ambient temperature, tyre selection and pressure).
- (45) In 2016, emissions tests under real driving conditions were introduced in the EU. These tests are also known as RDE tests.<sup>25</sup> The RDE tests have been used for new type-approvals since 1 September 2017 and for first registrations of models that have already been type-approved since 1 September 2019. In the RDE test procedure,

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<sup>22</sup> Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information (OJ L 171, 29.6.2007, p. 1)

*Recital 5 of this Regulation states: 'Achieving EU air quality objectives requires a continuing effort to reduce vehicle emissions. For that reason, industry should be provided with clear information on future emission limit values. This is why this Regulation includes, in addition to Euro 5, the Euro 6 stage of emission limit values.'*

*Recital 7 of this Regulation states: 'In setting emissions standards it is important to take into account the implications for markets and manufacturers' competitiveness, the direct and indirect costs imposed on business and the benefits that accrue in terms of stimulating innovation, improving air quality, reducing health costs and increasing life expectancy, as well as the implications for the overall impact on carbon dioxide emissions.'*

<sup>23</sup> In particular the particle number for diesel vehicles.

<sup>24</sup> See Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Commission Regulation (EC) No 692/2008 (OJ L 175, 7.7.2017, p. 1).

<sup>25</sup> See Commission Regulation (EU) 2016/427 of 10 March 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ L 82, 31.3.2016, p. 1) and Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) (OJ L 109, 26.4.2016, p. 1).

Portable Emissions Measurement Systems (PEMS) are used in addition to the test under laboratory conditions. The NO<sub>x</sub>-emission limits are adapted using a ‘conformity factor’ so that higher emission limits are admissible for vehicles measured under RDE conditions in order to take account of the uncertainty owing to the different test methods. Since 1 September 2017, the conformity factor for NO<sub>x</sub> has been 2.1 (so that the NO<sub>x</sub> measurement results have to be under 0.168 g/km) for new types of vehicles and from 1 January 2020, this will be 1 plus a certain margin (which was initially set at 0.5 and later reduced to 0.43<sup>26</sup>). One year after these dates, the same conditions applied to all newly registered vehicles.

- (46) The introduction of the RDE test was a significant change for the manufacturers of diesel passenger cars.<sup>27</sup>

## 2.5. Functioning of the SCR-system

- (47) The NO<sub>x</sub> concentration in exhaust gases of diesel vehicles can be reduced with (a combination of) various techniques, including, for example, exhaust gas recirculation (EGR), NO-storage in a NO<sub>x</sub>-storage catalyst (NSC) or SCR. The subject matter of this Case Overview is only SCR-technology.
- (48) With SCR systems, NO<sub>x</sub>-emissions in exhaust gases can be reduced by up to 90%<sup>28</sup> or more<sup>29</sup> under the relevant operating conditions using a liquid urea solution (harmless nitrogen and water being emitted - the so-called de-noxification process).<sup>30</sup> There is a correlation between the quantity of AdBlue added and the effectiveness of reduced nitrogen oxide concentration. However, the effectiveness of the cleaning process also depends on various other factors such as the temperature of the SCR catalyst, engine load, altitude, speed and driving dynamics. AdBlue-dosing is a complex balancing act between injecting too little, which leads to less effective NO<sub>x</sub>-cleaning, and injecting too much, which causes the unpleasantly smelling hazardous substance ammonia (NH<sub>3</sub>) to be discharged (‘ammonia slip’).
- (49) AdBlue is added from a special tank the size of which, together with the AdBlue-consumption, determines how far the vehicle can be driven without refilling AdBlue (‘AdBlue range’). When SCR-systems for passenger cars were developed, no adequate infrastructure existed in the EEA for refilling the AdBlue (pumps at fuel stations or canisters for sale at fuel stations or garages).
- (50) Refilling AdBlue is considered by (some) users to be inconvenient and entails costs. One option was to equip liquid SCR-systems with sufficiently large AdBlue tanks to make only AdBlue refilling at usual service intervals in the garage necessary.

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<sup>26</sup> See Commission Regulation (EU) 2018/1832 of 5 November 2018 amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) 2017/1151 for the purpose of improving the emission type-approval tests and procedures for light passenger and commercial vehicles, including those for in-service conformity and real-driving emissions and introducing devices for monitoring the consumption of fuel and electric energy (OJ L 301, 27.11.2018, p. 1)

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

<sup>28</sup> [...]. See also this quote from the advertisement: ‘*Passat Blue TDI: one of the most environmentally friendly diesel cars in the world... BlueTDI stands for 90% less NO<sub>x</sub> in exhaust gas.*’ [...].

<sup>29</sup> In [...], the technical customer documentation for a delivery module mentions a value of 96%. In [...], it is stated that up to 95-100% of the nitrogen oxide is removed.

<sup>30</sup> [...].

- (51) Larger AdBlue tanks are heavier and more difficult to integrate into the construction space available in passenger cars or reduce space left for other purposes (for example boot volume). Furthermore, there are conflicting interactions with other emissions, such as CO<sub>2</sub>-emissions. To reduce CO<sub>2</sub>-emissions, fuel consumption of passenger cars must be reduced as much as possible. This can be achieved, for example, by reducing vehicle weight, such as with a smaller AdBlue tank.
- (52) If the range that a passenger car can achieve without refilling AdBlue is to be maintained (so that it corresponds to the service interval), either the tank needs to remain large or the AdBlue-consumption must decrease. Reducing AdBlue-consumption can be achieved, for example, by using additional exhaust gas after treatment systems such as an NSC, improved AdBlue-dosing or measures within the engine.

### **3. PROCEDURE**

- (53) The procedure was initiated after DAIMLER applied for immunity pursuant to the Leniency Notice<sup>31</sup>, [...].
- (54) On 9 December 2015, DAIMLER complemented its original application and reported for the first time about anti-competitive contacts between the parties in the framework of the so-called ‘circles of 5’-meetings. DAIMLER complemented its application by providing further information and additional documents on arrangements in respect of AdBlue-tank sizes and ranges.
- (55) On 4 July 2016, VW applied for leniency and reported anti-competitive contacts between the parties in the framework of the so-called ‘circles of 5’-meetings and arrangements in respect of AdBlue-tank sizes and ranges, as well.
- (56) In October 2017, the Commission carried out inspections in the premises of BMW, DAIMLER, Audi and Volkswagen.
- (57) On 18. September 2018, the Commission initiated proceedings pursuant to Article 2(1) of Regulation (EC) No 773/2004 against the parties.
- (58) On 5 April 2019, the Commission adopted a Statement of Objections in the ordinary procedure.
- (59) Subsequently the parties had full access to the parts of the file relevant for the infringement here at issue, including the oral corporate statements, and received copies of the documentary evidence, as well as a list of all documents on file. The parties also had the possibility to access further listed documents.
- (60) The parties replied to the Statement of Objections after several prolongations of the deadline and indicated that they would be interested in settlement discussions.
- (61) On 2 February 2021, the Commission formally offered the parties to switch to the settlement route. All parties responded that they were prepared to enter into settlement discussions.

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<sup>31</sup> Commission notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 8.12.2006, p. 17.

- (62) In the course of these settlement discussions, the Commission informed the parties of the objections it intended to retain against them with reference to the key evidence, on which these objections rely.
- (63) At the end of the settlement discussions all parties agreed that sufficient common understanding had been reached on the envisaged objections in the settlement procedure. The Commission also informed the parties of the ranges of likely fines the Commission would impose.
- (64) By 28 April 2021, the parties submitted to the Commission their formal request to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004 (the ‘settlement submissions’). The settlement submission of each party contained:
- an acknowledgement in clear and unequivocal terms of the party's liability for the infringement summarily described as regards its object, the main facts, their legal qualification, including the party's role and the duration of its participation in the infringement;
  - an indication of the maximum amount of the fine the party expects to be imposed by the Commission and which it would accept in the framework of a settlement procedure;
  - the party's confirmation that it has been sufficiently informed of the objections the Commission envisages raising against it in the settlement procedure and that it has been given sufficient opportunity to make its views known to the Commission;
  - the party's confirmation that it does not envisage requesting access to the file again or to be heard again in an oral hearing, unless the Commission does not reflect its settlement submission in the Statement of Objections and the Decision;
  - the party's agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003<sup>32</sup> in German.
- (65) Each party made its settlement submission conditional upon the imposition of a fine by the Commission, which does not exceed the maximum amount specified in its settlement submission.
- (66) On 21 May 2021, the Commission adopted a Statement of Objections under the settlement procedure. All the parties replied to the Statement of Objections by confirming that it corresponded to the contents of their settlement submissions and that they remained committed to continuing the settlement procedure.

#### **4. DESCRIPTION OF THE FACTS**

- (67) The Commission has concluded that the facts are as follows.

##### **4.1. Organisation and structure of the contacts between DAIMLER, VW and BMW**

- (68) [...], technicians of the car manufacturers DAIMLER, VW (Volkswagen, Audi and, to a lesser extent, Porsche) and BMW met regularly in groups known as ‘circles of 5’

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<sup>32</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p 1-25).

for detailed discussions of various technical issues in connection with passenger car production and with certain car components.<sup>33</sup>

- (69) The meetings of these ‘circles of 5’, which dealt with issues related to development were held at different hierarchical levels. [...].
- (70) [...], there were various circles in which the heads of the relevant departments met at least once a year.
- (71) The next level consisted of working groups (‘WG’), which were further sub-divided in some cases into expert groups (‘EG’).
- (72) The following thematic circles dealt with SCR-technology: [...] <sup>34</sup> [...] <sup>35</sup> [...].
- (73) In the relevant period, DAIMLER, Volkswagen, Audi and BMW took part in all the respective meetings [...]. Porsche did not participate in all respective meetings, [...].

#### 4.2. The facts

- (74) The coordination of DAIMLER, VW and BMW concerned the development of SCR systems for diesel passenger cars that they developed and produced for the EEA and sold there.<sup>36</sup> [...]. DAIMLER, Volkswagen, Audi and BMW first determined topics that were of common interest.<sup>37</sup> They then shared information at regular meetings about the development of SCR-technology and possibilities of using it.
- (75) [...].<sup>38</sup>
- (76) DAIMLER, VW and BMW discussed a number of topics and aspects relevant for the development of SCR-systems. The following description focusses on the area of their cooperation, which is relevant for this decision: the discussions on AdBlue-tank sizes and ranges and the exchange of information on assumed average AdBlue-consumption.

##### 4.2.1. *Regarding the behaviour concerning tank sizes, ranges and assumed average AdBlue-consumption*

- (77) [...] the parties agreed on 25 June 2009 on the use of small AdBlue tanks for the EEA with an effective range of 10 000 km which in their view corresponded for most car manufacturers to tank sizes of 8 to 10 litres and comparable AdBlue refill intervals.<sup>39</sup> Smaller AdBlue tanks had advantages in terms of vehicle weight (and therefore fuel consumption and CO<sub>2</sub>-emissions) and available construction space. In 2011, DAIMLER, VW and BMW confirmed the medium-term goal of moving to smaller

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<sup>33</sup> [...].

<sup>34</sup> [...].

<sup>35</sup> [...].

<sup>36</sup> All the parties’ brands mentioned in paragraphs (16), (23) and (33) are concerned by the conduct to the extent that they sold diesel passenger cars with SCR-systems. Passenger cars are *category M* vehicles: *Motor vehicles with at least four wheels designed and constructed for the carriage of passengers* pursuant to Annex II of Directive 2007/46/EC.

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

<sup>38</sup> [...].

<sup>39</sup> [...]. The AdBlue range in km is the distance a diesel passenger car can drive before the AdBlue is used up. The AdBlue refill interval is the frequency at which an AdBlue refill is required. The two concepts are closely linked as the frequency is heavily dependent on the mileage.

AdBlue tanks for Europe and therefore to shorter ranges between AdBlue refills.<sup>40</sup> On this basis, DAIMLER, VW and BMW coordinated envisaged AdBlue tank sizes and ranges until 1 October 2014.<sup>41</sup> However, DAIMLER, VW and BMW did not actually introduce uniform AdBlue tank sizes or ranges. Actual tank sizes remained well above the volumes discussed.<sup>42</sup>

- (78) Tank sizes and ranges were also discussed as part of joint efforts of DAIMLER, VW and BMW to push for construction of a comprehensive and customer-friendly refill infrastructure by influencing the mineral oil industry. This infrastructure was necessary in their view for the long-term commercial viability of the particularly effective SCR-technology. These efforts, including the medium-term goal of smaller tanks, were discussed in the associations ACEA and VDA and publicly communicated by these associations.<sup>43</sup>
- (79) Assumed average AdBlue consumption can be deduced from AdBlue tank size and range between two refills of a car with liquid SCR-system. The [...] based their decision of 25 June 2009 in favour of a range of 10 000 km (corresponding to AdBlue tank sizes of 8 to 10 litres for most car manufacturers) on an assumed average AdBlue-consumption of 0.8 to 1.0 litres per 1 000 km.
- (80) This joint understanding of an assumed average AdBlue-consumption is in line with internal documents of the manufacturers, which show that they expected assumed average AdBlue-consumption to be around 1 litre per 1 000 km for their models.<sup>44</sup> To comply with the regulatory provisions to be expected under European and national law<sup>45</sup>, the manufacturers considered an average AdBlue-consumption of approx. 1 litre per 1 000 km to be sufficient.<sup>46</sup> Furthermore, DAIMLER, VW and BMW had the joint understanding that AdBlue-consumption would increase with introduction of stricter regulatory requirements, in particular the RDE test procedure in the EEA.<sup>47</sup> Despite similar estimates concerning future AdBlue-consumption, the NO<sub>x</sub>-cleaning strategies, which the manufacturers subject to these proceedings used for diesel passenger cars with SCR-systems for the EEA, differed significantly.<sup>48</sup>
- (81) The manufacturers were aware that, with even higher quantities of AdBlue, more effective NO<sub>x</sub>-cleaning beyond regulatory requirements would have been possible

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<sup>40</sup> [...].

<sup>41</sup> [...].

<sup>42</sup> BMW built a twin-tank system with a total volume of over 20 litres into many vehicle models. DAIMLER mainly used AdBlue tank systems with a volume well above the 8 litres that were discussed originally, usually over 20 litres. VW either used large single-tank systems for SCR-vehicles or twin-tank systems with volumes consistently far above 8 litres.

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

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

<sup>45</sup> 0.08 g NO<sub>x</sub> per km, measured according to the NEDC, see paragraphs (41) to (43).

<sup>46</sup> [...].

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

<sup>48</sup> So BMW introduced a combination of NSC and SCR and used a twin-tank system for AdBlue to counter restrictions of construction space in the cars and still ensure a sufficient range of the SCR-system. DAIMLER mainly used AdBlue tank systems with a volume well above the 8 litres discussed originally, usually over 20 litres. VW used single-tank solutions and twin-tank solutions with large volumes well over 8 litres.

under certain real driving conditions for various vehicle models ('over-fulfilment').<sup>49</sup> Higher quantities of AdBlue would have led to a shorter range or required larger AdBlue tanks.

- (82) Consequently, DAIMLER, VW and BMW were aware that:
- each manufacturer followed a NO<sub>x</sub>-cleaning strategy for the EEA which did not aim for all vehicle models at cleaning as effectively as possible beyond regulatory requirements under certain real driving conditions, and
  - each manufacturer would have had the ability to follow a more effective NO<sub>x</sub>-cleaning strategy for the EEA beyond regulatory requirements.
- (83) Against this background, DAIMLER, VW and BMW signalled to each other through their common understanding that AdBlue-consumption would increase with introduction of stricter regulatory requirements that they did not strive for over-fulfilment.
- (84) In addition, DAIMLER, VW and BMW exchanged information on the characteristics of different vehicle models in terms of AdBlue tank sizes, ranges and assumed average consumption for the EEA.<sup>50</sup> This exchange of information increased the transparency that already existed between them in respect of possible uses of certain aspects of SCR-technology. DAIMLER, VW and BMW also discussed the possibility of placing vehicle models on the market, which complied with regulatory requirements already before they became obligatory ('pre-fulfilment').<sup>51</sup>
- (85) On 1 October 2014, a meeting of SCR-experts confirmed that it was not possible to agree on a uniform AdBlue tank size after disagreements between DAIMLER, VW and BMW had arisen in September 2014 that they found impossible to be resolved.<sup>52</sup>
- 4.2.2. *Questions in connection with development and introduction of SCR-systems were relevant for competition*
- (86) Evidence shows that DAIMLER, VW and BMW examined whether NO<sub>x</sub>-cleaning, AdBlue tank size and the ranges between refills were relevant for competition.
- (87) According to their own rules, no discussion of issues relevant for competition should take place in the 'circles of 5'.<sup>53</sup> In a document, DAIMLER, VW and BMW referred to the premise that the SCR-system was regarded as 'not relevant for competition'.<sup>54</sup>
- (88) As diesel engines had been advertised as environmentally friendly technology for years, criticism due to poorer NO<sub>x</sub>-cleaning would have entailed reputational risks for all car manufacturers.<sup>55</sup> Such risks had been confirmed by earlier experience. In the early 2000s, French car manufacturer Peugeot had unilaterally introduced a filter retaining particulate matter emitted by diesel engines. Peugeot had actively promoted

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<sup>49</sup> [...].

<sup>50</sup> [...].

<sup>51</sup> [...].

<sup>52</sup> [...].

<sup>53</sup> [...].

<sup>54</sup> [...].

<sup>55</sup> [...].

this innovation and presented itself as precursor with clean diesel cars.<sup>56</sup> The German car industry had come under communicative pressure with the unilateral introduction of diesel particulate filters by Peugeot and the parties discussed if something similar could happen again.<sup>57</sup> DAIMLER, VW and BMW compared their environmental performance with rival car manufacturers. This comparison was not only relevant within the ‘circles of 5’, as regular monitoring of technology and NO<sub>x</sub>-emissions performance of the other participants, as well as of third-party competitors shows.<sup>58</sup>

- (89) Internal documents and public statements show that DAIMLER, VW and BMW considered environmental performance in respect of NO<sub>x</sub>-emissions to be a factor relevant for competition.<sup>59</sup> Occasionally, car manufacturers also used environmental performance in respect of NO<sub>x</sub>-emissions for advertising purposes.<sup>60</sup> Furthermore, the manufacturers internally discussed the possibility of promoting their cars on the basis of their environmental performance.<sup>61</sup>
- (90) DAIMLER, VW and BMW considered issues related to AdBlue refill strategies, in particular the possibility of customer refilling and frequency and convenience of such refills (with due respect for infrastructure development) to be relevant for customers and, thus, for competition.<sup>62</sup> Both refill strategies and assumed average AdBlue-consumption and AdBlue ranges were closely linked to AdBlue tank sizes. The smaller the AdBlue tank, the more often AdBlue refills would – under otherwise identical conditions – be required, which ruled out refills solely at service intervals. The marketing, sales and/or after-sales service departments were involved in weighing up the choice between service refill and customer refill strategies and the frequency of required customer refills.<sup>63</sup>

#### **4.3. Individual participation of DAIMLER, VW and BMW**

- (91) DAIMLER participated throughout the relevant period in all aspects of the relevant behaviour, through engineers and technical managers at various hierarchical levels who took part in the above-mentioned meetings of the ‘circles of 5’ and in further contacts with VW and BMW.<sup>64</sup>
- (92) Volkswagen, Audi and Porsche participated throughout the relevant period in all aspects of the relevant conduct, through engineers and technical managers at various hierarchical levels who took part in the above-mentioned meetings of the ‘circles of 5’ and in further contacts with DAIMLER and BMW. Porsche did not participate in all relevant meetings, notably not in the meetings of [...].<sup>65</sup>

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

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

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

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

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

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

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

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

<sup>64</sup> See Section 4.1

<sup>65</sup> See Section 4.1.

- (93) BMW participated throughout the relevant period in all aspects of the relevant conduct, through engineers and technical managers at various hierarchical levels who took part in the above-mentioned meetings of the ‘circles of 5’ and in further contacts with DAIMLER and VW.<sup>66</sup>

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

- (94) Having regard to the body of evidence, the facts as described in Section 4 and the parties’ clear and unequivocal acknowledgement of the facts and the legal qualification thereof contained in their settlement submissions, the legal assessment is set out as follows.

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

- (95) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States (or contracting parties) and which have as their object or effect the prevention, restriction or distortion of competition within the internal market (territory covered by the EEA Agreement).<sup>67</sup>

#### *5.1.1. Agreements and/or concerted practices*

##### *Principles*

- (96) Article 101(1) of the Treaty refers to ‘agreements’ and ‘concerted practices’. An agreement can be said to exist when the parties adhere to a common plan that limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action on the market.<sup>68</sup> It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties.<sup>69</sup> An infringement of Article 101(1) of the Treaty does not require the parties to have agreed in advance on a comprehensive common plan. The undertakings concerned need only to have expressed their joint intention to conduct themselves on the market in a specific way.<sup>70</sup>

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<sup>66</sup> See Section 4.1.

<sup>67</sup> The case law of the Court and the General Court of the European Union concerning Article 101 of the Treaty also applies to Article 53 of the EEA Agreement. See recitals 4 and 15, as well as Article 6 of the EEA Agreement. With the understanding that the same considerations also apply to Article 53 EEA Agreement only Article 101 of the Treaty is referenced here below.

<sup>68</sup> Judgment of the General Court of 16 June 2015, *FSL and Others v Commission*, T-655/11, ECLI:EU:T:2015:383, paragraph 441 (confirmed on appeal by Judgment of the Court of Justice of 27 April 2017, *FSL and Others v Commission*, C-469/15 P, ECLI:EU:C:2017:308).

<sup>69</sup> See Judgment of the General Court of 20 March 2002, *HFB and Others v Commission*, T-9/99, ECLI:EU:T:2002:70, paragraphs 199-200, and Judgment of the Court of Justice of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, ECLI:EU:C:2006:592, paragraphs 80, 94-100, 110-113, 135-142 and 162.

<sup>70</sup> See Judgment of the General Court of 20 April 1999, *LVM and Others v Commission* (PVC II), T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 715.

- (97) Tacit approval of an unlawful initiative, without public distancing from its content or reporting it to the authorities, encourages the continuation of the infringement and compromises its discovery.<sup>71</sup>
- (98) Article 101(1) of the Treaty draws a distinction between the concept of ‘concerted practices’ and ‘agreements between undertakings’, the object is to bring within the prohibition of those articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition.<sup>72</sup>
- (99) The criteria of coordination and cooperation laid down by the case law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy, which they intend to adopt on the common market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct, which they themselves have decided to adopt or contemplate adopting on the market.<sup>73</sup>
- (100) Conduct may therefore be regarded as a concerted practice and thus fall within the prohibition laid down in Article 101(1) of the Treaty if the undertakings concerned, despite not expressly agreeing on a common plan for their conduct on the market, have knowingly colluded or participated in collusion which facilitates the coordination of their commercial policies.<sup>74</sup> The existence of a concerted practice may also be demonstrated by evidence that contacts took place between several undertakings and that those undertakings were specifically pursuing the objective of removing from the outset uncertainty as to the conduct they are expected to adopt.<sup>75</sup>
- (101) Although under Article 101(1) of the Treaty the concept of a concerted practice requires not only concertation, but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market. That is all the more true where the undertakings concert together on a regular basis over a long period. A

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<sup>71</sup> Judgment of the Court of Justice of 21 January 2016, *Eturas and Others*, C-74/14, ECLI:EU:C:2016:42, paragraph 28.

<sup>72</sup> See Judgment of the Court of Justice of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraph 64.

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

<sup>74</sup> See Judgment of the General Court of 17 December 1991, *Hercules Chemicals v Commission*, T-7/89, ECLI:EU:T:1991:75, paragraph 256.

<sup>75</sup> See Judgment of the Court of Justice of 16 December 1975, *Suiker Unie and Others v Commission*, 40-48/73, 50/73, 54-56/73, 111/73, 113/73 and 114/73, ECLI:EU:C:1975:174, paragraphs 175 and 179; and Judgment of the General Court of 12 July 2011, *Fuji Electric v Commission*, T-132/07, ECLI:EU:T:2011:344, paragraph 88.

concerted practice as defined above falls within the scope of Article 101(1) of the Treaty, even in the absence of anti-competitive effects on the market.<sup>76</sup>

- (102) In the case of a complex infringement of long duration, the Commission is not required to classify the anti-competitive conduct exclusively as an agreement or a concerted practice. The concepts of ‘agreement’ and ‘concerted practice’ are not clearly defined and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. However, it would be artificial to attempt to subdivide a clearly continuous common approach with the same overall objective into several discrete forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time.<sup>77</sup>

#### *Application in this case*

- (103) It follows from the facts that DAIMLER, VW and BMW participated in the relevant period in agreements and/or concerted practices in the form of competitor contacts, in which they discussed and coordinated the development and introduction of exhaust gas cleaning systems for new diesel passenger cars for the EEA. These systems were an exhaust gas after-treatment for NO<sub>x</sub> with liquid SCR-systems.
- (104) They agreed AdBlue tank sizes and refill ranges and exchanged information on assumed average AdBlue-consumption of diesel passenger cars for the EEA.
- (105) DAIMLER, VW and BMW coordinated the desired AdBlue tank sizes and ranges possible with one AdBlue refill. They discussed the introduction of small AdBlue tanks in the EEA for new diesel passenger car models and the range between AdBlue refills.<sup>78</sup> On 25 June 2009, DAIMLER, VW and BMW agreed that the ranges between two AdBlue refills should be approximately 10 000 km, which would correspond to an AdBlue tank size of 8 - 10 litres for most car manufacturers.<sup>79</sup> Consequently, a common understanding existed that assumed average AdBlue-consumption would be approximately 0.8 - 1 litre per 1 000 km.<sup>80</sup> Until 2014, DAIMLER, VW and BMW continued to discuss and coordinate both AdBlue tank sizes and corresponding refills ranges and confirmed repeatedly their agreement on small tank sizes and refill ranges of 10 000 km for the EEA.<sup>81</sup>
- (106) The manufacturers had the common understanding that an AdBlue-consumption of approximately 0.8 - 1 litre per 1 000 km would in principle suffice to safely meet the requirements of the Euro 6 standard applicable in the EEA at that time. However, DAIMLER, VW and BMW were already aware at that time that it would be

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<sup>76</sup> See Judgment of the Court of Justice of 8 July 1999, *Hüls v Commission*, C-199/92 P, ECLI:EU:C:1999:358, paragraphs 158-166.

<sup>77</sup> See Judgment of the General Court of 17 December 1991, *Hercules Chemicals v Commission*, T-7/89, ECLI:EU:T:1991:75, paragraph 264. See also Judgment of the General Court of 20 April 1999, *LVM and Others v Commission* (PVC II), T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 696.

<sup>78</sup> See paragraphs (77).

<sup>79</sup> See paragraph (77).

<sup>80</sup> See paragraphs (79) and (80).

<sup>81</sup> See paragraph (77).

technically possible with future SCR-systems to achieve even greater NO<sub>x</sub>-reductions beyond regulatory requirements under certain real driving conditions. Furthermore, DAIMLER, VW and BMW had the common understanding that AdBlue-consumption would increase with the introduction of stricter regulatory requirements, in particular the RDE test procedure in the EEA.<sup>82</sup>

- (107) DAIMLER, VW and BMW repeatedly exchanged information on AdBlue tank sizes, ranges and assumed average AdBlue-consumption of respective current or planned diesel passenger car models at that time.<sup>83</sup> In that way they created a high degree of transparency among themselves regarding their at that time current and future conduct on the market.
- (108) In summary, DAIMLER, VW and BMW coordinated the sizes of their AdBlue tanks and the ranges between two refills for the EEA. They agreed to limit the sizes of the AdBlue tanks to 8 - 10 litres, agreed refill ranges of around 10 000 km and exchanged information on assumed average AdBlue-consumption. However, DAIMLER, VW and BMW never actually introduced AdBlue tanks with uniform sizes and ranges. Actual tank sizes were often well above the agreed volumes.<sup>84</sup>
- (109) References to agreed AdBlue tank sizes and ranges and the exchange of information on assumed average AdBlue-consumption can be found in minutes of meetings, e-mails and other contacts at expert meetings in the multi-layer framework of the 'circles of 5'. In this context, the coordination was repeatedly mentioned at different hierarchical levels and confirmed, which filtered down through a pyramid of expert circles. The parties thus maintained their common understanding that they wished to coordinate their conduct with regard to certain aspects of the SCR-system.
- (110) The conduct of DAIMLER, VW and BMW described above concerning the AdBlue tank sizes, refill ranges and assumed average AdBlue-consumption for their new diesel passenger cars therefore shows all the characteristics of agreements and/or concerted practices within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

#### 5.1.2. *Restriction of competition*

##### *Principles*

- (111) Article 101(1) of the Treaty and Article 53(1) EEA prohibit agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. They expressly include as being restrictive of competition agreements or concerted practices, which:
  - (a) [...];
  - (b) limit or control production, markets or technical development;
  - (c) [...].<sup>85</sup>

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<sup>82</sup> Despite similar projections in terms of future AdBlue-consumption, the NO<sub>x</sub>-cleaning strategies of the manufacturers for diesel passenger cars with SCR-system for the EEA differed. See paragraph (80).

<sup>83</sup> See paragraph (84).

<sup>84</sup> See footnote 48.

<sup>85</sup> This list is not exhaustive.

- (112) The anti-competitive object and effect of an infringement are not cumulative, but alternative conditions for the assessment of whether such an agreement falls within the scope of the prohibition laid down in Article 101(1) of the Treaty.<sup>86</sup>
- (113) According to settled case law, certain forms of coordination between undertakings affect competition in such a way that an assessment of their effects may be deemed superfluous.<sup>87</sup>
- (114) That case law is based on the fact that certain forms of coordination between undertakings may, by their very nature, be regarded as harmful to the proper functioning of normal competition.<sup>88</sup>
- (115) It is established that certain collusive behaviour may be considered so likely to have negative effects, in particular on the quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty and Article 53 of the EEA Agreement, to prove that they have actual effects on the market.<sup>89</sup> According to settled case law, for the purposes of applying Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement, the effects of an agreement need not be taken into account where its object is to prevent, restrict or distort competition in the internal market.<sup>90</sup> Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved.<sup>91</sup>
- (116) In order to establish the anti-competitive nature of an agreement and/or concerted practices and to determine whether the effect on competition may be regarded as sufficient to constitute a restriction of competition by object within the meaning of Articles 101(1) of the Treaty and 53(1) of the EEA Agreement, it is necessary to take

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<sup>86</sup> See Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, ECLI:EU:C:2009:343, paragraph 55.

<sup>87</sup> See Judgment of the Court of Justice of 30 June 1966, *Société Technique Minière*, 56/65, ECLI:EU:C:1966:38; Judgment of the Court of First Instance of 6 July 2000, *Volkswagen v Commission*, T-62/98, ECLI:EU:T:2000:180, paragraph 178; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraph 34; Judgment of the Court of Justice of 11 September 2014, *Groupement des Cartes Bancaires/Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 49; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 115 and the case law cited; Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 434.

<sup>88</sup> See Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 114 and the case law cited; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraph 35.

<sup>89</sup> See Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 51. See also Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 341.

<sup>90</sup> Judgment of the Court of Justice of 20 January 2016, *Toshiba Corporation v Commission*, C-373/14 P, ECLI:EU:C:2016:26, paragraph 25.

<sup>91</sup> Judgment of the General Court of 6 July 2000, *Volkswagen AG v Commission*, T-62/98, ECLI:EU:T:2000:180, paragraph 178; Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires/Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 49; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe/Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 113.

account of the content of its provisions and the objectives it pursues and of the economic and legal context of which it forms part. In order to establish that link, it is also necessary to consider both the nature of the goods and services concerned and the real conditions of the functioning and structure of the market or markets in question.<sup>92</sup> Intention is not a necessary factor, but it can also be taken into account.<sup>93</sup>

- (117) An exchange of information capable of removing uncertainty among the parties as to the timing, extent and modalities of the adjustment of the undertakings' conduct on the market, including in the light of technological developments, must be regarded as having an anti-competitive object.<sup>94</sup>
- (118) The exchange of information between competitors with regard to their intended conduct on the market should enable them to agree on a common coordination of their competitive actions (as it removes strategic uncertainty) and thus facilitate collusion.<sup>95</sup> The exchange of information on such future intentions is therefore, by its very nature, detrimental to the proper functioning of normal competition. In particular, the exchange of information on planned future behaviour is likely to lead to a collusive outcome on the market. Exchanges of past and present information<sup>96</sup>, when carried out as part of an overall anti-competitive scheme with the single anti-competitive aim of coordinating the competitors' future conduct on the market, in

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<sup>92</sup> See Judgment of the Court of Justice of 26 September 2018, *Infineon Technologies AG v Commission*, C-99/17 P, ECLI:EU:C:2018:773, paragraph 156; Judgment of the General Court of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 117; Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 53; Judgment of the Court of Justice of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECLI:EU:C:2013:160, paragraphs 36-37; Judgment of the Court of Justice of 16 July 2015, *ING Pensii*, C-172/14, ECLI:EU:C:2015:484, paragraphs 33-44. See also Judgment of the General Court of 8 September 2016, *Lundbeck v Commission*, T-472/13, ECLI:EU:T:2016:449, paragraph 438: The experience referred to in *Groupement des cartes bancaires* “does not concern the specific category of an agreement in a particular sector, but rather refers to the fact that it is established that certain forms of collusion are, in general and in view of the experience gained, so likely to have negative effects on competition that it is not necessary to demonstrate that they had such effects in the particular case at hand. The fact that the Commission has not, in the past, considered that a certain type of agreement was, by its very object, restrictive of competition is therefore not, in itself, such as to prevent it from doing so in the future following an individual and detailed examination of the measures in question having regard to their content, purpose and context.”

<sup>93</sup> See Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 118; Judgment of the Court of Justice of 11 September 2014, *Groupement des cartes bancaires v Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 54.

<sup>94</sup> See Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands BV and Others*, C-8/08, ECLI:EU:C:2009:343, paragraph 41, and Judgment of the Court of Justice of 19 March 2015, *Dole Food Company, Inc. and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraph 122; see also Judgment of the Court of Justice of 26 September 2018, *Infineon Technologies AG v Commission*, C-99/17 P, ECLI:EU:C:2018:773, paragraphs 157-158.

<sup>95</sup> Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 11, 14.1.2011, p. 1 (‘Horizontal Guidelines’), paragraphs 66, 73 and 74.

<sup>96</sup> Commission Decision 92/157/EEC in Case IV/31.370, *UK Agricultural Tractor Registration Exchange* (OJ L 68, 13.3.1992, p. 19), paragraph 50; Commission Decision 98/4/ECSC in Case IV/36.069 *Wirtschaftsvereinigung Stahl* (OJ L 1, 3.1.1998, p. 10), paragraph 17, and Horizontal Guidelines, paragraph 90, footnote 2.

particular by enabling monitoring of any deviation of collusive outcome<sup>97</sup>, may equally contribute to removing future strategic uncertainty between competitors and therefore pursue the same anti-competitive aim as the exchange of information about future intentions.

- (119) Article 101 of the Treaty (and Article 53 of the EEA Agreement), like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such.<sup>98</sup> It follows that concerted practices may have an anti-competitive object even though they are not directly linked to consumer prices. Consequently, it is not possible on the basis of the wording of Article 101(1) of the Treaty to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.<sup>99</sup>
- (120) Finally, the fact that an agreement or concerted practice pursues a legitimate objective does not preclude that it is regarded as having an object restrictive of competition as regards another aim pursued, which in turn cannot be regarded as legitimate, also with a view to the content of the agreement or concerted practice and its context.<sup>100</sup> In so far as pro-competitive effects are claimed, they have to be relevant and solely caused by the respective agreement or concerted practice, if proven, to be so significant as to give reason to doubt that the agreement or concerted practice concerned sufficiently distorts competition and that it therefore constitutes a restriction by object.<sup>101</sup>

#### *Application in this case*

- (121) The agreements and/or concerted practices concluded by DAIMLER, VW and BMW in respect of their SCR-systems included the coordination of AdBlue tank sizes and refill ranges, as well as the exchange of assumed average AdBlue-consumption for their new diesel passenger car models with SCR-system in the relevant period. For this purpose, they had regular contact and exchanged competitively sensitive information on current and future strategies.

#### Content of the agreements and/or concerted practices

- (122) In the relevant period, DAIMLER, VW and BMW coordinated their AdBlue tank sizes and the correspondingly possible refill ranges for the EEA.<sup>102</sup> On 25 June 2009, DAIMLER, VW and BMW agreed on AdBlue tanks with a size of 8 - 10 litres,

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<sup>97</sup> Horizontal Guidelines, paragraph 67.

<sup>98</sup> See Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08 P, ECLI:EU:C:2009:343, paragraph 38.

<sup>99</sup> Judgment of the Court of Justice of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08 P, ECLI:EU:C:2009:343, paragraphs 36-39; Judgment of the Court of Justice of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, ECLI:EU:C:2015:184, paragraphs 123-125.

<sup>100</sup> Judgment of the Court of Justice of 11 September 2014, *Groupeement des cartes bancaires/Commission*, C-67/13 P, ECLI:EU:C:2014:2204, paragraph 70; Judgment of the Court of Justice of 30 January 2020, *Generics (UK) Ltd.*, C-307/18, ECLI:EU:C:2020:52, paragraph 103; Judgment of the Court of Justice of 2 April 2020, *Bank Budapest*, C-228/18, ECLI:EU:C:2020:265, paragraph 52.

<sup>101</sup> Judgment of the Court of Justice of 30 January 2020, *Generics (UK) Ltd.*, C-307/18, ECLI:EU:C:2020:52, paragraph 107.

<sup>102</sup> See paragraph (77).

which in their view corresponded to an actual range of 10 000 km.<sup>103</sup> Consequently, a common understanding existed that assumed average AdBlue-consumption of their new diesel passenger cars would not exceed 0.8 - 1.0 l / 1 000 km.<sup>104</sup> Furthermore, DAIMLER, VW and BMW had the common understanding that AdBlue consumption would increase with introduction of stricter regulatory requirements, in particular the RDE test procedure in the EEA.<sup>105</sup>

- (123) When estimating average AdBlue-consumption of their new diesel passenger car models with SCR-system, the manufacturers were aware that it would be possible in future with SCR-systems to achieve even higher NO<sub>x</sub>-reductions beyond regulatory requirements under certain real driving conditions.<sup>106</sup> In many cases, higher AdBlue-consumption allows even more effective NO<sub>x</sub>-cleaning.<sup>107</sup> The manufacturers therefore had the option of pursuing an over-fulfilment strategy.<sup>108</sup> Through their common understanding that AdBlue-consumption would increase in future with introduction of stricter regulatory requirements, they signalled to each other that over-fulfilment was not strived for.<sup>109</sup>
- (124) DAIMLER, VW and BMW exchanged information about characteristics and performance indicators of different car models in respect of AdBlue tank sizes, refill ranges and assumed average AdBlue-consumption. This exchange of information increased transparency with regard to planning and implementation of certain aspects of SCR-technology for new diesel passenger car models.<sup>110</sup>
- (125) By its very nature, the conduct with regard to SCR-systems was liable to restrict competition on product characteristics and thus in terms of technical development in the field of NO<sub>x</sub>-cleaning for new diesel passenger cars for the EEA and to limit choice for customers. That conduct served to reduce uncertainty as to their future conduct on the market in relation to certain aspects of the SCR systems to be installed in new diesel passenger cars.<sup>111</sup>

Aim of the agreements and/or concerted practices

- (126) With regard to NO<sub>x</sub>-cleaning beyond regulatory requirements, the exchange of information on average AdBlue-consumption served to reduce uncertainty about future conduct of the manufacturers on the market.<sup>112</sup> It served also to prevent the risk that any of them would be worse off for failing to have gone along with more effective NO<sub>x</sub>-cleaning.<sup>113</sup>

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<sup>103</sup> See paragraph (77).

<sup>104</sup> See paragraphs (79) and (80).

<sup>105</sup> See paragraph (80).

<sup>106</sup> See paragraph (81).

<sup>107</sup> See paragraph (48).

<sup>108</sup> See paragraph (81).

<sup>109</sup> See paragraph (80) and (83).

<sup>110</sup> See paragraph (84).

<sup>111</sup> See paragraph (84).

<sup>112</sup> See paragraph (84).

<sup>113</sup> See paragraph (88).

- (127) In terms of customer-friendliness, DAIMLER, VW and BMW agreed not to offer larger AdBlue tanks that would have allowed longer refill ranges.<sup>114</sup> Consequently, following an implementation of the coordination on AdBlue tank sizes, customers interested in purchasing one of their new diesel passenger cars with SCR-system would have had no option other than to purchase a new diesel car with an AdBlue tank with the coordinated small volume. Even with an average AdBlue-consumption of 1 litre per 1 000 km, customers would have had no option other than to refill AdBlue once or more between two service intervals.<sup>115</sup> DAIMLER, VW and BMW agreed on AdBlue refill ranges of approximately 10 000 km<sup>116</sup> to ensure that there would be no competing offers with significantly longer refill ranges. In the Commission's view, this potential restriction for customers cannot be offset by the fact that the manufacturers at the same time considered that construction of a comprehensive infrastructure with AdBlue pumps would in any event largely eliminate the disadvantages of customer refill of AdBlue.<sup>117</sup>
- (128) By reducing uncertainty about NO<sub>x</sub>-cleaning beyond regulatory requirements and the customer-friendliness of AdBlue refills, DAIMLER, VW and BMW wanted to avoid competition on how best to achieve their (sometimes contradictory) objectives. The coordination served to eliminate the competitive risks arising from the divergent solutions 'small tank or large tank' and 'cleaning solution with the sole aim of meeting or exceeding regulatory requirements'.<sup>118</sup>

#### Economic and legal context

- (129) DAIMLER, VW and BMW are the largest German car manufacturers. Together they hold a strong market position in Europe, and in Germany especially. DAIMLER, Audi, Porsche and BMW saw themselves as 'premium' car manufacturers and Volkswagen as the leading quality supplier in volume business.<sup>119</sup> In view of their market position, technical capabilities and self-image, they were in a position to compete on over-fulfilment in terms of NO<sub>x</sub>-cleaning.<sup>120</sup>
- (130) Diesel passenger cars are a specific feature of the European car market, where they record high sales due to lower fuel consumption of these cars and tax breaks.<sup>121</sup> Notably the German car industry was for a long time particularly focused on the production and sale of diesel-powered passenger cars and presented itself as the

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<sup>114</sup> See paragraph (77).

<sup>115</sup> See paragraph (77).

<sup>116</sup> See paragraph (78).

<sup>117</sup> See paragraph (78).

<sup>118</sup> In particular, small tanks allowed for reduced fuel consumption, reduced CO<sub>2</sub>-emissions, cost savings, and advantages in terms of weight and construction space. They were sufficient to obtain official authorisations without requiring customers to refill AdBlue too frequently. However, where effective NO<sub>x</sub>-cleaning required higher AdBlue-consumption under certain real driving conditions, smaller tanks had to be refilled more frequently, if the effectiveness of NO<sub>x</sub>-cleaning was to be maintained. By contrast, larger tanks allowed more effective NO<sub>x</sub>-cleaning under certain real driving conditions without overly frequent refills. At the same time, they increased the weight of the vehicle, increased fuel consumption and CO<sub>2</sub>-emissions, entailed higher costs and took up more construction space.

<sup>119</sup> See paragraph (37).

<sup>120</sup> See paragraphs (37), (39), (48) and (74) to (90).

<sup>121</sup> See paragraph (38).

world leader in diesel cars.<sup>122</sup> Diesel passenger cars are far less common, by contrast, notably in the USA and Asia (and many other countries). DAIMLER, VW and BMW were among the main proponents of the idea that introducing diesel technology in Europe would be an important factor in reducing fuel consumption and CO<sub>2</sub>-emissions and promoting clean car technologies.<sup>123</sup>

- (131) Since diesel engines had been promoted as environment-friendly technology for several years, risks for their public image existed in connection with NO<sub>x</sub>-cleaning.<sup>124</sup>
- (132) DAIMLER, VW and BMW worked together in trying to persuade the mineral oil industry to build a customer-friendly AdBlue refill infrastructure.<sup>125</sup> In particular, they gathered information to convince the mineral oil industry that building an AdBlue infrastructure would make economic sense. They cited, among other things, the increasing number of diesel cars equipped with SCR systems, increasing AdBlue-consumption due to stricter regulatory requirements, and the strategy of small AdBlue tanks, which the parties considered necessary to persuade the mineral oil industry that there was a business case.
- (133) According to the case law<sup>126</sup>, a restriction of competition by object may also exist, where the conduct of the undertakings involved at the same time serves a legitimate purpose. This is notably the case, if the coordination of competitors goes beyond what is necessary to achieve the additional legitimate purpose. To promote building an AdBlue-infrastructure it was not indispensable in the view of the Commission to agree certain tank sizes or refill ranges. The same applies to the insufficiently anonymised or aggregated information exchange on assumed average AdBlue-consumption between DAIMLER, VW and BMW.
- (134) By agreeing on AdBlue tank sizes of 8 - 10 litres, DAIMLER, VW and BMW wanted, among other things, to save construction space in the car and to reduce the weight (and thus fuel consumption and CO<sub>2</sub>-emissions) of diesel passenger cars in the EEA.<sup>127</sup> DAIMLER, VW or BMW could each have introduced small AdBlue tanks independently of one another. Instead, they strived to coordinate so as to avoid competition between them on the most intelligent solution to achieve potentially conflicting objectives.
- (135) DAIMLER, VW and BMW had internal concerns about the financial impact of SCR-systems and voiced them at meetings of the 'circles of 5'. They made joint efforts to reduce costs of such systems, for example, by seeking to standardise requirements for individual components.<sup>128</sup>

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<sup>122</sup> See paragraph (39).

<sup>123</sup> See paragraphs (38) and (39).

<sup>124</sup> See paragraph (88).

<sup>125</sup> See paragraph (78).

<sup>126</sup> See paragraph (120).

<sup>127</sup> See paragraph (77).

<sup>128</sup> [...].

- (136) However, such cost considerations cannot justify agreeing on particular tank sizes or ranges and exchanging information on assumed average AdBlue-consumption, since this conduct was not necessary to reduce the costs.
- (137) As regards the legal context, Regulation (EC) No 715/2007 introduced stricter emission requirements for the type-approval of passenger cars. The Euro 5 standard was due to enter into force in 2009, the Euro 6 standard in 2014. The RDE test procedure was defined in 2016.<sup>129</sup>
- (138) The regulatory framework for passenger car emissions (including diesel passenger cars) sets minimum requirements, which must be met by new cars sold in the EEA. However, car manufacturers are free to go beyond those minimum requirements, i.e. to make and sell new cars that are more environment-friendly than the prescribed minimum requirements. That gives car manufacturers room to compete on the effectiveness of exhaust gas cleaning.<sup>130</sup> Moreover, aims and intentions expressed in the EU legislation concerning emission standards for passenger cars confirm that technical development and innovation in connection with effective exhaust gas cleaning systems for passenger cars are considered to be of general public interest.<sup>131</sup>

*Conclusion on the restriction of competition*

- (139) The Commission therefore concludes that DAIMLER, VW and BMW entered into agreements and/or engaged in concerted practices which, by their nature, were liable to restrict competition regarding product characteristics of their new diesel passenger cars as concerns AdBlue tank sizes, refill ranges and NO<sub>x</sub>-cleaning beyond regulatory requirements; and, thus, to restrict technical development in the area of NO<sub>x</sub>-cleaning with SCR-systems for new diesel passenger cars in the EEA and to limit customer choice.
- (140) At no time did DAIMLER, VW and BMW actually introduce SCR-systems with AdBlue-Tanks of uniform size and/or range. Actual tank sizes were often much above the discussed volumes.<sup>132</sup> Furthermore, the cleaning strategies used by the manufacturers differed.<sup>133</sup> On the question, if and to what extent the diesel passenger cars with SCR-system sold in the EEA by the parties over-fulfilled regulatory requirements, the Commission has made no finding. However, this does not put the existence of an infringement by object in doubt. According to constant case law effects of an agreement or concerted practice do not need to be taken into account for the application of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement, if they were already by their nature liable to eliminate, restrict or distort competition in the internal market.<sup>134</sup>

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<sup>129</sup> See paragraphs (41) to (46).

<sup>130</sup> See paragraph (88).

<sup>131</sup> See Section 2.4, notably footnote 22

<sup>132</sup> See paragraph (77). BMW introduced a combination of NSC and SCR and used a twin-tank system for AdBlue to counter restrictions of construction space in the cars and still ensure a sufficient range of the SCR-system. DAIMLER mainly used AdBlue tank systems with a volume well above the 8 litres discussed originally, usually over 20 litres. VW used single-tank solutions and twin-tank solutions with large volumes well over 8 litres. See footnote 48.

<sup>133</sup> See paragraph (80).

<sup>134</sup> See paragraph (120).

- (141) The Commission therefore concludes that the above-mentioned agreements and/or concerted practices concerning SCR-systems for new diesel passenger cars in the EEA in the form of a restriction of competition by object are caught by Article 101(1)(b) of the Treaty and Article 53(1)(b) of the EEA Agreement.

### 5.1.3. *Single and continuous infringement*

#### *Principles*

- (142) A complex cartel may be viewed as a *single, continuous infringement* for the period in which it existed. The concept of a ‘single agreement’ or ‘single infringement’ presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.<sup>135</sup> The agreement or concerted practice may be changed from time to time, or its mechanisms adapted or enhanced to take account of new developments. The validity of that assessment cannot be challenged on the ground that one or several elements of a series of acts or continuous conduct could also constitute in themselves an infringement of Article 101 of the Treaty.<sup>136</sup>
- (143) An infringement of Article 101(1) of the Treaty and of Article 53(1) of the EEA Agreement can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of those provisions. Accordingly, if the fact that different actions form part of an ‘overall plan’ because they have the same objective distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement as a whole.<sup>137</sup>
- (144) According to the case law, “the agreements and concerted practices referred to in [Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement] necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged”.<sup>138</sup>
- (145) Although a cartel is a joint enterprise, each participant in the arrangement is able to play its own particular role. One or more cartel participants may be dominant in the role of ringleader. There may be instances of internal conflicts and rivalries, or even of deception, but that does not, however, prevent the arrangement from constituting an agreement and concerted practices under Article 101(1) of the Treaty and of Article 53(1) of the EEA Agreement as long as the parties continue to pursue a single common objective. However, the mere fact that each undertaking takes part in the

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<sup>135</sup> Judgment of the Court of First Instance of 15 March 2000, *Cimenteries CBR v Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, ECLI:EU:T:2000:77, paragraph 3699.

<sup>136</sup> Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 81.

<sup>137</sup> Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 258.

<sup>138</sup> Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 79.

infringement in ways particular to it does not relieve it of responsibility for the entire infringement, including conduct which although put into effect by other participating undertakings, has the same anti-competitive object or effect.<sup>139</sup>

- (146) 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. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk.<sup>140</sup>
- (147) An undertaking may thus have participated directly in all the forms of anti-competitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, the undertaking may have participated directly in only some of the forms of anti-competitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anti-competitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole.<sup>141</sup>
- (148) The fact that the undertaking concerned did not participate directly in all the constituent elements of the infringement does not relieve it of responsibility for the infringement of Article 101(1) of the Treaty and of Article 53(1) of the EEA Agreement. Such a circumstance may nevertheless be taken into account when assessing the gravity of the infringement which it is found to have committed. Such a conclusion is not therefore contrary to the principle that responsibility for such infringements is personal in nature, it does not ignore the individual analysis of the

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<sup>139</sup> Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 80.

<sup>140</sup> Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 83. Judgment of the Court of Justice of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, ECLI:EU:C:2015:416, paragraph 157, and Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 42.

<sup>141</sup> Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 43; Judgment of the Court of Justice of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, ECLI:EU:C:2015:416, paragraph 158; Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 83 and the case law referred to there; Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 87; Judgment of the Court of Justice of 30 November 2011, *Quinn Barlo and others v Commission* (T-208/06) ECLI:EU:T:2011:701, paragraph 128.

incriminating evidence and it does not breach the rights of defence of the undertakings involved.<sup>142</sup>

- (149) On the other hand, if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and was prepared to take the risk.<sup>143</sup>

*Application in this case*

- (150) On the basis of the facts described in Section 4 above, the Commission considers that the conduct of DAIMLER, VW and BMW as concerns SCR-systems for new diesel passenger cars constitutes a single, continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement. The coordination between DAIMLER, VW and BMW served to restrict competition on certain product characteristics of new diesel passenger cars with SCR systems for sale in the EEA.
- (151) This is supported by the fact that the contacts, which took place as part of this coordination, followed the same pattern, that the undertakings involved were the same and that employees of the parties, also on higher hierarchical levels, participated in the various aspects of behaviour (agreement of AdBlue tank sizes and ranges, as well as exchange of information on AdBlue-consumption) with a high degree of continuity, also as regards the decision-making positions held by them (see point (i) for further details).
- (152) The Commission also considers that DAIMLER, VW and BMW intended to contribute to the achievement of the anti-competitive aim of their contacts (see point (ii) for further details).
- (153) As set out in more detail under point (iii), DAIMLER, VW and BMW participated directly in all aspects of the anti-competitive conduct, which forms the single, continuous infringement. Porsche did not participate in all contacts in connection with the single, continuous infringement. However, Porsche could in any case reasonably have foreseen the other anti-competitive conduct planned or put into effect by the other participants in pursuit of the same objective, and was prepared to take the risk.<sup>144</sup> On that basis, the Commission intends to hold DAIMLER, VW and BMW liable for the entire single, continuous infringement.

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<sup>142</sup> See Judgment of the Court of First Instance of 12 December 2007, *BASF and UCB v Commission*, T-101/05 and T-111/05, ECLI:EU:T:2007:380, paragraph 160.

<sup>143</sup> Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 44; Judgment of the Court of Justice of 24 June 2015, *Fresh Del Monte Produce v Commission* and *Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, ECLI:EU:C:2015:416, paragraph 159.

<sup>144</sup> See paragraph (165).

*(i) On the existence of an overall plan to pursue a single anti-competitive aim*

Single anti-competitive aim

- (154) DAIMLER, VW and BMW expressed their joint intention to behave on the market in a certain way and followed a common plan to restrict their individual behaviour in the field of the development and introduction of new diesel passenger cars with liquid SCR-systems manufactured by them and sold in the EEA.
- (155) The coordination between DAIMLER, VW and BMW served to restrict competition on certain product characteristics of new diesel passenger cars with SCR-systems. The product characteristics concerned are AdBlue tank sizes and ranges (i.e. characteristics affecting customer refill comfort) and NO<sub>x</sub>-cleaning beyond regulatory requirements by way of the SCR-systems installed in the affected diesel passenger cars.

A common pattern of collusive conduct and operational stability underpinning the overall plan

- (156) The collusive conduct mostly took the form of competitor contacts between technical experts and managers of DAIMLER, VW and BMW in the framework of the organisational structure referred to as ‘circles of 5’, which were controlled by the same decision-making bodies [...].<sup>145</sup> This organisational structure was essentially in place in the same form throughout the relevant period, even if new subgroups were created or dissolved as required and responsibilities were sometimes reallocated between different subgroups.<sup>146</sup>
- (157) The employees, whose functions within the undertakings corresponded to the tasks of the various circles, participated in these contacts.<sup>147</sup>
- (158) The individuals involved in the conduct of DAIMLER, VW and BMW remained the same throughout the relevant period.
- (159) For the reasons set out above, the described collusive conduct of DAIMLER, VW and BMW constituted an overall plan with the single anti-competitive aim of restricting competition on product characteristics of new diesel passenger cars with SCR-systems<sup>148</sup> and, therefore, formed part of a single, continuous infringement.

*ii) On the contribution of the undertakings participating in the overall plan*

- (160) The direct and active participation in the meetings of the ‘circles of 5’ and other relevant contacts shows that DAIMLER, VW and BMW wanted to make a conscious contribution to the overall plan to restrict competition on product characteristics of new diesel passenger cars with SCR-systems and to limit customer choice.
- (161) DAIMLER, Volkswagen, Audi and BMW participated in all multilateral discussions, arrangements and understandings in the context of their conduct relating to the SCR-systems. Throughout the relevant period, they participated in the respective working groups or management meetings in the framework of the ‘circles of 5’. They were

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<sup>145</sup> See above paragraphs (68) to (73).

<sup>146</sup> For the organisational set-up of the hierarchical structures for the meetings of the ‘circles of 5’, see paragraphs (68) to (73). See also paragraphs (74) to (77).

<sup>147</sup> See paragraphs (91) to (93).

<sup>148</sup> See above paragraph (156).

involved in preparing meetings and actively contributed to the meetings, organised meetings from time to time and reported internally on the outcome of the meetings.<sup>149</sup>

(162) As member of the ‘circles of 5’, Porsche participated in many meetings and other contacts in which DAIMLER, VW and BMW coordinated their SCR-systems. In the framework of the ‘circles of 5’, Porsche in any case participated in the top-level management bodies, to which all subordinate working groups and expert groups reported.<sup>150</sup>

(163) The Commission therefore considers that DAIMLER, VW (Volkswagen and Audi, as well as Porsche) and BMW wanted to make a conscious contribution to the overall plan.

*(iii) On direct participation and awareness of the undertakings*

(164) The Commission holds DAIMLER, VW (Volkswagen, Audi, Porsche) and BMW liable for their participation in all aspects of the conduct from 25 June 2009 to 1 October 2014, as they participated directly in all types of contacts in the context of the ‘circles of 5’ concerning SCR-system technologies for new diesel passenger cars.

(165) Porsche did not participate in the meetings of [...] (as it had no diesel engine development of its own).<sup>151</sup> Porsche used Audi engines for its own diesel passenger cars (which came on the market from 2014).<sup>152</sup> However, Porsche could in any case reasonably have foreseen the other anti-competitive conduct planned or put into effect by the other participants in the cartel in pursuit of the same single anti-competitive aim and was prepared to take the risk. Porsche participated as member of the ‘circles of 5’ in many meetings and other contacts, in which DAIMLER, VW and BMW coordinated AdBlue tank sizes and ranges and exchanged information on assumed average AdBlue-consumption. In the framework of the ‘circles of 5’ Porsche participated in any case in top-level bodies, to which subordinated working groups and expert circles reported.

*Conclusion*

(166) For these reasons, the Commission considers that the conduct of DAIMLER, VW and BMW concerning their SCR-systems constitutes a single, continuous infringement prohibited by Article 101(1)(b) of the Treaty and Article 53(1)(b) of the EEA Agreement and that DAIMLER, VW and BMW participated in this single, continuous infringement throughout its duration.

*5.1.4. Effect on trade between EU Member States and between Contracting Parties to the EEA Agreement*

*Principles*

(167) Article 101(1) of the Treaty prohibits agreements or concerted practices, which could jeopardise the realisation of the internal market within the European Union by partitioning national markets or distorting competition in the internal market.

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<sup>149</sup> See paragraphs (73) and (91) to (93).

<sup>150</sup> See paragraph (73).

<sup>151</sup> See paragraphs (72), (73) and (92).

<sup>152</sup> See paragraph (74).

Similarly, Article 53(1) of the EEA Agreement covers agreements or concerted practices, which jeopardise the achievement of a single European Economic Area or distort competition within the EEA.

- (168) According to settled case law, “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 of fact, that [it] may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that [it] might hinder the attainment of a single market between Member States”.<sup>153</sup> Article 101 of the Treaty does not require that the agreements or concerted practices referred to therein must actually have an appreciable effect on trade between Member States, but merely requires proof that they are capable of having such an effect.<sup>154</sup>
- (169) However, the application of Article 101 of the Treaty and Article 53 of the EEA Agreement to a cartel is not limited to that part of sales that actually involve the transfer of goods to another Member State or to another contracting party to the EEA Agreement. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.<sup>155</sup>

#### *Application in this case*

- (170) The coordination covered the sale in the entire EEA of diesel passenger cars equipped with liquid SCR-systems in order to comply with the emission standards applicable in the EEA.
- (171) DAIMLER, VW and BMW manufacture diesel passenger cars in Germany and other Member States and sell them in the entire EEA.<sup>156</sup>
- (172) EU emissions rules apply to all diesel passenger cars sold in the entire EEA.<sup>157</sup>
- (173) The Commission therefore considers that the coordination between DAIMLER, VW and BMW was capable of having an appreciable effect on trade between Member States of the EU and between Contracting Parties of the EEA Agreement.

## **5.2. Non-applicability of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement**

### *Principles*

- (174) In accordance with Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement, the provisions of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement may be declared inapplicable to agreements or concerted practices,

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<sup>153</sup> See Judgment of the Court of Justice of 30 June 1966, *Société Technique Minière*, C-56/65, ECLI:EU:C:1966:38, paragraph 7; Judgment of the Court of Justice of 11 July 1985, *Remia*, C-42/84, ECLI:EU:C:1985:327, paragraph 22, Judgment of the Court of Justice of 28 April 1998, *Javico v Yves Saint Laurent Parfums*, C-306/96, ECLI:EU:C:1998:173, paragraph 16.

<sup>154</sup> See Judgment of the Court of Justice of 17 July 1997, *Ferriere Nord v Commission*, C-219/95 P, ECLI:EU:C:1997:375, paragraph 19.

<sup>155</sup> See Judgment of the Court of Justice of 10 March 1992, *ICI v Commission*, T-13/89, ECLI:EU:T:1992:35, paragraph 304.

<sup>156</sup> See paragraphs (14), (20) and (32).

<sup>157</sup> See Section 2.4.

which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or without creating opportunities to eliminate competition in respect of a substantial part of the products in question.

#### *Application in this case*

- (175) The parties argued that the contacts concerning development of SCR-technology also served the purpose of building a customer-friendly AdBlue-infrastructure and enhancing the marketability of the environment-friendly SCR-technology. However, the Commission considers that the agreements and/or concerted practices referred to in Section 5.1.1 concerning product characteristics of diesel passenger cars with SCR-systems do not meet the requirements of Article 101(3) of the Treaty and Artikel 53(3) of the EEA Agreement. It is already doubtful, in how far agreeing certain AdBlue tank sizes or refill ranges, as well as the insufficiently anonymised or aggregated exchange of information on assumed average AdBlue-consumption of their new diesel passenger car models with SCR-System were capable of bringing about the claimed advantages ‘customer-friendly AdBlue-infrastructure’ and ‘marketability of SCR-technology’. This conduct was, however, in any case not indispensable to achieve the building of a customer-friendly AdBlue-infrastructure and marketability of SCR-technology.
- (176) Therefore, the Commission considers that the conditions for exemption under Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement are not fulfilled in this case.

## **6. DURATION OF ADDRESSEES' PARTICIPATION TO THE INFRINGEMENT**

- (177) In light of the facts described in Section 4, the Commission concludes that the meeting of the parties on 25 June 2009, where the parties agreed AdBlue tank sizes and ranges, should be determined as start of the infringement. 1 October 2014, when the parties confirmed during a meeting that an understanding on uniform tank size would not be possible, should be determined as end date. The duration of the participation of each party in the infringement should then be set as follows:

**Table 1: Duration of the infringement**

Undertaking	Start date	End date	Duration (in days)
DAIMLER	25 June 2009	1 October 2014	1 925
VW	25 June 2009	1 October 2014	1 925
BMW	25 June 2009	1 October 2014	1 925

## **7. LIABILITY**

### *Principles*

- (178) The subject matter of Union competition law is, in principle, the ‘undertaking’, although this concept is not the same as the concept of an undertaking’s legal

personality in national commercial or tax law. It follows that the ‘undertaking’ involved in the infringement is not necessarily the same as the legal entity within a group of undertakings whose representatives actually participated in the cartel contacts. The concept ‘undertaking’ is not defined in the Treaty. However, it is clear from the case law that:

*“In prohibiting undertakings inter alia from entering into agreements or participating in concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market, [Article 101(1) of the Treaty ] is aimed at economic units which consist of a unitary organisation of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision”.*<sup>158</sup>

- (179) In Union law, the term ‘undertaking’ serves a specific purpose and applies to every economic unit, regardless of its legal status or its precise legal form under national law.<sup>159</sup> For each undertaking held liable in this case for an infringement of Article 101 of the Treaty, one or more legal persons are to be designated to assume legal liability for the infringement. According to the case law, “[...] Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of [Article 101 and 102 of the Treaty] ... if the companies concerned do not determine independently their own conduct on the market”.<sup>160</sup>
- (180) Where a subsidiary does not independently determine its conduct on the market, the company that determines its market strategy forms an economic unit with that subsidiary and may be held liable for an infringement on account of the fact that it belongs to the same undertaking.
- (181) The Commission can generally assume that a wholly owned, or nearly wholly owned subsidiary essentially follows the instructions it receives from its parent company, without needing to check whether the parent company has in fact exercised that power.<sup>161</sup> The parent company and/or the subsidiary may rebut this presumption by

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<sup>158</sup> Judgment of the Court of First Instance of 10 March 1992, *Shell International Chemical Company v Commission*, T-11/89, ECLI:EU:T:1992:33, paragraph 311; Judgment of the Court of First Instance of 14 May 1998, *Mo och Domsjö v Commission*, T-352/94, ECLI:EU:T:1998:103, paragraph 87.

<sup>159</sup> Although an ‘undertaking’ within the meaning of Article 101(1) of the Treaty does not necessarily coincide with the concept of a company having legal personality, the enforcement of decisions requires the identification of a natural or legal person to whom the decision is addressed. See Judgment of the Court of First Instance of 20 April 1999, *LVM v Commission*, T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 978.

<sup>160</sup> See Judgment of the Court of Justice of 12 July 1984, *Hydroterm*, C-170/83, ECLI:EU:C:1984:271, paragraph 11, and Judgment of the Court of First Instance of 12 January 1995, *Viho v Commission*, T-102/92, ECLI:EU:T:1995:3, paragraph 50, cited in the Judgment of the Court of First Instance of 30 September 2003, *Michelin v Commission*, T-203/01, ECLI:EU:T:2003:250, paragraph 290. See also Judgment of the Court of Justice of 14 July 1972, *ICI v Commission*, C-48/69, ECLI:EU:C:1972:70, paragraphs 132-133.

<sup>161</sup> Judgment of the Court of First Instance of 14 May 1998, *Stora Kopparbergs Bergslags v Commission*, T-354/94, ECLI:EU:T:1998:104, paragraph 80, confirmed in the Judgment of the Court of Justice of 16 November 2000, *Stora Kopparbergs Bergslags v Commission*, C-286/98 P, ECLI:EU:C:2000:630, paragraphs 27-29; Judgment of the Court of First Instance of 15 June 2005, *Tokai Carbon v*

providing sufficient evidence that the subsidiary “*decided independently on its own conduct on the market rather than carrying out the instructions given to it by its parent company and such that they fall outside the definition of an ‘undertaking’*”.<sup>162</sup>

It follows from the case law, moreover, that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded.<sup>163</sup>

- (182) When an infringement is found to have been committed against Article 101 of the Treaty, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time of the infringement, so that it can answer for it.<sup>164</sup>
- (183) If an undertaking that has committed an infringement of Article 101 of the Treaty sells the assets involved in the infringement at a later stage in order to withdraw from the relevant market, the undertaking remains liable for the infringement as long as the undertaking exists.<sup>165</sup> If the undertaking which has acquired the assets carries on the violation of Article 101 of the Treaty, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets, each undertaking being responsible for the period of the infringement in which it participated through these assets in the cartel. However, if the legal person initially responsible for the infringement no longer exists simply because it was acquired by another legal entity, the latter entity must be held liable for the entire period of the infringement and is accordingly liable for the activities of the entity that it acquired.<sup>166</sup> The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow the latter to

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*Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, ECLI:EU:T:2005:220, paragraph 60, and Judgment of the Court of Justice of 25 October 1983, *AEG v Commission*, Case 107-82, EU:C:1983:293, paragraph 50; Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and Others v Commission*, C-97/08 P, ECLI:EU:C:2009:262, paragraph 60; Judgment of the Court of Justice of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, ECLI:EU:C:2011:620, paragraph 56.

<sup>162</sup> Judgment of the Court of First Instance of 15 June 2005, *Tokai Carbon v Commission*, T-71/03, T-74/03, T-87/03 and T-91/03, ECLI:EU:T:2005:220, paragraph 61.

<sup>163</sup> Judgment of the Court of Justice of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, ECLI:EU:C:2011:620, paragraphs 60-62.

<sup>164</sup> Judgment of the Court of First Instance of 17 December 1991, *Enichem Anic v Commission*, T-6/89, ECLI:EU:T:1991:74, paragraph 236.

<sup>165</sup> Judgment of the Court of First Instance of 17 December 1991, *Enichem Anic v Commission*, T-6/89, ECLI:EU:T:1991:74, paragraph 237. Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni* (C-49/92 P) ECLI:EU:C:1999:356, paragraphs 47-49.

<sup>166</sup> Judgment of the Court of Justice of 16 November 2000, *Cascades v Commission*, C-279/98 P, ECLI:EU:C:2000:626, paragraphs 78-79: “*It falls, in principle, to the legal or natural person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking. Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it.*” (emph. added)

evade liability.<sup>167</sup> Liability for a fine may thus pass to a successor where the corporate entity, which committed the violation, has ceased to exist in law.

- (184) Different conclusions may, however, be reached when a business is transferred from one company to another, in cases where transferor and transferee are tied by economic links, that is to say, when they belong to the same undertaking. In such cases, liability for past behaviour of the transferor may transfer to the transferee, notwithstanding the fact that the transferor remains in existence.<sup>168</sup>

*Application in this case*

- (185) It follows from the described facts that DAIMLER, VW and BMW participated in the infringement. The participants in the meetings of the 'circles of 5' were employed by Daimler AG, Volkswagen AG, Audi AG, Dr. Ing. h.c. F. Porsche AG (or its predecessor) or BMW AG and worked for them.

- (186) The following legal entities participated in the infringement for those undertakings during the periods listed below:

DAIMLER

- (187) Daimler AG participated directly from 25 June 2009 to 1 October 2014.

VW

*Direct participation*

- (188) Volkswagen AG and Audi AG participated directly from 25 June 2009 to 1 October 2014.

- (189) Dr. Ing. h.c. F. Porsche AG participated directly from 25 June 2009 to 1 October 2014. The operational business of Porsche Automobil Holding SE was transferred on 13 November 2007 from Porsche Automobil Holding SE to Porsche AG 2007 and on 30 November 2009 from Porsche AG 2007 to Dr. Ing. h.c. F. Porsche AG.<sup>169</sup> Both transfers took place under the (ultimate) ownership and control of Porsche Automobil Holding SE and, thus, between entities all belonging to the same undertaking. [...].<sup>170</sup> Therefore, Dr. Ing. h.c. F. Porsche AG as economic successor of Porsche Automobil Holding SE and Porsche AG 2007 is held liable throughout the relevant period as direct participant.

*Liability of parent companies*

- (190) Throughout the relevant period, Audi AG was a nearly 100%-subsidiary of Volkswagen AG. The Commission therefore also holds Volkswagen AG liable as parent company of Audi AG for the entire relevant period.

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<sup>167</sup> Judgment of the Court of First Instance of 20 April 1999, *LVM v Commission*, T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, ECLI:EU:T:1999:80, paragraph 953.

<sup>168</sup> Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and Others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraphs 354-360; Judgment of the Court of First Instance of 27 September 2006, *Jungbunzlauer v Commission*, T-43/02, ECLI:EU:T:2006:270, paragraphs 132-133.

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

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

(191) From 7 December 2009, Volkswagen AG indirectly held a 49.9% stake in Dr. Ing. h.c. F. Porsche AG. The remaining (indirect) 50.1% of the shares were held at the time by Porsche Automobil Holding SE. On 1 August 2012, the indirect shareholding of Volkswagen AG in Dr. Ing. h.c. F. Porsche AG increased to 100%. It can therefore be presumed that Volkswagen AG exercised decisive influence over Dr. Ing. h.c. F. Porsche AG from 1 August 2012. Already in the period between 7 December 2009 and 31 July 2012, Volkswagen AG was in a position to exercise decisive influence over Dr. Ing. h.c. F. Porsche AG and did exercise such decisive influence on the basis of all the relevant factors relating to the economic, organisational and legal links by which Dr. Ing. h.c. F. Porsche AG was bound to Volkswagen AG. These factors are the following:

- From 7 December 2009 to 1 August 2012, Volkswagen AG held 49.9% and Porsche Automobil Holding SE 50.1% of the shares in Porsche Zwischenholding GmbH, then the 100% parent of Dr. Ing. h.c. F. Porsche AG.
- The board members of Dr. Ing. h.c. F. Porsche AG were and are nominated by the supervisory board of that same company. As sole shareholder of Dr. Ing. h.c. F. Porsche AG [...].<sup>171</sup>
- [...] <sup>172</sup> [...] <sup>173</sup>
- [...]
- Furthermore, certain mandated representatives at the same time held functions both at Volkswagen AG and at Dr. Ing. h.c. F. Porsche AG. In addition, switches between managers took place repeatedly between Volkswagen AG and Dr. Ing. h.c. F. Porsche AG<sup>174</sup>:
  - [...] From April 2010 to 2012 five of the ten shareholder representatives in the supervisory board of Dr. Ing. h.c. F. Porsche AG were at the same time board members of Volkswagen AG, [...] of Volkswagen AG. Between 30 November 2009 and 2012, [...] shareholder representatives in the supervisory board of Dr. Ing. h.c. F. Porsche AG were since their respective nomination [...] also members of the supervisory board of Volkswagen AG (...).<sup>175</sup>
  - Furthermore several double mandates existed as concerns Volkswagen AG and various Porsche-companies, such as with [...].<sup>176</sup>
  - According to Volkswagen AG, managers repeatedly switched between companies of Volkswagen group and Dr. Ing. h.c. F. Porsche AG.<sup>177</sup> [...].
- Before acquisition of the 49.9% stake in Porsche Zwischenholding GmbH, Volkswagen AG had, with the consent of the supervisory board of

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<sup>171</sup> [See confidential annex - only addressed to VW.]

<sup>172</sup> [See confidential annex - only addressed to VW.]

<sup>173</sup> [See confidential annex - only addressed to VW.]

<sup>174</sup> [...].

<sup>175</sup> [...].

<sup>176</sup> [...].

<sup>177</sup> [...].

Volkswagen AG, concluded a basic agreement with Porsche Automobil Holding SE, Dr. Ing. h.c. F. Porsche AG and others in September 2009 with the aim of creating an integrated automotive group with Porsche under the lead of Volkswagen AG.<sup>178</sup> Furthermore, in the basic agreement Volkswagen AG was granted, in the framework of a call-option, the non-withdrawable right to acquire the remaining shares of Porsche Zwischenholding GmbH and, thus, indirectly all shares of Dr. Ing. h.c. F. Porsche AG in case the planned merger of Porsche Automobil Holding SE into Volkswagen AG should not be possible.<sup>179</sup>

- After signing of the basic agreement in 2009, [...] board members of Volkswagen AG were nominated [...] as board members of Porsche Automobil Holding SE with corresponding responsibilities as in Volkswagen AG [...].<sup>180</sup> In addition, there were in the period between [...] 2009 and [...] 2010 two further board members of Porsche Automobil Holding SE (...).<sup>181</sup> The board of Porsche Automobil Holding SE (as representative organ) was in a position to exercise respective voting rights in the general assembly of Porsche Zwischenholding GmbH through the 50.1% shareholding of Porsche Automobil Holding SE in Porsche Zwischenholding GmbH.<sup>182</sup> Given the fact that [...] board members of Volkswagen AG were on the board of Porsche Holding SE, the Commission concludes that in this way the coordination of voting rights for the 49.9% share of Volkswagen AG with the 50.1% share of Porsche Holding SE in the interest of Volkswagen was ensured.
- [...].<sup>183</sup> The Commission therefore holds Volkswagen AG as parent company of Dr. Ing. h.c. F. Porsche AG liable for the period 7 December 2009 to 1 October 2014.

#### Porsche

- (192) From 25 June 2009 to 6 December 2009, Dr. Ing. h.c. F. Porsche AG participated directly in the infringement without Volkswagen AG exercising decisive influence over Dr. Ing. h.c. F. Porsche AG.

#### BMW

- (193) BMW AG participated directly from 25 June 2009 to 1 October 2014.

#### *Conclusion*

- (194) Consequently, the addressees of this Decision are:

- for DAIMLER:  
Daimler AG for its direct participation in the entire infringement.

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<sup>178</sup> [...], annual report Volkswagen 2009: „Zuvor hatte der Aufsichtsrat von Volkswagen der Grundlagenvereinbarung zwischen der Volkswagen AG, der Porsche Automobil Holding SE, ... zur Schaffung eines integrierten Automobilkonzerns unter Führung von Volkswagen zugestimmt.“

<sup>179</sup> [...], annual report Volkswagen 2009.

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

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

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

<sup>183</sup> [...].

- for VW:
  - Volkswagen AG for its direct participation in the entire infringement, as the parent company of Audi AG for the entire infringement and as the parent company of Dr. Ing. h.c. F. Porsche AG for the period of the infringement of 7 December 2009 to 1 October 2014,
  - Audi AG for its direct participation in the entire infringement, and
  - Dr. Ing. h.c. F. Porsche AG for its direct participation in the entire infringement.
- for BMW:
 

BMW AG for its direct participation in the entire infringement.

## **8. REMEDIES**

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

- (195) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation 1/2003.
- (196) Given the secrecy, with which cartel arrangements are usually put into practice, and the gravity of such infringements, the Commission therefore requires the undertakings, to which this Decision is addressed, to bring the infringement to an end (if they have not already done so) and to refrain from any agreement, concerted practice or decision of an association which may have the same or a similar object or effect.

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

- (197) Under Article 23(2) of Regulation No 1/2003<sup>184</sup>, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty and/or Article 53 of the EEA Agreement. For none of the undertakings participating in the infringement shall the fine exceed 10% of its total turnover in the preceding business year.
- (198) The Commission considers that based on the facts described and the assessment contained above the infringement has been committed intentionally or at least negligently. Since this infringement is an infringement by object, the parties cannot claim successfully that they did not act intentionally. Their conduct served to reduce uncertainty as to their future market conduct and to limit competitive pressure as concerns product characteristics.
- (199) The Commission therefore imposes fines on the undertakings to which this Decision is addressed.

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<sup>184</sup> 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 101 and 102] of the EC Treaty [...] shall apply *mutatis mutandis*". (OJ L 305/6 of 30 November 1994). The same Article also empowers the Commission to impose fines for infringements of EEA rules.

- (200) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation No 1/2003, regard shall be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003<sup>185</sup> (hereafter ‘Guidelines on fines’).
- (201) In assessing the gravity of the infringement, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market shares of all the undertakings concerned, the geographic scope of the infringement and/or whether or not the infringement has been implemented.
- (202) Finally, the Commission applies the provisions of the Leniency Notice and the Settlement Notice<sup>186</sup>, as appropriate.

### 8.3. On the *ne bis in idem* principle

- (203) Public prosecutors in Germany have imposed fines for breaches of the supervisory duties of executives of Volkswagen AG, Audi AG and Dr. Ing. F. Porsche AG against these legal persons,<sup>187</sup> based on the German Code of Administrative Offenses (§ 30 Gesetz über Ordnungswidrigkeiten (OWiG) in conjunction with §§ 130 and 9 OWiG). [...].<sup>188</sup>
- (204) In its reply to the Statement of Objections of 5 April 2019, VW argues that in light of the fine already imposed by the public prosecutors a violation of the *ne bis in idem* principle would arise if a fine were imposed in the Commission's anti-cartel proceedings. [...].<sup>189</sup>
- (205) The *ne bis in idem* principle is a fundamental right enshrined in the Charter of Fundamental Rights of the European Union<sup>190</sup> (the ‘Charter’) and applicable in competition proceedings leading to the imposition of fines.<sup>191</sup>
- (206) The application of the *ne bis in idem* principle in the framework of competition proceedings is subject to two conditions, namely, first, that an earlier final decision exists (‘*bis*’-condition), and, second, that the same collusive conduct is covered by the earlier decision and by the subsequent prosecution or decisions (‘*idem*’-condition).<sup>192</sup> Fulfilling the ‘*idem*’-condition in turn depends on three further conditions: the identical nature of facts, of acting persons and of the protected legal interest.<sup>193</sup> The *ne bis in idem* principle then prohibits that the same person receives a

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<sup>185</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.09.2006, p. 2.

<sup>186</sup> Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p. 1).

<sup>187</sup> [...].

<sup>188</sup> [...].

<sup>189</sup> [...].

<sup>190</sup> OJ C 202/1, 7.6.2016, p. 389.

<sup>191</sup> Judgement of 14 February 2012, *Toshiba Corporation e.a* (C-17/10) ECLI:EU:C:2012:72, paragraph. 94.

<sup>192</sup> Judgement of 25. February 2021, *Slovak Telekom* (C-857/19) ECLI:EU:C:2021:139, paragraph 42.

<sup>193</sup> Judgement of 25 February 2021, *Slovak Telekom* (C-857/19) ECLI:EU:C:2021:139, paragraph 43; Judgement of 14 February 2012, *Toshiba Corporation e.a* (C-17/10) ECLI:EU:C:2012:72, paragraph 97.

fine more than once for the same illegal conduct serving the protection of the same legal interest.<sup>194</sup>

#### 8.3.1. *Not the same facts*

- (207) The fines decisions of the German public prosecutors are based on the same legal provisions of the OWiG. § 30 OWiG allows companies to be fined, if a representative or manager has violated obligations of the company.
- (208) [...].
- (209) [...].<sup>195</sup>
- (210) [...].
- (211) [...].
- (212) [...]. As the condition that the facts must be the same is not met, the imposition of fines on VW in this antitrust procedure does not constitute an infringement of the *ne bis in idem* principle.

#### 8.3.2. *Not the same protected legal interests*

- (213) As regards the conditions that the protected legal interest must be the same, it is sufficient to say that Article 101 of the Treaty aims at protecting competition between undertakings in the internal market. § 130 OWiG, by contrast, is intended to ensure such an organisation of undertakings as to prevent their business activities from endangering the general public.
- (214) It is appropriate to determine the protected legal interest on the basis of the fining decisions pursuant to § 130 OWiG. [...]. The protected legal interests are therefore also not the same.

#### 8.3.3. *Conclusion*

- (215) Therefore, the imposition of a fine on VW in this case does not infringe the *ne bis in idem* principle, since neither of the two cumulative conditions, namely that the facts and the protected legal interests must be the same, are met.

### 8.4. **Calculation of the fines**

- (216) In applying the Guidelines on fines, the basic amounts of the fines to be imposed for each party result from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of sales of goods or services to which the infringement relates in a given year (normally, the last full business year of the infringement); this amount percentage is multiplied with the number of years of the undertaking's participation in the infringement. The additional amount is a percentage between 15% and 25% of the value of sales. The resulting basic amount can then be increased or reduced for each undertaking, if either aggravating or mitigating circumstances are retained.

#### 8.4.1. *The value of sales*

- (217) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of their sales<sup>196</sup>, that is the value of the undertakings'

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<sup>194</sup> Judgement of 25 February 2021, *Slovak Telekom* (C-857/19) ECLI:EU:C:2021:139, paragraph 43.

<sup>195</sup> [...].

sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA.

- (218) In this case, the value of sales, which the parties achieved in 2013, the last full business year of their participation in the infringement, with sales of new diesel passenger cars with SCR-system, are used for the calculation of the relevant value of sales.
- (219) For cartels, it is standard practice confirmed by the Courts to use the full price of the good or service to which the infringement directly or indirectly related, even if only pricing elements<sup>197</sup> or yearly price increases<sup>198</sup> were coordinated. The same logic should also be followed for collusion on product characteristics. The SCR-systems concerned by competitor contacts in this case are part of new diesel passenger cars and are not sold separately. Since SCR-systems determine the NO<sub>x</sub>-cleaning effectiveness of diesel passenger cars, they are relevant for the environment-friendliness concerning NO<sub>x</sub> emissions and therefore for the product characteristics of the whole car.
- (220) Accordingly, the Commission takes into account the following value of sales for each undertaking:

**TABLE 2**

<b>Undertaking</b>	<b>Value of sales (EUR)</b>
DAIMLER	[800 000 000 – 1 200 000 000]
VW	[1 200 000 000 – 1 600 000 000]
BMW	[400 000 000 – 600 000 000]

#### 8.4.2. *Determination of the basic amount of the fines*

- (221) The basic amount consists (a) of an amount of up to 30% of an undertaking's relevant sales, which depend on the degree of gravity of the infringement and is then multiplied by the number of years of the undertaking's participation in the infringement (together the 'variable amount') and (b) an additional amount of between 15% and 25% of an undertaking's relevant value of sales irrespective of duration.<sup>199</sup>

##### 8.4.2.1. Variable amount: on the gravity of the infringement

- (222) In assessing the gravity of the infringement, the Commission has 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/or whether or not the infringement has been implemented.<sup>200</sup>

<sup>196</sup> Point 12 of the Guidelines on fines.

<sup>197</sup> AT.39462 - *Freight Forwarding*, confirmed by the EU Courts in this respect (Case C-263/16 P *Schenker Ltd vs Commission* and Case T-265/12 *Schenker v Commission*; AT.39922 - *Bearings*).

<sup>198</sup> AT.39452 - *Mountings*.

<sup>199</sup> Points 19-26 of the Guidelines on fines.

<sup>200</sup> See point 22 of the Guidelines on fines.

- (223) Regarding the nature of the infringement, the Commission takes into account that cartels where two or more competitors agree and/or engage in a concerted practice to coordinate their competitive conduct on the market are among the most serious violations of Article 101(1) of the Treaty.<sup>201</sup>
- (224) The Parties aimed at removing uncertainty regarding their market behaviour in respect of product characteristics of new diesel passenger cars equipped with SCR-systems, which were relevant for customers. This behaviour was, by its very nature, capable of hindering competition in relation to cleaning better than required by the applicable EU emission standards and thus limiting technological development, a type of conduct that is explicitly prohibited by Article 101(1)(b) of the Treaty. Technical development and innovation in the field of car emission cleaning technology is of public interest.
- (225) Furthermore, the infringement covered the whole EEA.
- (226) In view of the particular circumstances of this case, the proportion of the value of sales taken into account is therefore 16%.

#### 8.4.2.2. Duration

- (227) In assessing the fine to be imposed on each undertaking, the Commission will also take into consideration the respective duration of the infringement set out in Section 6 above. The increase for duration will be calculated based on days.
- (228) Pursuant to point 24 of the Guidelines on Fines, the amount resulting from the gravity percentage applied to the relevant value of sales is to be multiplied by the duration of the involvement of the individual cartel members. In this case, the single and continuous infringement lasted from 25 June 2009 to 1 October 2014 (i.e. 1 925 days). This leads to a duration multiplier of 5.27 for all the parties. All parties participated in the infringement throughout the entire infringement.

**TABLE 3**

<b>Undertaking</b>	<b>Duration (in days)</b>	<b>Multiplication factor</b>
DAIMLER	1 925	5.27
VW	1 925	5.27
BMW	1 925	5.27

#### 8.4.2.3. Additional Amount

- (229) Point 25 of the Guidelines on Fines allows the increase of the variable amount by a percentage of the relevant value of sales, irrespective of the duration of the parties' participation in the infringement (so-called 'entry fee'). The Commission considers that in view of the gravity of the infringement (see Section 8.4.2.1) undertakings should be deterred from even entering into a cartel limiting technical development.

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<sup>201</sup> See point 23 of the Guidelines on fines.

- (230) The factors to be taken into account for the calculation of the entry fee are the same as those that are taken into account to set the gravity percentage. The entry fee cannot exceed 25% of the value of sales. For these reasons, the Commission sets the percentage for the entry fee at 16%.

#### 8.4.2.4. Determination of the basic amount

- (231) When applying the criteria set out above, the basic amounts of the fines to be imposed on each undertaking for the infringement are set out in Table 4.

**TABLE 4**

<b>Undertaking</b>	<b>Basic amount (EUR)</b>
DAIMLER	[800 000 000 – 1 200 000 000]
VW	[1 200 000 000 – 1 600 000 000]
BMW	[300 000 000 – 700 000 000]

#### 8.4.3. *Adjustments to the basic amount: aggravating or mitigating factors*

- (232) The Commission may consider aggravating or mitigating circumstances that result in an increase or reduction of the basic amount.<sup>202</sup>
- (233) No aggravating circumstances were found.
- (234) Regarding a reduction of fines, it is taken into account that, for the first time, the Commission has qualified a conduct as a cartel and imposes a fine solely on the basis of an infringement of Article 101(1)(b) of the Treaty, which prohibits restrictions on technical development.
- (235) As regards the level of the reduction, it is considered that, on the one hand, the Commission has not yet applied a practice of sanctioning cartels solely on the basis of an infringement of Article 101(1)(b) of the Treaty but on the other hand, restrictions of technical development are expressly mentioned in the Treaty as an example of a restriction of competition. The Commission therefore considers it as appropriate to exceptionally reduce the fines to be imposed on all parties by 20%.
- (236) As regards the fines imposed by the public prosecutor's offices, VW submits that, even if the conditions laid down in the *ne bis in idem* principle are rejected, those conditions must at least be taken into account as fines reducing element.<sup>203</sup> In view of the dissimilarity of facts and in the absence of any indication that the fine to be imposed on VW in these proceedings would be disproportionate in view of the fines already imposed by the public prosecutors, it is not necessary to further reduce VW's fine. The same applies with regard to the sanctions imposed against VW in the US.

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<sup>202</sup> Points 28-29 of the Guidelines on fines.

<sup>203</sup> [...].

TABLE 5

Undertaking	Adjusted basic amount (EUR)
DAIMLER	[...]
VW	[...]
BMW	[...]

#### 8.4.4. *Deterrence*

- (237) The Commission takes particular account of the fact that fines are intended to have a sufficiently deterrent effect. To that end, the Commission may increase the amount of the fines imposed on undertakings, which have a particularly high turnover in addition to the value of the goods or services sold in connection with the infringement. In this case, however, in the exercise of its discretion in that regard, the Commission decided not to apply such an additional increase in the light of the specific circumstances of the case, since the fines to be imposed must, in absolute terms, be regarded as significant and sufficiently dissuasive in the light of the overall assessment of the infringement.

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

- (238) The fine imposed on each undertaking participating in the infringement shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision.<sup>204</sup>
- (239) None of the fines calculated for any of the parties exceeds 10% of the undertaking's total turnover in 2020.

#### 8.4.6. *Application of the Leniency Notice*

- (240) DAIMLER applied for immunity, in the alternative, reduction of the fine under the Leniency Notice, and on 9 December 2015 supplemented its original leniency application by providing further information and additional documents relating to collusion with regard to AdBlue tank sizes and ranges. The application was supplemented by further oral submissions and documents. DAIMLER was the first undertaking to fulfil the conditions of point 8 (a) of the Leniency Notice.
- (241) On 5 April 2019, DAIMLER was granted conditional immunity for the infringement. DAIMLER fulfilled the conditions of the Leniency Notice as concerns the cooperation with the Commission throughout the entire proceedings. The Commission confirms immunity from fines for DAIMLER.
- (242) On 4 July 2016, VW applied for immunity, in the alternative, reduction of the fine under the Leniency Notice. The application was supplemented by further oral submissions and documents. VW was the first undertaking to meet the conditions of points 24 and 25 of the Leniency Notice. On 5 April 2019, VW was granted a conditional reduction of the fine in the range of 30%-50%.

<sup>204</sup> Article 23(2) of Regulation No 1/2003.

- (243) VW also submitted that it qualifies for partial immunity concerning the period of the infringement between 25 June 2009 and early 2011. VW claims to have been the first party to have submitted compelling evidence that enabled the Commission to extend the duration of the infringement by the earlier period. However, DAIMLER had provided information before VW showing that the infringement started in June 2009.<sup>205</sup> Therefore, VW's submission in respect of partial immunity does not fulfil the conditions set out in point 26(3) of the Leniency Notice.
- (244) To determine the reduction of the fine within the leniency band the Commission considers the time when the evidence was submitted as well as the added value for establishing the infringement. As concerns the time, VW has submitted its application before the Commission inspections. VW supplemented its application before and after the inspections. As concerns added value it must be noted that the Commission, due to DAIMLER's application, was already in the possession of substantial information relating to the infringement. As concerns the information submitted by VW after the inspections it must be considered that during the inspections the Commission has gathered relevant evidence. Nevertheless, VW has provided useful information, in particular evidence of the infringement and explanations of the context. VW has thereby confirmed the information already in the Commission's file and has facilitated the Commission's demonstration of the infringement.
- (245) Taking into account the time of the application and the added value of the information provided by VW for establishing the infringement and as VW has met the conditions of the Leniency Notice as concerns the cooperation with the Commission throughout the entire proceedings the fine will be reduced by 45%.

#### 8.4.7. *Application of the Settlement Notice*

- (246) According to point 32 of the Settlement Notice, the fine to be imposed on each party will be reduced by 10%. This reduction is added to the reduction granted under the Leniency Notice.

### 9. **CONCLUSION – TOTAL AMOUNT OF FINES TO BE IMPOSED BY THIS DECISION**

- (247) Volkswagen AG is responsible for the entire duration of the infringement as the parent company of Audi AG. Volkswagen AG and Audi AG are therefore jointly and severally liable for the fine for the entire duration of the infringement. Volkswagen AG is responsible for the period 7 December 2009 until 1 October 2014 as parent company of Dr. Ing. h.c. F. Porsche AG. For this period Dr. Ing. h.c. F. Porsche AG is therefore together with Volkswagen AG and Audi AG jointly and severally liable for the fine. The proportion of the fine corresponding to that period shall be calculated by allocating the fine pro rata to the respective periods, with the entry fee fully allocated to the longer period. From 25 June 2009 to 6 December 2009, Dr. Ing. h.c. F. Porsche AG participated directly in the infringement without Volkswagen AG exercising any decisive influence over Dr. Ing. h.c. F. Porsche AG. For this period Dr. Ing. h.c. F. Porsche AG does not receive a separate fine, as it had no relevant turnover.

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<sup>205</sup>

[...].

- (248) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) no 1/2003 are set out in Table 6.

**TABLE 6**

<b>Undertaking</b>	<b>Fines (EUR)</b>
DAIMLER	0
VW	502 362 000 Thereof: Volkswagen AG, Audi AG and Dr. Ing. h.c. F. Porsche AG jointly and severally 466 172 000 Volkswagen AG and Audi AG jointly and severally 36 190 000
BMW	372 827 000

HAS ADOPTED THIS DECISION:

### *Article 1*

The following undertakings infringed Article 101(1) (b) of the Treaty and Article 53(1) (b) of the EEA Agreement by coordinating, for the EEA from 25 June 2009 to 1 October 2014, the sizes of their AdBlue tanks and the ranges between two refills and by exchanging information about assumed average AdBlue-consumption, thereby participating in a single and continuous infringement, which concerned the entire EEA and was by its nature capable of limiting technical development in the area of emission cleaning for new diesel passenger cars:

- (1) Daimler AG;
- (2) Volkswagen Aktiengesellschaft, Audi Aktiengesellschaft and Dr. Ing. h.c. F. Porsche Aktiengesellschaft;
- (3) Bayerische Motoren Werke Aktiengesellschaft.

### *Article 2*

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

- (1) Daimler AG: EUR 0;
- (2) (a) Volkswagen Aktiengesellschaft, Audi Aktiengesellschaft and Dr. Ing. h.c. F. Porsche Aktiengesellschaft, jointly and severally: EUR 466 172 000;  
(b) Volkswagen Aktiengesellschaft and Audi Aktiengesellschaft, jointly and severally: EUR 36 190 000;
- (3) Bayerische Motoren Werke Aktiengesellschaft: EUR 372 827 000.

The fines shall be credited, in euros, within a period of six months from the date of notification of this Decision to the following bank account held in the name of the European Commission:

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

IBAN: LU02 0019 3155 9887 1000 / BIC: BCEELULL  
Ref.: EC/BUFI/AT.40178

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

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council<sup>206</sup>.

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<sup>206</sup> Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the European Union (OJ L 193, 30.7.2018, p. 80).

### *Article 3*

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

They shall refrain in future from repeating any acts as those described in Article 1 and from any acts with the same or a similar object or effect.

### *Article 4*

This Decision is addressed to:

- (a) Daimler AG, Mercedesstraße 120, 70372 Stuttgart, Germany
- (b) Volkswagen Aktiengesellschaft, Berliner Ring 2, 38440 Wolfsburg, Germany
- (c) Audi Aktiengesellschaft, Auto-Union-Straße 1, 85045 Ingolstadt, Germany
- (d) Dr. Ing. h.c. F. Porsche Aktiengesellschaft, Porscheplatz 1, 70435 Stuttgart, Germany
- (e) Bayerische Motoren Werke Aktiengesellschaft, Petuelring 130, 80809 München, Germany

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

Done at Brussels, 8.7.2021

*For the Commission*  
*Margrethe VESTAGER*  
*Executive Vice-President*