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COMMISSION DECISION

of 6.4.2016

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

Case AT.39965 – Mushrooms

(Only the English text is authentic)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

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[1], and in particular Article 7(1) and Article 23(2) thereof,

Having regard to the Commission Decision of 9 April 2013 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of 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 Treaty[2],

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

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

Whereas:

1. INTRODUCTION

(1) This Decision concerns a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union (the Treaty) and Article 53 of the

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1 OJ L 1, 4.1.2003, p.1.With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market".

2 OJ L 123, 27.4.2004, p. 18.

3 Final report of the Hearing Officer of 4 April 2016.

Agreement on the European Economic Area (the EEA Agreement). The infringement, in which the addressees Grupo Riberebro Integral S.L. and Riberebro Integral S.A.U. (hereinafter together referred to as "Riberebro") participated together with other undertakings, consisted of price coordination and customer allocation for mushrooms sold in cans and jars (hereinafter referred to as "canned mushrooms") and lasted at least from 1 September 2010 to 28 February 2012.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

(2) The anticompetitive conduct concerned by the present proceedings relates to canned mushrooms.[4] The cartel identified in these proceedings covered the private label sales (MDD, HD and MPP)[5] via tender procedures to retailers and the food service channel.[6]

2.2. The sector players

(3) The undertakings subject to the present proceedings, either under the normal procedure or under the settlement procedure, are described in Section 2.2.1 and 2.2.2 respectively. They are collectively referred to as "the parties" or "the cartel members".

2.2.1. Addressee of this Decision: Riberebro

(4) Riberebro is an undertaking specialised in the production and sale of canned vegetables. Riberebro focuses on five specialities: mushrooms, pulses, vegetables, piquillo peppers and asparagus. Riberebro sells canned products and, as of 2007, started selling a part of its mushrooms production in the fresh market. It distributes a variety of canned vegetables, including mushrooms which are mainly sold under the trade name "Ayecue".[7]

(5) With regard to its mushrooms business, Riberebro operates since July 2011 in a strategic alliance with Eurochamp S.A.T ("Eurochamp"), a cooperative of approximately 300 mushroom breeders. Riberebro transferred its mushroom production capacity to Eurochamp and distributes all mushrooms produced by Eurochamp.

(6) The relevant legal entities are:

(1) Grupo Riberebro Integral S.L. which has its registered office at Polígono Industrial La Llanada, 26540 Alfaro, La Rioja, Spain; and

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4 Tins and jars.

5 MDD stands for 'Marque de Distributeur', 'HD' for 'Hard Discount' and MPP stands for 'Marque Premier Prix'.

6 The retail channel includes sales to supermarkets, hypermarkets and hard discounters.
The food service channel includes sales to food wholesalers and processors.
Sales of fresh and frozen mushrooms are not concerned.
Sales of canned mushrooms that are not channelled through tender procedures, such as the sales of parties own brands, are also not concerned.
The business to business channel (i.e. industrial customers which use canned mushrooms as an ingredient for the products they sell to the retailers or the foodservice) is also not part of the infringement.

7 […].

(2) Riberebro Integral S.A.U. which has its registered office at Polígono Industrial La Llanada, 26540 Alfaro, La Rioja, Spain.

(7) Grupo Riberebro Integral S.L. is the top legal entity of the undertaking Riberebro.[8]

(8) Riberebro Integral S.A.U. is a wholly-owned subsidiary of Grupo Riberebro Integral S.L. and the main operational entity of the Riberebro undertaking.[9] Riberebro Integral S.A.U. deals with the management, marketing and logistics of the undertaking and brings together the billing for most of its activities: canned mushrooms and vegetables.

(9) The relevant individuals at Riberebro are:[10]

Name	**Entity**	**Function**
[…]	Grupo Riberebro Integral S.L.	[Manager]
[…]	Riberebro Integral S.A.U.	[Manager]
[…]	Riberebro Integral S.A.U.	[Manager]

2.2.2. Other undertakings that have been subject to the present proceedings

(10) Three other undertakings – […] - were also subject to the present proceedings. But they are not addressees of this decision. They opted for the settlement procedure and were the addressees of the Commission Decision C(2014) 4227 of 25 June 2014 ("the Settlement Decision").[11] They are collectively referred to as "the settling parties".

(11) The conduct referred to in this Decision involving the settling parties is exclusively used to establish liability of Riberebro for an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement.

3. PROCEDURE

(12) The Commission's investigation began as a result of information received in an immunity application by […] under the Commission notice on immunity from fines and reduction of fines in cartel cases[12] ("the Leniency Notice")

(13) On 22 December 2011 […] applied for a marker for immunity under point 14 of the Leniency Notice.[13] On 25 January 2012, […] submitted an application for immunity from fines pursuant to point 8 of the Leniency Notice aiming at perfecting the marker. On 17 February 2012, the Commission granted conditional immunity to […] pursuant to point 8(a) of the Leniency Notice.

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8 Grupo Riberebro Integral S.L was established on 25 October 2006 under the name Inversiones Agroalimentarias del Ebro S.L. in Pamplona (Navarra). On 28 November 2008, the Board of the company approved the change of the corporate name to Riberebro Integral Group S.L.

9 […].

10 […].

11 See the press release of the Commission at http://europa.eu/rapid/press-release_IP-14-727_en.htm.

12 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

13 See points 8 and 14 of the Leniency Notice.

(14) From 28 February 2012, the Commission carried out inspections under Article 20(4) of Regulation (EC) No 1/2003 at the premises of various mushroom producers in France, the Netherlands and Spain.

(15) As of 3 April 2012, the Commission addressed several requests for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 to the parties.

(16) On 21 May 2012 and 21 September 2012, respectively, Riberebro and […] submitted leniency applications.

(17) On 9 April 2013, the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against all parties including Grupo Riberebro Integral S.L. and Riberebro Integral S.A.U, with a view to engaging in settlement discussions with them.

(18) As provided for in point 29 of the Leniency Notice, the Commission reached the preliminary conclusion that the evidence submitted by Riberebro and [non-addressee] constitutes significant added value within the meaning of point 24 and 25 of the Leniency Notice and that the undertakings had so far met the conditions of point 12 and 27 of the leniency Notice. The Commission informed Riberebro and [non-addressee] by letter dated 9 April 2013 of its preliminary intention to grant them a reduction of fine within a specified band, as provided for in point 26 of the Leniency Notice.

(19) After each party had confirmed its willingness to engage in settlement discussions, the discussions started on […].

(20) Settlement meetings between each party and the Commission took place between […] and March 2014. During those meetings, the Commission informed the parties of its objections and disclosed the main evidence in the Commission file. The parties were also given a copy of the relevant evidence in the file as well as a list of all the documents in the file. Further, […] were made available to the parties on Commission premises. The Commission also provided the parties with an estimation of the range of fines to be imposed.

(21) […] the settling parties submitted to the Commission their formal request to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004.

(22) Riberebro did not submit a formal request to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004.

(23) On 25 June 2014, the Commission adopted a Decision addressed to the settling parties holding them liable for their respective conduct in this case.

(24) On 27 May 2015, the Commission adopted a Statement of Objections (SO) addressed to Grupo Riberebro Integral S.L. and Riberebro Integral S.A.U. in which it raised objections based on the description of the events in Section 5 of this Decision and the legal assessment in Section 6 of this Decision. Subsequently, the Commission provided Riberebro with a CD ROM which gave it access to the accessible parts of the Commission's investigation file.

(25) On 17 July 2015, Riberebro replied to the SO stating that it does not contest the description of the facts and the legal assessment set out therein and provided comments with regard to its cooperation under the Leniency Notice as well as its financial situation. Riberebro did not request an Oral Hearing.

4. DESCRIPTION OF THE EVENTS

4.1. Nature and scope of the conduct

(26) The overall aim of this cartel was to stabilise the market shares for the cartelized product and stop the decline of prices. Summarized, the cartel was a non-aggression pact with a compensation scheme in case of customer transfer and application of minimum prices which had been agreed beforehand.[14] To achieve this aim, the cartel members exchanged confidential information on tenders, set minimum prices, agreed on volume targets and allocated customers.[15]

(27) The cartel members held numerous regular multilateral meetings and occasionally some of the cartel members had additional contacts on a bilateral basis. Top level management was directly involved, as it would discuss the general parameters of the cartel and then the sales managers would intervene, discuss individual tenders and monitor the cartel on a regular basis. For Riberebro, such managers include the CEO of Grupo Riberebro Integral S.L and managers of Riberebro Integral S.A.U.[16]

(28) Secrecy was applied to the cartel arrangements as cartel members were instructed a) not to exchange emails, b) only use dedicated phones for their communications and c) communicate via private email addresses.[17]

(29) The implementation of the cartel was carried out thoroughly not only by the exchange of prices to be offered in tenders and disclosure of individual customers in follow-up meetings but also by having a mechanism in place to compensate transfers of customers between competitors and stabilise market shares for private label sales.[18] This compensation issue was raised on a regular basis during cartel meetings.[19] This shows that cartelists paid close attention that agreements were implemented.

4.2. Geographic scope of the conduct

(30) The geographic scope of the infringement was EEA-wide – with focus on Western European countries - during the entire period of the infringement.[20]

4.3. Description of the meetings and other collusive contacts

(31) On **1 September 2010,** a multilateral GETC[21] meeting took place at the Regus centre at Charles de Gaulle airport in Paris. Participants were [Riberebro], […], […], […] and […].[22] […] proposed that each participant speak about its clients and the phases of the negotiations and […] confirm that all parties shared this information.[23] The participants also discussed pricing policy and agreed that prices had to increase […]

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14 […].
15 […].
16 See recital (9) and Section 4.
17 […].
18 […].
19 […].
20 […].
21 GETC is the association of the Group of European Mushrooms Transformers. In autumn 2007, the producers of canned mushrooms set up the GETC with the goal of collecting market info to better understand the market, create greater cooperation between European companies and defend the tariff quota within the WTO; […].
22 […].
23 […].

and that the cartel members should try to achieve an increase […]. […] stressed that none of the cartel members should give in on the price increase as otherwise the whole exercise would be in vain. […] left the meeting early and the remaining participants took the opportunity to discuss […] situation and the distrust against […]. […] stated at the meeting that he was in talks with […] and there might be possibilities to better control […].[24]

(32) On **17 November 2010,** a multilateral GETC meeting took place in Paris. Participants were [Riberebro], […] , […] and […].[25] The cartel members exchanged information on each participant's stock levels and agreed that they should respect each other's clients and markets and complained generally about the loss of clients.[26] This meeting also focussed on the distrust between the parties. […] and […] were accusing each other of applying prices that were too low. […] and […] again stressed the importance of cooperation between the parties and that as a result of fewer imports from China, it was absolutely incomprehensible why cartel members were selling at prices lower than what had been agreed.[27]

(33) On **20 December 2010,** a multilateral GETC meeting was scheduled at the Charles de Gaulle airport in Paris with [Riberebro], […], […] and […] .[28] Due to bad weather conditions, […] flight was cancelled and he informed the other participants of this fact.[29] The meeting was very short and the participants decided to adjourn the meeting to **28 December 2010** to be held again in Paris.[30] The participants present at the meeting on 28 December 2010 were […] , […] and [Riberebro][31] who reported on their level of stock and also discussed specific clients.[32] […] was not present at the meeting on 28 December 2010 but had, in an internal email to […] previously informed which position he should take and that he should talk openly with the other parties and try to convince them of the merits of an increased price level.[33]

(34) On **7 February 2011,** [Riberebro] and […] discussed, by email, a potential Skype conference call for that same day with […]. They also discussed a future meeting with Riberebro and […] in March 2011. […] .[34]

(35) On **22 April 2011,** [Riberebro] sent an email to […] with subject line "Base MKT" which reads in parts as follows: "*…I just send you information (excel) to your hotmail address…*".[35]

(36) On **27 April 2011,**[36] a meeting took place at the premises of Riberebro in Alfaro, Spain between […], […], [Riberebro] and […]. […] stated that the market was too divided, that prices were declining and everyone was going after volumes. The participants noted that prices for concluded contracts had fallen [..] and blamed […]

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36 […].

and […] for that fall and […] and Riberebro stated that tougher agreements had to be put in place.[37]

(37) At the meeting of 27 April 2011 a spread sheet […][38] created by […] was distributed amongst the participants. It contains an overview of total volumes delivered by […] between 2009-2011 to its main customers in France, Germany, Belgium, Spain and Portugal.[39] […] circulated the spread sheet and all participants agreed to take it with them […] and fill in their individual figures of delivery tons.[40]

(38) At the meeting on 27 April 2011, an agreement was also reached that regular meetings of […] should take place to avoid […] excuse for not being aware of certain issues. Prices had dropped […] in the preceding two years and statements were made that such price drops had to end. After the meeting, upon request by […] , […] communicated the requested figures in the spreadsheet referred to in recital (37) to […]. [41]

(39) On **31 May 2011, -** as agreed at the previous meeting on 27 April 2011 - a follow-up meeting took place at Charles de Gaulle airport, Paris. In the morning, […], […], […] and [Riberebro] and […] met and were later joined by […], [Riberebro], […] and […].[42] All attendees brought a detailed overview of deliveries to their main customers and […] circulated […]a spreadsheet […][43] containing an overview of suggested minimum prices proposed by […]. The spread sheet was further discussed and fine-tuned in further meetings and has since functioned as the master document of the cartel.[44] During the meeting on 31 May 2011, the spread sheet was finalised with the new prices based on the discussions between the parties […].[45] This price list was distributed […] and contains the detailed minimum prices which had to be obtained for the tenders in year 2012.[46]

(40) The meeting 31 May 2011 began with a discussion on a list containing a detailed overview of the volumes delivered or contracted by the parties during the years 2009, 2010 and 2011 to big customers in various European countries.[47] Riberebro accused […], […] and […] losing less volume than Riberebro in previous years and stated that it wanted compensation from the other parties for a loss […] in volume or otherwise it would step out of the talks and meetings.[48] After discussions and to appease Riberebro, the participants decided to compensate Riberebro […][49]. After this issue was resolved, the parties also concluded that the market prices for 2012 had to increase […] as the previous years had seen a strong decline in prices but costs had heavily increased.[50]

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50 […].

(41) A further spread sheet […][51] was also prepared and distributed […] at the meeting on **31 May 2011** which sets out the rules of the cartel, lists the countries covered as well as sales channels and products (only canned mushrooms). The document clearly demonstrates that […] was involved as it shows that […] discussed the general parameters and that […] intervened, discussed individual tenders and monitored the cartel on a regular basis.[52]

(42) The aim of the cartel is described […][53] […] addresses the level the secrecy to be applied to the cartel and states that cartel members should not exchange emails and should only use dedicated phones for their communications. […] contains proposals for customer transfers.[54]

(43) During the meeting on 31 May 2011, the cartel members agreed on a price increase […]. A list of minimum prices per product category had been prepared by […] and was discussed during the meeting.[55] During the second part of the meeting, […] proposed to create […] which could facilitate the execution of the action plan.[56] At the end of the meeting, the cartel members agreed that the price list should serve as basis for the negotiation of contracts with customers for deliveries in 2012.[57]

(44) Following the meeting on 31 May 2011, […], [Riberebro], […] and […] met on a regular basis to discuss the implementation of the cartel and agreed on the offer to be submitted to customers in specific tenders.[58] In addition to the ongoing discussions of specific tenders, the cartel members also agreed to transfer some volume to Riberebro as a precondition for its participation in the cartel, […] agreed to withdraw an offer from one of Riberebro's customers and […] disclosed the prices it had offered to […].[59]

(45) On **23 August 2011,** a meeting of [Riberebro], […] , […] and […] took place in the Sheraton Hotel, Amsterdam.[60] At the meeting, the participants exchanged information on prices, customers, and stocks.[61] […].[62]

(46) On **10 October 2011,** a meeting of [Riberebro], […] , […] and […] took place during the Anuga fair.[63] The cartel members proposed to improve the table for minimum prices. A table of minimum prices for six countries was initially suggested and then two further countries were added. It was also agreed that […] were to meet once a month.[64]

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52 […].
53 […].
54 […].
55 […].
56 […].
57 […].
58 […].
59 […].
60 […].
61 […].
62 […].
63 Anuga is the world's largest and most important food and beverage fair in Cologne. […].
64 […].

(47) On **19 October 2011,** a meeting between [Riberebro], […], […] and […] took place in Lille[65]. The cartel members exchanged information on customers, negotiation steps and the execution of a plan to balance volumes sales […].[66]

(48) The cartel members exchanged price levels and mentioned that several tenders were currently open. They also agreed that bids should be submitted at higher prices so that the cartel member that claimed the right on a certain volume would win the tender.[67] [Riberebro] and […] discussed the Spanish market generally, comparing prices, discussing target prices and agreeing on how bids for tenders should be submitted.[68]

(49) On **8 November 2011,** a meeting between [Riberebro], […], […] and […] took place in Bilbao.[69] The meeting mainly addressed passing the promised volume that had been raised at the 31 May 2011 meeting (see recitals (39)-(42)) on to Riberebro. […] stated that […] had already given 70% of the promised volume to Riberebro […].[70] At the meeting, […] was criticized in relation to […] selling at low prices in France […][71]. In reaction to this, […] instructed […]to stop the "too cheap" offer. At the meeting, […] reported that all was fine and […] prices would be increased.

(50) During the meeting on 8 November 2011, […] was put under pressure by […] and [Riberebro] to give up its share at […] so that Riberebro could get the contract. […] was also angry at the fact that […] and […] had done nothing to move their share of compensation to Riberebro as agreed at the meeting on 31 May 2011 (see recitals (39)-(42)).[72] […] instructed […] to increase the price and reported that […] had retreated from that client. […] was also criticized by […] that things should move so that Riberebro gets the […] volume compensation from […]. Finally, it was generally agreed that the participants have to stick to the concluded agreements.[73]

(51) On **30 November 2011,** a meeting between […], […], [Riberebro] and […] took place.[74] The parties discussed the tenders, that they were in an advanced stage and that Polish producers were putting pressure on prices in Scandinavia. The parties also discussed the catering prices in France and agreed that the price levels should be in line with what had been previously agreed. The issue of volume compensation through […] and […] for Riberebro was again brought up and […] generally stressed the importance of sticking to the agreed price levels.[75]

(52) During the meeting on 30 November 2011, [Riberebro] also circulated a list with minimum prices for various geographic markets inside and outside the Union.[76] Riberebro wanted to agree on prices outside the Union but this was dismissed and no agreements were reached.

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68 […].
69 […].
70 […].
71 […].
72 […].
73 […].
74 […].
75 […].
76 […].

(53) During the meeting on 30 November 2011, the cartel members also discussed specific clients […]. They exchanged information on prices and […] shared information on the price they implement with […], […] shared information on the reference price with […] and Riberebro shared information on their upcoming price increase in Italy.[77] The cartel members agreed to respect the volumes sold to various customers in Scandinavia, the Netherlands and Germany by staying out of the market or bidding so high so as not to win customers.[78] […] agreed to withdraw an offer […] to avoid that […] stops purchasing from Riberebro.[79]

(54) On **20 January 2012,**[80] a meeting between […], [Riberebro] and […] took place in Lille. […] did not attend and informed […] that he was not attending. The cartel members discussed the catering sector in France.[81] […].[82]

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

5.1. Jurisdiction

(55) The Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the anticompetitive conduct had an appreciable effect on trade between Member States and between contracting parties to the EEA Agreement (see recital (100)).[83]

5.2. Application of competition rules

5.2.1. Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement

(56) Article 101(1) of the Treaty and Article 53(1) EEA prohibit as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

(57) Article 53(1) of the EEA Agreement contains a similar prohibition. However, the reference in Article 101(1) of the Treaty to "*trade between Member States"* is replaced by a reference to trade "*between contracting parties"* and the reference to competition "*within the internal market"* is replaced by a reference to competition "*within the territory covered by the … [EEA] Agreement".*

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77 […].

78 […].

79 […].

80 […].

81 […].

82 […].

83 The case law of the Court of Justice and the General Court in relation to the interpretation of Article 101 of the Treaty applies equally to Article 53 of the EEA Agreement. See Recitals 4 and 15 as well as Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement and Case E-1/94 of 16 December 1994, paragraphs 32-35. References in this Decision to Article 101 of the Treaty therefore apply also to Article 53 EEA.

5.2.2. Agreements and concerted practices

Principles

(58) Article 101(1) of the Treaty and Article 53(1) EEA prohibits anticompetitive agreements between undertakings, decisions of associations of undertakings and concerted practices.

(59) An agreement may be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 101(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of agreement in Article 101(1) of the Treaty would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(60) In its judgement in PVC II case,[84] the General Court stated that "[i]t is well established in the case-law that for there to be an agreement within the meaning of Article 101(1) of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way".

(61) Where, for instance, an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed. It is well-settled case-law that "the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings".[85] Such distancing should take the form of an announcement by the company, for example, that it would take no further part in the collusive meetings and therefore did not wish to be invited to them.[86]

(62) Although Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement draw a distinction between the concept of "concerted practices" and "agreements between undertakings", the object is to bring within the prohibition of these Articles a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[87]

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84 Joined Cases T-305/94 and others, *Limburgse Vinyl Maatschappij N.V. and others v Commission*, ECLI:EU:T:1999:80, paragraph 715.

85 See Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, ECLI:EU:C:2004:6, paragraph 85, Case T-334/94 *Sarrió SA v. Commission* ECLI:EU:T:1998:97, paragraph 118; Case T-141/89 *Tréfileurope Sales SARL v. Commission* ECLI:EU:T:1995:62, paragraph 85; Case T-7/89 SA *Hercules Chemicals NV v. Commission* ECLI:EU:T:1991:75, paragraph 232.

86 Case T-377/06, *Comap v Commission* ECLI:EU:T:2011:108, paragraphs 75-78.

87 Case 48/69, *Imperial Chemical Industries v Commission* ECLI:EU:C:1972:70, paragraph 64

(63) The criteria of co-ordination and co-operation laid down by the case-law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators 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.

(64) Conduct may fall under Article 101(1) of the Treaty as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.[88]

(65) Although in terms of 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, all the more so when the concertation occurs on a regular basis and over a long period. Such presumption applies even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion. A concerted practice is caught by Article 101(1) of the Treaty even in the absence of anti-competitive effects on the market.[89]

(66) Moreover, it is established case-law that the exchange between undertakings in pursuance of a cartel falling under Article 101(1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article.[90]

(67) In the case of a complex infringement of long duration, it is not necessary for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of agreement and concerted practice may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall

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88 Case T-7/89 *Hercules v Commission* ECLI:EU:T:1991:75, paragraph 256.

89 See also Case C-199/92 *P Hüls v Commission*, ECLI:EU:C:1999:358, paragraphs 158-166; Case T-186/06 *Solvay*, ECLI:EU:T:2011:276, paragraphs 132, 134, 139, 143-149).

90 See, in this sense, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission, Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, ECLI:EU:T:1995:71, paragraph 72.

objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 101(1) of the Treaty lays down no specific category for a complex infringement of the present type.[91]

(68) In its PVC II judgement (see recital (61)), the General Court stated that "[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101] of the Treaty".[92]

(69) An agreement for the purposes of Article 101(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract under civil law. Moreover, in the case of a complex cartel of long duration, the term "agreement" can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out, it follows from the express terms of Article 101(1) of the Treaty that agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[93]

Application in the present case

(70) The facts described in Section 4.3. demonstrate that Riberebro was involved in collusive anticompetitive arrangements concerning the sale of canned mushrooms through participation in a number of meetings and other contacts with competitors. During the period from 1 September 2010 to 28 February 2012, the cartel participants held regular multilateral meetings and also had numerous discussions on bilateral basis. The Commission notes that during the infringement period Riberebro's representatives […] attended all multilateral meetings and in addition held a number of bilateral discussions with the other cartel members (see Section 4.3).

(71) Riberebro was well aware of the illegal nature of the contacts shown at several occasions where emphasis was put on secrecy as parties used specific phones ("red phones") for their cartel contacts or were sending email to private email accounts.

(72) The collusive arrangements included in particular agreements on joint price increases or setting minimum prices to be offered to specific tenders (see recitals (34), (42), (46), (49), (50), (51), (54)) as well as agreements on customer allocation (see recitals (36), (44), (54)). The cartel participants also put a compensation scheme in place in case of customer transfer (see recitals (43), (47), (53), (54)). [The sales managers] met on a regular basis to discuss the implementation of the cartel and agreed on the offer to be submitted to the specific tenders (see recitals (41), (44)).

(73) Through their conduct the cartel participants, including Riberebro, knowingly substituted the risks of competition between them for practical co-operation. The parties refrained from determining their commercial policy that they intended to adopt on the market independently but instead coordinated their market behaviour.

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91 See again Case T-7/89 *Hercules v Commission* ECLI:EU:T:1991:75, paragraph 26.

92 See Case T-305/94 *PVC II*, ECLI:EU:T:1999:80, paragraph 696.

93 See Case C-49/92P *Commission v Anic Partecipazioni SpA*, ECLI:EU:C:1999:356, paragraph 81.

(74) Their behaviour had all the characteristics of an agreement and/or concerted practice within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

5.2.3. Single and continuous infringement

Principles

(75) According to settled case-law, the agreements and concerted practices referred to in Article 101(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged.[94] It follows, that an infringement of Article 101 of the Treaty may result not only from an isolated act but also from a series of acts or from a continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 101 of the Treaty. When the different actions form part of an overall plan, because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[95]

(76) It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.[96]

(77) The concept of a single infringement covers a situation in which a number of undertakings have participated in an infringement consisting in continuous conduct in pursuit of a single economic aim designed to distort competition or, yet again, in individual infringements linked to one another by the same object (all the elements sharing the same purpose) and the same subjects (the same undertakings, which are aware that they are participating in the common object).[97]

(78) An undertaking which has participated in such a single and complex agreement through its own conduct and intended, through that conduct, to contribute to the common objectives pursued by all the participants and was aware of the actual conduct planned or put into effect by other undertakings in pursuit of those same

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94 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.

95 Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens NV*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 41; Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and others v Commission*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 258; Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraphs 78-81, 83-85 and 203.

96 Judgment of the General Court of 17 December 1991, *Enichem Anic v Commission*, T-6/89, ECLI:EU:T:1991:74, paragraph 204, upheld by Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 82.

97 Judgment of the General Court of 28 April 2010, *Amann & Söhne GmbH & Co. KG a.o. v Commission, T-446/05*, ECLI:EU:T:2010:165, paragraph 89.

objectives or could reasonably have foreseen it and was prepared to take the risk, can be attributed liability in relation to the infringement as a whole.[98]

(79) If an undertaking has directly participated in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it is not 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 the other parties' anti-competitive conduct planned or put in effect in pursuit of the same objectives, or that it could reasonably have foreseen 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.[99]

(80) The fact that an undertaking concerned did not take part in all aspects of an anti-competitive arrangement cannot relieve it of liability for conduct in which it has undeniably taken part.[100]

(81) Such a conclusion is not at odds with the principle that responsibility for such an infringement is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.[101]

Application in the present case

(82) In this case, the Commission considers that Riberebro, by participating in the conduct described in Section 4, committed a single and continuous infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement from at least 1 September 2010 to 28 February 2012. This is notwithstanding that at the same time, on the basis of the facts described in Section 4.3, any one of the aspects of conduct described therein (price coordination and customer allocation) in respect of any one of the products [private label sales (MDD, HD and MPP) of mushrooms sold in cans and jars via tender procedures to retailers and the food service channel] and in respect of any one of the Member States and Contracting parties of the EEA has as its object the restriction of competition and therefore constitutes an infringement of Article 101 of the Treaty and of Article 53(1) EEA.

(83) The existence of a single and continuous infringement is demonstrated by the fact that the cartel followed the same pattern throughout the infringement period (see

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98 Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens NV*, C-441/11 P, ECLI:EU:C:2012:778, paragraphs 42-43; Judgment of the General Court of 7 January 2004, *Aalborg Portland and others v Commission*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 83; Judgment of the General Court of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 87; Judgment of the General Court of 30 November 2011, *Quinn Barlo Ltd a.o. v Commission*, T-208/06, ECLI:EU:T:2011:701, paragraph 128.

99 See to that effect: Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens NV*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 44.

100 Judgment of the Court of Justice of 6 December 2012, *Commission v Verhuizingen Coppens NV*, C-441/11 P, ECLI:EU:C:2012:778, paragraph 45; Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland and others v Commission*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECLI:EU:C:2004:6, paragraph 86; Judgment of the Court of Justice of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, ECLI:EU:C:1999:356, paragraph 90.

101 Judgment of the General Court of 12 December 2007, *BASF and UCB v Commission*, Joined Cases T-101/05 and T-111/05, ECLI:EU:T:2007:380, paragraph 160.

recital (27)). Several factors such as the common characteristics of the content of the contacts, the identity of individuals participating in the contacts, the timing of the contacts or the proximity in time confirm that the collusive contacts were linked and complementary[102] in nature, since each of them was intended to deal with one or more consequences of the normal pattern of competition within the framework of a global plan having a single objective.[103]

(84) The undertakings as well as individuals involved were essentially the same (see Section 2.2.1) and the timing and the frequency of the contacts confirms that the parties were pursuing a single objective and were not only engaged in sporadic anticompetitive contacts (see Section 4.3).

(85) The evidence available to the Commission shows that Riberebro pursued with the contacts a single anti-competitive objective and a single economic aim, namely that of stabilising market shares for the cartelized product and stopping the decline of prices. To achieve this aim, the cartel members exchanged confidential information on tenders, set minimum prices, agreed on volume targets and allocated customers (see recital (26)).

(86) Riberebro contributed to the common objectives of the anti-competitive conduct described in Section 4 and was or at least must have been aware of the general scope and the essential characteristics of the cartel as a whole. Riberebro knew or must have known that it was part of an overall plan in pursuit of a common unlawful object in particular as its (top level) management directly participated in the collusive arrangements/meetings (see recitals (31), (32), (33), (36), (39) and (49)).

(87) There is no evidence available that at any point in time Riberebro distanced itself from the cartel arrangements.

5.2.4. Restriction of competition

Principles

(88) Article 101(1) of the Treaty and Article 53 of the EEA Agreement expressly prohibit as incompatible with the internal market such agreements and concerted practices which have as their object or effect the restriction of competition by directly or indirectly fixing prices or any other trading conditions.

(89) It is settled case-law that, for the purpose of the application of Article 101 of the Treaty and Article 53 of the EEA Agreement, there is no need to take into account the effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the internal market. The same applies to concerted practices.

Application in the present case

(90) As is clear from the facts set out in Section 4.3, Riberebro was involved in horizontal anticompetitive arrangements which formed part of an overall scheme pursuing a single anti-competitive object of stabilizing market shares and stopping the decline of

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102 Judgment of the General Court of 14 March 2013, *Fresh Del Monte Produce v Commission*, T-587/08, ECLI:EU:T:2013:129, paragraph 593.

103 Judgment of the General Court of 8 July 2008, *Lafarge v Commission*, T-54/03, ECLI:EU:T:2008:255, paragraph 482; Judgment of the General Court of 12 December 2007, *BASF and UCB v Commission*, Joined Cases T-101/05 and T-111/05, ECLI:EU:T:2007:380, paragraph 179.

prices for canned mushrooms. The cartel was a non-aggression pact with a compensation scheme in case of customer transfer and this pact included the fixing of (minimum) prices, the allocation of customers and volume targets and the exchange of sensitive confidential information on tenders, prices, volumes and customers. The object of Riberebro's behaviour was to restrict competition within the meaning of Article 101 of the Treaty and Article 53 of the EEA Agreement.

(91) The fact that an agreement having an anti-competitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market. The facts described in Section 4.3 show that the anti-competitive cartel arrangements have been implemented.

(92) All of the arrangements covered by this Decision had the object of restricting price competition. Such agreements cannot benefit from the *de minimis* thresholds Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice).[104]. As stated by the Court of Justice in the Expedia case: "it must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition."[105]

5.2.5. Effect upon trade between Members States and between EEA contracting parties

Principles

(93) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of a single market between Member States, whether by partitioning national markets or by affecting the structure of competition within the common market. Similarly, Article 53 (1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.

(94) The European Courts have consistently held that, "in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States".[106] In any event, whilst Article 101 of the Treaty does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect.

(95) The application of Articles 101 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the participants' sales that actually involve the transfer of goods from one Member State or from one Contracting Party to another. Nor is it necessary, in order for these provisions to apply, to show that the

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104 OJ C 291, 30.8.2014, p. 1–4.

105 See Case C-226/11, Expedia Inc. v Autorité de la concurrence and Others judgment of 13 December 2012, paragraph 37.

106 Case 42/84 *Remia* and Others ECLI:EU:C:1985:327, paragraph 22; Case C-238/05 *Asnef-Equifax* ECLI:EU:C:2006:734, Recital 34 and *Cimenteries CBR and Others v Commission*, ECLI:EU:T:2000:77, cited above, paragraph 491.

individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[107]

(96) Point 61 of the Commission Notice on Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty[108] provides that agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States.

Application in the present case

(97) The market for canned mushrooms is characterised by a substantial volume of trade between Member States and between Contracting Parties to the EEA Agreement.

(98) From 1 September 2010 until 28 February 2012, the parties sold canned mushrooms to retailers and the food service channel based in different Member States and Contracting Parties to the EEA Agreement. The cartel arrangements covered the entire EEA - with focus on Western European countries - and related to trade within the EEA.

(99) The agreements and concerted practices concerned were therefore capable of having an appreciable effect upon trade between Member States and between contracting parties to the EEA Agreement.

5.2.6. Appreciability

(100) Trade between Member States and between EEA Contracting Parties was affected in an appreciable manner, given a substantial volume of trade in canned mushrooms and the fact that the cartel arrangements covered the whole territory of the EEA.

5.2.7. Application of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement

(101) Riberebro did not submit any claim based on Article 101(3) of the Treaty and Article 53(1) of the EEA Agreement that the agreements or concerted practices described were pro-competitive. The Commission itself did not detect any indications that the conditions of these provisions could be fulfilled. In any event, it is highly unlikely that efficiency arguments under these Articles could succeed in hard-core cartel cases.

6. ADDRESSEES

6.1. Principles

(102) In order to identify the addressees of this Decision, it is necessary to determine the legal entities to which responsibility for the infringement should be attributed.

(103) The Union's competition law refers to activities of "undertakings". The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal.[109] The concept of undertaking is not

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107 See Case T-13/89 *Imperial Chemical Industries v Commission* ECLI:EU:T:1992:35, paragraph 304.

108 Official Journal C 101, 27.04.2004, p. 81-96.

109 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission* C-97/08 P, ECLI:EU:C:2009:536, paragraphs 54 and 55 and the case law referred to in those paragraphs.

identical with the notion of corporate legal personality in national commercial or fiscal law.

(104) When such an economic entity infringes Article 101 of the Treaty, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. The infringement must be imputed unequivocally to a legal person on whom fines may be imposed.[110] The same principles hold true, mutatis mutandis, for the purposes of the application of Article 53 of the EEA Agreement.

(105) The conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Community competition law. In such circumstances, a Statement of Objections and a Decision imposing fines can be addressed to the parent company, without it being necessary to establish the personal involvement of the parent company in the infringement.[111]

(106) In the specific case in which a parent company has a (direct or indirect) 100% shareholding or near 100% shareholding in a subsidiary which has infringed the Article 101 of the Treaty there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.[112]

(107) In those circumstances, it is sufficient for the Commission to prove that the subsidiary is 100% or near 100% owned by the parent company in order to presume that the parent company exercises a decisive influence over the commercial policy of the subsidiary. The parent company can be held jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.[113]

(108) In cases were such exercise of decisive influence cannot be presumed, it has to be demonstrated on the basis of factual evidence, including in particular the

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110 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission* C-97/08 P, ECLI:EU:C:2009:536, paragraphs 56 and 57 and the case law referred to in those paragraphs.

111 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission* C-97/08 P, ECLI:EU:C:2009:536, paragraphs 58 and 59 and the case law referred to in those paragraphs.

112 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission* C-97/08 P, ECLI:EU:C:2009:536, paragraph 60 and the case law referred to in that paragraph. See also Judgment of the General Court of 30 September 2009, *Elf Aquitaine SA v Commission*, T-174/05 ECLI:EU:T:2009:368, (summary publication), paragraphs 125 and 155-156 and the case law referred to in those paragraphs and Judgment of the General Court of 30 September 2009, *Arkema SA v Commission*, T-168/05, ECLI:EU:T:2009:367 (summary publication), paragraphs 69-70 and the case law referred to therein, as well as paragraph 100.

113 Judgment of the Court of Justice of 10 September 2009, *Akzo Nobel and others v Commission* C-97/08 P, ECLI:EU:C:2009:536, paragraph 61 and the case law referred to in that paragraph; Judgment of the General Court of 30 September 2009, *Elf Aquitaine SA v Commission*, T-174/05 ECLI:EU:T:2009:368, quoted, paragraph 156 and Judgment of the General Court of 30 September 2009, *Arkema SA v Commission*, T-168/05, ECLI:EU:T:2009:367, quoted, paragraph 70.

management powers that the parent has on the subsidiary.[114] The European Courts have established that such powers can be, not only directly concluded from the parent's specific instructions, guidelines or rights of co-determination on the commercial policy given to their subsidiary, but also indirectly inferred from the totality of the economic and legal links between the parent company and its subsidiary[115] influencing it in aspects such as corporate strategy, operational policy, business plans, investment, capacity, provision of finance, human resources and legal matters, even if each of those elements taken in isolation does not have sufficient probative value.[116] Among these elements, the European Courts have considered, for example, the implementation of the applicable statutory provisions/agreements between the parent companies in relation to the management of their common subsidiary, the presence in management positions of the subsidiary of individuals who occupy simultaneously (or even consecutive)[117] managerial posts within the parent company,[118] or the business relationships that they have with each other (for example, where a parent company is also the supplier or customer of its subsidiary).[119]

(109) The question of decisive influence relates to the level of autonomy of the subsidiary with regard to its overall commercial policy and does not require awareness of the parent company with respect to the infringing behaviour of the subsidiary. Attribution of liability to a parent company flows from the fact that the two entities constitute a single undertaking for the purposes of the EU rules on competition[120] and does not require proof of the parent's participation in or awareness of the infringement, both as regards its organisation or implementation.

(110) Once the Commission has determined that an undertaking composed of the parent and one or more subsidiaries implicated in the infringement exists, it enjoys discretion in deciding which entity(ies) are to be held accountable for the infringement in the prohibition decision. It is established case-law that the Commission may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period[121] (or both for that matter).

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114 Judgment of the General Court of 2 February 2012, *Dow Chemical v. Commission*, T-77/08, ECLI:EU:T:2012:47, paragraph 76.

115 Judgment of the General Court of 2 February 2012, *Dow Chemical v. Commission*, T-77/08, ECLI:EU:T:2012:47, quoted, paragraph 77.

116 Judgement of the General Court of 12 July 2011, *Fuji Electric v Commission*, T-132/07, ECLI:EU:T:2011:344, paragraph 183.

117 Judgement of the General Court of 2 February 2012, *EI du Pont de Nemours and Others v Commission*, T-76/08, ECLI:EU:T:2012:46, paragraphs 70 and 74.

118 Judgement of the General Court of 12 July 2011, *Fuji Electric v Commission*, T-132/07, ECLI:EU:T:2011:344, quoted, paragraph 184.

119 Judgement of the General Court of 12 July 2011, *Fuji Electric v Commission*, T-132/07, ECLI:EU:T:2011:344, quoted, paragraph 184.

120 Judgment of the General Court of 15 June 2005, *Tokai Carbon v Commission*, Joined Cases T–71/03, T–74/03, T–87/03, and T–91/03, ECLI:EU:T:2005:220, paragraph 54.

121 Judgment of the General Court of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, Joined Cases T-259/02 to T-264/02 and T-271/02, ECLI:EU:T:2006:396, paragraph 331 and the case-law referred to therein, confirmed by the Judgment of the Court of Justice of 24 September 2009, *Erste Group Bank and Others v Commission*, Joint Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, ECLI:EU:C:2009:576, paragraphs 81 and 82.

6.2. Application in the present case

(111) The main entity for the sales of canned mushrooms within Riberebro is Riberebro Integral S.A.U. Grupo Riberebro Integral S.L. is the top legal entity of Riberebro. From 1 September 2010 until 28 February 2012, Riberebro Integral S.A.U. was a wholly owned subsidiary of Grupo Riberebro Integral S.L.

(112) According to the evidence on the file (see Section 4.3.), employees of both Grupo Riberebro Integral S.L. and Riberebro Integral S.A.U. have directly participated in the cartel contacts between 1 September 2010 and 28 February 2012 for the sales of canned mushrooms.[122]

(113) On that basis, the Commission considers that Grupo Riberebro Integral S.L. and Riberebro Integral S.A.U. should be held jointly and severally liable for the undertaking's involvement in the infringement for the entire period from 1 September 2010 until 28 February 2012.

(114) Consequently, the Commission addresses this Decision to the following companies and intends to hold these entities jointly and severally liable for their direct participation in illicit activities from 1 September 2010 until 28 February 2012:

(1) Grupo Riberebro Integral S.L. (see recitals (31), (32), (33), (36), (39) and (49)),

(2) Riberebro Integral S.A.U. (see recitals (31), (32), (33), (34), (36) and (45)).

(115) In addition, the Commission addresses this Decision to the following entity, applying the unrebutted[123] presumption of exercise of decisive influence because of a 100% shareholding and intends to hold this entity in its capacity as parent company jointly and severally liable for the illicit activities from 1 September 2010 until 28 February 2012:

Grupo Riberebro Integral S.L. for the acts of Riberebro Integral S.A.U.

7. DURATION OF THE INFRINGEMENT

(116) The cartel contacts started at least on 1 September 2010 with the multilateral meeting in Paris which was attended by all parties, including Riberebro (see recital (34). The Commission considers 1 September 2010 as the starting date of the involvement of Riberebro.

(117) Since 1 September 2010, there were regular multilateral meetings at [top management] level and as of 31 May 2011 also at sales manager level between the cartel participants (see Section 4.3.).

(118) There is no indication that the anticompetitive arrangements came to an end before the Commission inspections in this case. Riberebro did not publicly distance itself from the arrangements with other cartel participants before 28 February 2012. Therefore, the Commission considers the first day of its inspections, namely 28 February 2012, as the end date of the involvement of Riberebro.

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122 […].

123 The Commission stated its intention to rely on the Parental Liability Presumption in the statement of objections addressed to Riberebro. In its reply to the statement of objections, Riberebro did not put forward any arguments rebutting the presumption. On the contrary, Riberebro stated that it does not contest the description of facts and the legal assessment made in the statement of objections.

8. REMEDIES

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

(119) 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 (EC) No 1/2003.

(120) Given the secrecy in which cartel arrangements are carried out, it is necessary for the Commission to require the undertaking to which this Decision is addressed to bring the infringement to an end (if it has not already done so in view of the Settlement Decision adopted in this case) and to refrain from any agreement or concerted practice which may have the same or a similar object or effect.

8.2. Article 23(2) of Regulation (EC) No 1/2003 – Fines

8.2.1. Principles

(121) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 of the Treaty and Article 53 of the EEA Agreement[124]. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year. Pursuant to Article 23(3) of Regulation (EC) No 1/2003 the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement.

(122) The principles used by the Commission to set fines are laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[125] ('the Guidelines on fines'). The Commission determines a basic amount for each party. The basic amount results from the addition of a variable amount and an additional amount. Both components of the basic amount are calculated on the basis of an undertaking's value of sales of goods or services to which the infringement relates in a given year.

(123) The basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are found. The Commission sets the fines at a level sufficient to ensure deterrence. The Commission assesses the role played by each undertaking party to the infringement on an individual basis.

(124) The Commission may use rounded figures in its calculations.

8.2.2. Intent

(125) Based on the facts described in Section 4 of this Decision, the Commission considers that the infringement was committed intentionally. Even if it were found that the addressee did not act intentionally, it acted at least negligently.

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[124] According to Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for 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 Treaty] of the EC Treaty […] shall apply *mutatis mutandis*" (OJ L 305, 30.11.1994, p.6.).

[125] OJ C 210, 1.9.2006, p. 2. According to point 37 of the Guidelines on fines the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in their point 21.

(126) The Commission therefore imposes a fine on Riberebro.

8.2.3. The value of sales

(127) The basic amount of the fine is to be set by reference to the value of sales,[126] that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the EEA.

(128) The relevant value of sales is the undertaking's sales of canned mushrooms (as defined in recital (2)) in the EEA.

(129) According to the information provided by Riberebro, the Commission uses Riberebro's sales in the last full business year of its participation in the infringement, namely 2011:

Table 1. The value of sales

Undertaking	**Value of Sales in the EEA (EUR)**
Riberebro	**[…]**

8.2.4. Determination of the basic amount of the fines

(130) The basic amount consists of an amount of up to 30% of an undertaking's relevant sales in the EEA, depending on the degree of gravity of the infringement and multiplied by the period in years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of an undertaking's relevant sales, irrespective of the duration.[127]

8.2.4.1. Gravity

(131) The gravity of the infringement determines the percentage of the value of sales taken into account in setting the fine. 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.[128]

(132) In its assessment, the Commission considers the facts described in this Decision, and in particular the fact that price coordination arrangements are, by their very nature, among the most harmful restrictions of competition. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale of the value of sales.[129]

(133) The Commission also takes into account in the assessment the fact that the infringement has been thoroughly implemented and covered the entire EEA.

(134) Given the specific circumstances of this case and taking into account the nature, the geographic scope of the infringement and the fact that the infringement has been

126 Point 12 of the Guidelines on fines.
127 Points 19-26 of the Guidelines on Fines.
128 Points 21 and 22 of the Guidelines on Fines.
129 Point 23 of the Guidelines on Fines.

thoroughly implemented the proportion of the value of sales to be taken into account is 17%.

8.2.4.2. Duration

(135) In calculating the fine to be imposed on the undertaking, the Commission also takes into consideration the duration of the undertaking's participation in the infringement.[130]

(136) The duration to be taken into account for the purposes of calculating the fine to be imposed on Riberebro, rounded down to the month and the resulting multiplier for duration is set out in Table 2.

Table 2. Duration

Entity	**Duration**	**Multipliers**
Riberebro	1 September 2010 - 28 February 2012	1.41

8.2.4.3. Additional amount

(137) The infringement concerns a price-coordination cartel. Therefore, the Commission includes in the basic amount of each fine a sum of between 15% and 25% of the value of sales to deter the undertakings from entering into such illegal practices on the basis of the criteria listed in recital (134) with respect to the variable amount.

(138) Taking into account the factors listed in Section 8.3.2.1 relating to the nature, the geographic scope of the infringement and the fact that the infringement has been thoroughly implemented the percentage to be applied for the purposes of calculating the additional amount is 17%.

8.2.4.4. Calculation of the basic amount

(139) Based on the criteria explained above, the basic amount of the fine to be imposed on Riberebro is set out in Table 3.

Table 3. Basic amounts of the fine

Undertaking	**Basic amount in EUR**
Riberebro	[…]

8.2.5. Adjustments to the basic amount of the fine: aggravating or mitigating factors

(140) The Commission may increase the basic amount where it considers that aggravating circumstances apply. Those circumstances are listed in a non-exhaustive way in point 28 of the Guidelines on fines. The Commission may also reduce the basic amount where it considers that mitigating circumstances apply. Those circumstances are listed in a non-exhaustive way in point 29 of the Guidelines on fines.

(141) The Commission does not consider that any aggravating or mitigating circumstances apply in this case.

130 Point 24 of the Guidelines on fines.

8.2.6. Application of the 10% turnover limit

(142) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking participating in the infringement must not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision.

(143) The 10% cap laid down in Article 23(2) is calculated on the basis of the total turnover of all the entities constituting an 'undertaking' in accordance with settled case-law.[131]

Table 4. Fine after application of 10% turnover limit

Undertaking	**Legal maximum amount (EUR)**
Riberebro	[…]

8.2.7. Application of the Leniency Notice

(144) Riberebro submitted its leniency application on 21 May 2012. Riberebro was the first undertaking to meet the requirements of points 24 and 25 of the Leniency Notice. Riberebro was notified of the decision of 9 April 2013 by which the Commission announced its intention to grant a reduction of the fine within the range of 30-50%. It cooperated continuously during the investigation and there are no indications that Riberebro continued its involvement in the cartel after its leniency application. Riberebro argued in its reply to the SO that it has fulfilled all the criteria established in the Leniency Notice and should be granted a reduction of 50% in the fine. It underlined that Riberebro has facilitated the Commission's task in proving the infringement.

(145) As regards the determination of the level of the reduction of the fine from which undertakings that have submitted a leniency application may benefit under the Leniency Notice, the Court has stated that the relevant criteria are, inter alia, the time at which the submission was made, the extent of the added value of the evidence provided, as well as the extent and continuity of the cooperation.[132]

(146) In assessing the significant added value of Riberebro's leniency application, the Commission takes into account that the evidence provided by Ribererbro strengthened by its very nature and level of detail the Commission's ability to prove the cartel.

(147) Riberebro provided substantial written evidence from the period during which the facts pertain. Part of this evidence […] constituted new and compelling evidence.

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131 See e.g. Judgment of the General Court of 16 June 2011, *Team Relocations and Others v Commission*, Joined Cases T-204/08 and T-212/08, ECLI:EU:T:2011:286, paragraphs 154; upheld on this point on appeal in Judgment of the Court of Justice of 11 July 2013, *Team Relocations and Others v Commission*, Case C-444/11 P, ECLI:EU:C:2013:656, paragraphs 170-179; Judgment of the General Court of 16 September 2013, *Laufen Austria v Commission*, T-411/10, ECLI:EU:T:2013:443, paragraph 150; Judgment of the General Court of 17 May 2013, *Parker Hannifin Manufacturing and Parker-Hannifin v Commission*, T-146/09, ECLI:EU:T:2013:258, paragraphs 226-230; Judgment of the General Court of 27 June 2012, *YKK and Others v Commission*, T-448/07, ECLI:EU:T:2012:322, paragraphs 192-195.

132 Judgment of the Court of Justice of 5 December 2013, *Akzo Nobel and others v Commission* C-455/11 P, ECLI:EU:C:2013:796, paragraph 105.

(148) Riberebro also provided other incriminating evidence directly relevant to the facts in question […]. These statements were detailed and corroborated the other contemporaneous evidence on file and/or the evidence provided by Riberebro. This evidence on the subject matter of the meetings and contacts significantly helped the Commission better understand the sophisticated functioning of this cartel and the relationships among the cartel members.

(149) It must also be taken into account that the immunity applicant's usual participant to the cartel meetings was absent for a specific period and that Riberebro was capable of filling that gap. […].

(150) Taking into account that Riberebro's leniency application substantially strengthened, by the nature and level of detail of the evidence submitted, the Commission's ability to prove the case, Riberebro's leniency cooperation should be rewarded with a 50% reduction of its fine.

8.2.8. Ability to pay (ITP) the fine

Introduction

(151) According to point 35 of the 2006 Guidelines on fines, "In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."

(152) In exercising its discretion under point 35 of the 2006 Guidelines on fines, the Commission carries out an overall assessment of the undertaking's financial situation, with the primary focus on the undertaking's capacity to pay the fine in a specific social and economic context.

(153) Riberebro made an application claiming its "inability to pay" the fine under point 35 of the 2006 Guidelines on fines. The Commission has considered this claim and carefully assessed the available financial data of this undertaking. Riberebro received requests for information pursuant to Article 18(1) and (2) of Regulation (EC) No 1/2003 asking it to submit details about its individual financial situation and the specific social and economic context it operates in.

(154) Insofar as the undertaking argues that the estimated fine would have a negative impact on its financial situation, without adducing credible evidence demonstrating its inability to pay the expected fine, the Commission points to settled case law according to which the Commission is not required, when determining the amount of the fine to be imposed, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving

unjustified competitive advantages to undertakings least well adapted to the conditions of the market.[133]

(155) The financial situation of the undertaking concerned is assessed at the time the Decision is adopted and on the basis of the financial data and information submitted by the undertaking.

(156) In assessing the undertakings' financial situation, the Commission considers the annual financial statements (including the balance sheet, the income statement, the statement of changes in equity, the cash-flow statement and the notes) of the last (usually five) business years, as well as their projections for the current year and next (usually) two years. The Commission takes into account and relies upon a number of financial ratios to measure the solidity (in this case, the proportion which the expected fine would represent in the undertakings' equity and assets), profitability, solvency and liquidity, all of which are commonly used when evaluating risks of bankruptcy. The analysis is both prospective and retrospective but with a focus on the present and immediate future of the concerned undertakings. The analysis is not purely static but rather dynamic, whilst taking into account consistency over time of the submitted projections. The analysis takes into account possible restructuring plans and their state of implementation. In addition, the Commission takes into account the relations with outside financial partners such as banks, on the basis of copies of contracts concluded with those partners in order to assess the undertakings' access to finance and, in particular, the scope of any undrawn credit facilities it may have. The Commission also includes in its analysis the relations with shareholders in order to assess if they are able and can be expected to assist the undertakings concerned financially.[134]

(157) The fact that an undertaking may go into liquidation does not necessarily mean that there will always be a total loss of assets' value and, therefore, this may not, in itself, justify a reduction of the fine which would have otherwise been imposed.[135] This is because liquidations sometimes take place in an organised, voluntary manner, as part of a restructuring plan in which new owners or new management ensure the continuity of the undertaking and of its assets. Therefore, the applicant which has invoked an inability to pay needs to demonstrate that good and viable alternative solutions are not available. If there is no credible indication of alternative solutions being available within a reasonably short period of time, which would ensure keeping the undertaking as a going concern, the Commission considers that there is a sufficiently high risk that the undertaking's assets would lose a significant part of

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133 See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, IAZ International Belgium and Others v Commission ECLI:EU:C:1983:310, paragraphs 54 and 55, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri and Others v Commission ECLI:EU:C:2005:408 paragraph 327, Case C-308/04 P, SGL Carbon AG v Commission ECLI:EU:C:2006:433, paragraph 105.

134 By analogy to the assessment of "serious and irreparable harm" in the context of interim measures, the Commission bases its assessment of the undertaking's ability to pay on the financial situation of the undertaking as a whole, including its shareholders, irrespective of the finding of liability (Case C-335/99 P (R), HFB v. Commission, ECLI:EU:C:1999:608; Case C-7/01 P(R), FEG v. Commission, ECLI:EU:C:2001:183, and Case T-410/09 R Almamet v. Commission ECLI:EU:T:2012:676, at paragraphs 47 et seq.

135 See case law above as well as Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 Tokai Carbon and Others v Commission ECLI:EU:T:2004:118, paragraph 372 and Case T-64/02 Heubach v Commission ECLI:EU:T:2005:431, paragraph 163.

their value if, as a result of the fine to be imposed, the undertaking were to be forced into liquidation.

(158) The Commission also assesses the specific social and economic context in case the undertaking's financial situation, including the situation of their assets, is found to be sufficiently critical following the analysis described in recitals (156) and (157).

(159) Consequently, where the conditions laid down in point 35 of the 2006 Guidelines on fines are met, the reduction of the final amount of the fine imposed on the undertaking is established on the basis of the financial and qualitative analysis described in recitals (156) and (157) also taking into account its ability to pay the final amount of the fine imposed and the likely effect that such payment would have on the economic viability of the concerned undertaking.

Assessment of the undertaking's ability to pay the fine

(160) During the settlement discussions, Riberebro submitted a claim for "inability to pay" (ITP) on 9 July 2013 and provided further data following requests for information sent by the Commission. The Commission assessed the claim and took the provisional position to reject it. This intention was communicated to Riberebro during the third settlement meeting in March 2014. In April 2014, Riberebro communicated its intention not to send a settlement submission by the due date arguing that the fines ranges communicated at that meeting would lead the Group to bankruptcy. Riberebro also intended both to provide updated information in respect to its ITP claim and to continue cooperating with the Commission, with the view that the future fine would not irretrievably jeopardize Riberebro's viability.

(161) The Commission made a reassessment of the ITP claim taking into account more recent information and financial data provided by Riberebro in 2015 and early 2016 such as (a) the audited 2014 financial statements, (b) updated financial forecasts for the period 2015-2018, (c) detailed information about the changes observed in 2015 in respect to the shareholding structure of Riberebro as well as to the increase in the participation of Riberebro in the capital of some subsidiaries and (d) the debt refinancing agreement for the period 2015-2023.

(162) Following this reassessment, the Commission concluded that the ITP claim submitted by Riberebro should remain rejected for the reasons set out in recitals (163) until (169).

(163) […].

(164) […].

(165) […].

(166) […].

(167) […].

(168) […]

(169) […].

9. CONCLUSION: FINAL AMOUNT OF INDIVIDUAL FINES TO BE IMPOSED IN THIS DECISION

(170) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are set out in Table 5.

Table 5. Fines

Undertaking	Fines (in EUR)
Riberebro	5 194 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertaking infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement covering the entire EEA in the canned mushrooms sector, which consisted of price coordination and customer allocation:

1. Riberebro:

(a) Grupo Riberebro Integral S.L., from 1 September 2010 until 28 February 2012

(b) Riberebro Integral S.A.U., from 1 September 2010 until 28 February 2012

Article 2

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

(a) Grupo Riberebro Integral S.L. and Riberebro Integral S.A.U. jointly and severally: EUR 5 194 000;

The fines shall be credited in euros within a period of three 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.: European Commission – BUFI /AT.39965

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 90 of Commission Delegated Regulation (EU) No 1268/2012.[136]

Article 3

The undertaking referred to in Article 1 shall immediately bring to an end the infringement referred to in that Article if it has not already done so.

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

Article 4

This Decision is addressed to:

(1) Grupo Riberebro Integral S.L. Polígono Industrial La Llanada, 26540 Alfaro, La Rioja, Spain;

(2) Riberebro Integral S.A.U. Polígono Industrial La Llanada, 26540 Alfaro, La Rioja, Spain.

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

Done at Brussels, 6.4.2016

For the Commission
Margrethe VESTAGER
Member of the Commission

[136] Commission Delegated Regulation (EU) No 1268/2012 of 29 October 2012 on the rules of application of Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union (OJ L 362, 31.12.2012, p. 1).