EUROPEAN COMMISSION
DG Competition

CASE AT.40055 – Parking heaters

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7 Regulation (EC) 1/2003

Date: 17/06/2015

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EUROPEAN
COMMISSION

Brussels, 17.6.2015
C(2015) 3981 final

COMMISSION DECISION

of 17.6.2015

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

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

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(Only the English text is authentic)

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 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,[2] and in particular Article 10a thereof,

Having regard to the Commission decision of 24 July 2014 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 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,[3]

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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 ("Treaty"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the Treaty will be used throughout this Decision.

2 OJ L 123, 27.4.2004, p. 18.

3 Final report of the Hearing Officer of 15 June 2015.

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. The infringement consisted of the coordination of prices and the allocation of supplies of parking heaters in the European Economic Area ("EEA") from 13 September 2001 to 15 September 2011.

(2) This Decision is addressed to the following legal entities:

(a) Webasto SE, Webasto Thermo & Comfort SE and Webasto Fahrzeugtechnik GmbH (collectively "Webasto"); and

(b) Eberspächer Gruppe GmbH & Co. KG, Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH (collectively "Eberspächer").

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The product

(3) The products concerned by the anticompetitive conduct are fuel-operated parking heaters and fuel-operated auxiliary heaters for cars[4] and trucks[5].

(4) Fuel-operated parking heaters heat a parked car and truck and/or pre-warm its engine. Fuel-operated auxiliary heaters support the heating system of modern cars and trucks that do not produce enough waste heat to keep a running car and truck warm. Fuel-operated parking heaters and fuel-operated auxiliary heaters are referred to as "parking heaters" in this Decision.

(5) Parking heaters are standard products that are specifically adapted for a particular car or truck or group of cars or trucks. For this purpose, customers issue Requests for Quotations ("RFQs").

2.2. The undertakings subject to the proceedings

2.2.1. Webasto

(6) The relevant legal entities are:

(a) Webasto SE with its registered offices in Stockdorf, Germany;

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4 For the purpose of this Decision, a car is defined as a power-driven vehicle, having at least four wheels, the maximum authorised weight of which is 3.5 tonnes and which may not be used for the transport of more than nine persons. Vans and minivans therefore fall within this definition.

5 For the purpose of this Decision, a truck is defined as a power-driven vehicle, the weight of which is above 3.5 tonnes and which is used for carrying goods and materials. This case does not cover parking heaters sold to manufacturers of passenger transport vehicles with a weight above 3.5 tons, in particular buses.

(b) Webasto Thermo & Comfort SE with its registered offices in Gilching, Germany; and

(c) Webasto Fahrzeugtechnik GmbH with its registered offices in Vienna, Austria.

(7) Webasto AG was the legal entity which operated Webasto's parking heater business in the period from 13 September 2001 to 15 September 2011. On 2 July 2012 Webasto AG transferred Webasto's parking heater business to its subsidiary Webasto Thermo & Comfort SE.[6] On that same day, Webasto AG became Webasto SE.

(8) Webasto Fahrzeugtechnik GmbH is the subsidiary of the Webasto group responsible for the sales of parking heaters in the aftermarket in Austria, including in the period from 13 September 2001 to 15 September 2011. Webasto SE (previously Webasto AG) has held 100% of the shareholding and 100% of the voting rights in Webasto Fahrzeugtechnik GmbH since 30 March 2005. Before 30 March 2005, the situation was as follows:

(a) between 13 September 2001 and December 2003, 51% of the shareholding and 51% of the voting rights in Webasto Fahrzeugtechnik GmbH were held by Webasto Thermosysteme International GmbH;

(b) in June 2003 Webasto Thermosysteme International GmbH merged with Webasto Thermosysteme GmbH;

(c) in December 2003, Webasto Thermosysteme GmbH merged with Webasto AG.

(9) Webasto is active in the development and production of roof systems for cars as well as heating, cooling and ventilation systems for cars, trucks and other vehicles. The worldwide turnover of Webasto in 2014 was EUR 2 469 417 000.[7]

2.2.2. Eberspächer

(10) The relevant legal entities are:

(a) Eberspächer Gruppe GmbH & Co. KG with its registered offices in Esslingen am Neckar, Germany;

(b) Eberspächer Climate Control Systems GmbH & Co. KG with its registered offices in Esslingen am Neckar, Germany; and

(c) Eberspächer GmbH with its registered offices in Vienna, Austria.

(11) From 13 September 2001 to 15 September 2011, Eberspächer Gruppe GmbH & Co. KG directly or indirectly owned 100% of the shares of Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH.

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6 Prior to the transfer, Webasto Thermo & Comfort SE was a shell company without any operating business.

7 […].

(12) Eberspächer is active in the development and production of parking heaters, bus air conditioning systems, exhaust technology and automotive control systems. The worldwide turnover of Eberspächer in 2014 was EUR 3 598 500 000.[8]

3. PROCEDURE

(13) On 15 November 2012, Webasto applied for a marker under the Leniency Notice[9]. The application was followed by a number of submissions consisting of oral statements and documentary evidence. On 11 July 2013, the Commission granted Webasto conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.

(14) Between 23 and 26 July 2013, the Commission carried out unannounced inspections at the premises of Eberspächer. On 9 August 2013, Eberspächer applied for immunity or, in the alternative, for a reduction of a fine, under the Leniency Notice.

(15) On 24 July 2014 the Commission initiated proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 against the addressees of this Decision (also referred to as "parties" or individually "party") with a view to engaging in settlement discussions with the parties. After each party had confirmed its willingness to engage in settlement discussions, the discussions started on 10 September 2014.

(16) Settlement meetings with the parties took place between 10 September 2014 and 10 March 2015. During those meetings, the Commission informed the parties of the potential objections it envisaged raising against them and disclosed the main pieces of evidence to establish those objections.

(17) The parties were also given access to the relevant parts of the oral statements at the Commission premises and received a copy of the relevant pieces of documentary evidence and a list of all the documents in the file. The Commission also provided the parties with an estimation of the range of fines likely to be imposed by the Commission.

(18) Each party expressed its view on the objections which the Commission envisaged raising against it. The parties' comments were carefully considered by the Commission and, where appropriate, taken into account.

(19) At the end of the settlement discussions, each party considered that there was a sufficient common understanding between it and the Commission as regards the potential objections as well as the estimation of the range of likely fines in order to continue the settlement process.

(20) On […] and […], Webasto and Eberspächer respectively submitted their formal requests to settle to the Commission pursuant to Article 10a (2) of Regulation (EC) No 773/2004 (the "settlement submissions"). The settlement submission of each party contained:

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[8] […]

[9] Commission notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

(a) 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;

(b) 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;

(c) the party's confirmation that it has been sufficiently informed of the objections the Commission envisages raising against it and that it has been given sufficient opportunity to make its views known to the Commission;

(d) the party's confirmation that it does not envisage requesting access to the file or requesting 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;

(e) 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 in English.

(21) Each of the parties made its settlement submission conditional upon the imposition of a fine by the Commission not exceeding the amount specified in that submission.

(22) On 6 May 2015, the Commission adopted a Statement of Objections addressed to Webasto and Eberspächer. All the parties replied to the Statement of Objections by confirming that it corresponded to the contents of their settlement submissions and that they therefore remained committed to following the settlement procedure.

(23) Having regard to the clear and unequivocal acknowledgments of all the parties to these proceedings described in their settlement submissions and to their clear and unequivocal confirmation that the Statement of Objections reflected their settlement submissions, it is concluded that the addressees of this Decision should be held liable for the infringement as described in this Decision.

4. DESCRIPTION OF THE EVENTS

4.1. Nature and scope of the cartel

(24) Webasto and Eberspächer coordinated prices and allocated the supply of parking heaters in the EEA from 13 September 2001 to 15 September 2011. In the framework of their basic understanding ("*Grundverständnis*"), established on 13 September 2001, Webasto and Eberspächer agreed that competition between them would focus primarily on quality and technology, rather than price.[10] Webasto and Eberspächer also agreed to respect the incumbent supplier principle, which meant that they would not aggressively pursue individual customers or specific models supplied historically

[10] In this respect, Webasto and Eberspächer also used the term "*reasonable Wettbewerb*", […].

by the other undertaking.[11] The ultimate aim of their conduct was thus to generate "reasonable margins" by limiting price competition.

(25) The conduct covered supplies to original equipment manufacturers (OEMs) and semi-OEM[12] customers that manufacture cars and trucks. It also extended to aftermarket sales in Germany and Austria.

4.2. Functioning of the cartel

(26) First, following the issuance of a RFQ, Webasto and Eberspächer typically had bilateral contacts (both face-to-face meetings and phone conversations) during which they discussed the attribution of the RFQ. Further, they engaged to varying degrees in exchanges of various price elements and the coordination of their responses to the RFQ. Contacts relating to a RFQ took place predominantly at the level of sales people.[13]

(27) Second, high-level meetings of board members and top managers from the two undertakings took place several times a year. Those contacts took place within a limited circle of key individuals, which remained almost the same throughout the duration of the cartel. During those high-level meetings, Webasto and Eberspächer reinforced their mutual cooperation by discussing issues of general interest and sometimes also coordinating the allocation of customers and RFQs.[14] The general line agreed at those meetings served as guidance for the sales people in the framework of their contacts.[15] Occasionally, board members and top managers from the two undertakings also called or sent emails to each other in order to settle problems or questions.[16]

(28) Third, Webasto and Eberspächer supplemented their price coordination and allocation activities by regular exchanges of sensitive market information, including information concerning prices that had been submitted in the framework of RFQs.[17]

(29) Fourth, the cartel covered aftermarket sales in Germany and Austria in particular via car and truck brand dealers and independent dealers. The discussions concerned sales of: (i) parking heaters for cars and trucks that originally did not have any heater *("Nachrüstung")*; and (ii) upgrade-kits to transform auxiliary heaters into complete parking heaters *("Aufrüstung")*.[18] The aftermarket sales in Germany and Austria were occasionally discussed between Webasto and Eberspächer together with issues regarding supplies to OEM and (to a lesser extent) semi-OEM customers.[19]

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11 […].

12 For the purpose of this Decision, semi-OEM means that the parking heater is not included on the production line**,** where the car or truck is assembled but is built-in by the OEM upon the specific request of the customer, for example in a separate fabrication hall.

13 […].

14 […].

15 […].

16 […].

17 […].

18 […].

19 […].

(30) At least in the period between 2004 and 2008, an annual meeting took place between Webasto and Eberspächer at the beginning of each year to harmonise their price lists for the German aftermarket.[20] Similar contacts also took place between Webasto and Eberspächer with regard to the Austrian aftermarket[21], or together for both Member States[22]. At the initiative of the German headquarters of Webasto and Eberspächer, the Austrian subsidiaries of Webasto and Eberspächer built up a close and frequent line of communication between themselves and with certain individuals in their respective German headquarters.[23] Employees of the Austrian subsidiaries of Webasto and Eberspächer had regular contacts on the phone as well as face-to-face meetings, occasionally with the involvement of certain key individuals from the German headquarters of the undertakings.[24]

(31) As part of their basic understanding in the aftermarket in Germany and Austria, Webasto and Eberspächer carried out marketing campaigns and price reductions that were directly beneficial only for final consumers and not for dealers.[25] Furthermore, Webasto and Eberspächer harmonised the amount of discounts, rebates[26] and other special conditions provided to the dealers[27]. Concerning the sale of kits *("Aufrüstung"),* Webasto and Eberspächer agreed not to upgrade each other's products in the aftermarket.[28]

4.3. Geographic scope of the cartel

(32) Throughout the duration of the conduct, the geographic scope of the cartel concerning the supply of parking heaters to OEMs and semi-OEMs was the EEA.

(33) Throughout the duration of the conduct, the geographic scope of the cartel concerning the aftermarket was Germany and Austria.

4.4. Duration of the cartel

(34) The cartel started on 13 September 2001. On that date a meeting involving four top-managers from Webasto and Eberspächer took place at the IAA (trade fair) in Frankfurt.[29] At that meeting, Webasto and Eberspächer agreed on the basic understanding *(Grundverständnis)* that served as the basis of the cartel.

(35) The cartel ended on 15 September 2011.[30] On that date, Webasto and Eberspächer discussed the allocation of a specific project at the IAA in Frankfurt.

(36) The duration of the cartel is therefore 10 years and 2 days.

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20 […].
21 […].
22 […].
23 […].
24 […].
25 In German: *"…nur endkundenrelevanten Aktionen durchzuführen"* […]
26 […].
27 […].
28 […].
29 […].
30 […].

5. LEGAL ASSESSMENT

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

5.1.1. Agreements and concerted practices

(a) Principles

(37) Article 101(1) of the Treaty prohibits agreements between undertakings, decisions by associations of undertakings and 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 internal market. Similarly, Article 53(1) of the EEA Agreement prohibits agreements and concerted practices between undertakings which may affect trade between Contracting Parties to the EEA Agreement and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

(38) 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. Although Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement draw a distinction between the concept of concerted practice and that of 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. Thus, conduct may fall under Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.[31]

(39) The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other.[32]

(b) Application to this case

(40) The conduct described in section 4 presents all the characteristics of an agreement and/or a concerted practice. The various aspects of the conduct of the parties were interlinked and served the same goal: to restrict competition between them, in

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[31] Judgment of the General Court of 17 December 1991, *Hercules* v *Commission*, T-7/89, ECLI:EU:T:1991:75, paragraph 256; Judgment of the Court of Justice of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, ECLI:EU:C:1972:70, paragraph 64; and Judgment of the Court of Justice of 16 December 1975, *Suiker Unie and others* v *Commission*, 40-48/73 etc., ECLI:EU:C:1975:174, paragraphs 173-174.

[32] 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.

particular by coordinating prices, allocating the supply of parking heaters and exchanging sensitive market information. The conduct of the parties can be characterised as a complex infringement consisting of various actions which can be classified as an agreement or a concerted practice, or both, whereby they knowingly substituted practical co-operation between them for the risks of competition.

(41) The Commission has therefore reached the conclusion that the conduct constitutes an "agreement" or a "concerted practice", or both, within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

5.1.2. Single and continuous infringement

(a) Principles

(42) 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 that provision. Accordingly, if 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.[33]

(b) Application to this case

(43) The conduct described in section 4 constitutes a single and continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

(44) The collusion between Webasto and Eberspächer was in pursuit of an identical object, namely that of coordinating the allocation and price of (i) parking heaters to OEMs and semi-OEMs in the EEA and (ii) aftermarket sales in Germany and Austria.

(45) Moreover, Webasto and Eberspächer engaged on a regular and repeated basis in an exchange of other commercially sensitive information such as price elements and market strategies.

(46) The evidence demonstrates that the contacts between Webasto and Eberspächer were of a continuous nature, with numerous phone calls, emails and personal contacts. The different elements of the infringement were in pursuit of an identical object, which remained the same throughout the whole period of the infringement, namely to keep the prices above the natural market trend.

(47) The existence of a single and continuous infringement is further supported by the fact that the cartel followed the same pattern throughout the period of the infringement, the individuals involved were essentially the same and there was a continuity and similarity of method.

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[33] Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland et al.*, C-204/00 P etc., ECLI:EU:C:2004:6, paragraph 258.

(48) It is therefore concluded that Webasto and Eberspächer participated in a single and continuous infringement of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

5.1.3. Restriction of competition

(a) Principles

(49) To come within the prohibition laid down in Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement, an agreement, a decision by an association of undertakings or a concerted practice must have as its object or effect the prevention, restriction or distortion of competition in the internal market.

(50) In that regard, it is apparent from the case-law of the Court of Justice of the European Union that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects.[34] That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition.[35]

(51) Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or 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(1) of the EEA Agreement, to prove that they have actual effects on the market.[36]

(b) Application to this case

(52) Through the conduct described in Section 4, the parties coordinated prices and allocated the supply of parking heaters in the EEA.

(53) Such conduct, by its very nature, restricts competition within the meaning of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

(54) It is therefore concluded that the object of the parties' conduct was to restrict competition within the meaning of Article 101 of the Treaty and Article 53(1) of the EEA Agreement.

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[34] 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 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 113.

[35] 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 50; 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.

[36] 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; 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.

5.1.4. Effect upon trade between Member States and between Contracting Parties to the EEA Agreement

(a) Principles

(55) Article 101(1) of the Treaty is aimed at agreements and concerted practices which might harm the attainment of an internal market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market. Similarly, Article 53(1) of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous EEA between the Contracting Parties to the EEA Agreement.[37]

(b) Application to this case

(56) During the relevant period, the sales of parking heaters involved a substantial volume of trade between Member States and between Contracting Parties to the EEA Agreement. Webasto and Eberspächer sold large quantities of parking heaters to OEM and semi-OEM customers with productions sites in the EEA. They also sold parking heaters to aftermarket customers in Germany and Austria. The sales data submitted by Webasto and Eberspächer provide ample evidence of direct sales made in the EEA.

(57) It is therefore concluded that the infringement was capable of having an appreciable effect upon the trade between Member States and between the Contracting Parties to the EEA Agreement.[38]

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

(a) Principles

(58) The provisions of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement may be declared inapplicable pursuant to Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(b) Application to this case

(59) On the basis of the facts before the Commission, there are no indications that the conduct of Webasto and Eberspächer entailed any efficiency benefits or otherwise promoted technical or economic progress.

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[37] Judgment of the General Court of 15 March 2000, *Cement*, T-25/95 etc., ECLI:EU:T:2000:77, paragraph 3930; Judgment of the Court of Justice of 28 April 1998, *Javico International and Javico AG v Yves Saint Laurent Parfums SA*, C-306/96, ECLI:EU:C:1998:173, paragraphs 16 and 17.

[38] Judgment of the Court of Justice of 24 September 2009, *Erste Bank der österreichischen Sparkassen v Commission*, C-125/07 P, ECLI:EU:C:2009:576, paragraph 39.

(60) It is therefore concluded that the conditions for declaring inapplicable the provisions of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement provided for in Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement are not met in this case.

6. DURATION OF THE INFRINGEMENT

(61) As set out in section 4.4, Webasto and Eberspächer started their participation in the cartel on 13 September 2001. The cartel ended on 15 September 2011.

(62) The duration of the participation of Webasto and Eberspächer in the infringement was therefore from 13 September 2001 to 15 September 2011.

7. LIABILITY

(a) Principles

(63) Union competition law refers to the activities of undertakings and the concept of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed.[39]

(64) When such an entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. Thus the conduct of a subsidiary may be imputed to the parent company in particular where that subsidiary, despite having a separate legal personality, 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, regard being had in particular to the economic, organisational and legal links between those two legal entities.[40]

(65) The Commission cannot merely find that an undertaking is able to exert decisive influence over another undertaking, without checking whether that influence was actually exerted. On the contrary, it is, as a rule, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other.[41]

(66) In the particular case, however, in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of the Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive influence over its subsidiary. In such a situation, it is sufficient for the Commission

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39 Judgment of the Court of Justice of 13 June 2013, *Versalis v Commission*, C-511/11 P, ECLI:EU:C:2013:386, paragraph 51.

40 Judgment of the Court of Justice of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, ECLI:EU:C:2011:620, paragraph 54.

41 Judgment of the General Court of 27 March 2014, *Saint Gobain v Commission*, T-56/09 and T-73/09, ECLI:EU:T:2014:160, paragraph 311.

to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies.[42]

(67) In addition, when an entity that has committed an infringement of the competition rules is subject to a legal or organisational change, that change does not necessarily create a new undertaking free of liability for the conduct of its predecessor that infringed the competition rules, when, from an economic point of view, the two entities are identical. Where two entities constitute one economic entity, the fact that the entity that committed the infringement still exists does not as such preclude the imposition of a penalty on the entity to which its economic activities were transferred. In particular, applying penalties in this way is permissible where those entities have been under the control of the same person and have therefore, given the close economic and organisational links between them, carried out, in all material respects, the same commercial instructions.[43]

(b) Application to this case

(68) Having regard to the body of evidence and the facts described in Section 4, the parties' clear and unequivocal acknowledgements of the facts and the legal qualification thereof contained in their settlement submissions, as well as their replies to the Statement of Objections, this Decision should be addressed to the legal entities and undertakings listed in sections 7.1 and 7.2.

7.1. Webasto

(69) Webasto SE (as legal successor of Webasto AG), Webasto Thermo & Comfort SE (as economic successor of Webasto AG) and Webasto Fahrzeugtechnik GmbH have acknowledged liability for their direct participation in the infringement.

(70) Webasto SE has further acknowledged that it is jointly and severally liable for the conduct of its subsidiary, Webasto Fahrzeugtechnik GmbH.

(71) Webasto SE, Webasto Thermo & Comfort SE and Webasto Fahrzeugtechnik GmbH should therefore be held jointly and severally liable for the infringement.

7.2. Eberspächer

(72) Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH have acknowledged liability for their direct participation in the infringement.

(73) Eberspächer Gruppe GmbH & Co. KG has further acknowledged that it is jointly and severally liable for the conduct of its wholly-owned subsidiaries, Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH.

(74) Eberspächer Gruppe GmbH & Co. KG, Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH should therefore be held jointly and severally liable for the infringement.

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[42] 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.

[43] Judgment of the Court of Justice of 18 December 2014, *Commission v Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, ECLI:EU:C:2014:2456, paragraphs 40 and 41.

8. REMEDIES

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

(75) 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.

(76) Given the secrecy in which the arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. The undertakings to which this Decision is addressed should therefore be required 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 (EC) No 1/2003 – Fines

(77) Under Article 23(2) of Regulation (EC) No 1/2003,[44] the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty and Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.

(78) In this case, the Commission has reached the conclusion that, based on the facts described in this Decision and the assessment contained in section 5 the infringement was committed intentionally.

(79) Fines should therefore be imposed on undertakings to which this Decision is addressed.

(80) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of fine, have regard both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission also refers to the principles laid down in its Guidelines on fines.[45]

(81) Finally, the Commission applies, as appropriate, the provisions of the Leniency Notice and the Settlement Notice[46].

8.3. Calculation of the fines

(82) In applying the Guidelines on fines, the basic amount of the fine to be imposed on each undertaking results from the addition of a variable amount and an additional

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[44] 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, 30.11. 1994, p.6).

[45] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ C 210, 1.9.2006, p. 2).

[46] 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).

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) multiplied by the number of years of the undertaking's participation in the infringement. The additional amount is calculated as a percentage between 15% and 25% of the value of those sales. The resulting basic amount can then be increased or reduced for each undertaking if there are either aggravating or mitigating circumstances.

8.3.1. The value of sales

(83) 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,[47] 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. In this case the relevant value of sales is the sales of parking heaters supplied to car and truck manufacturers in the EEA (OEM and semi-OEM customers) as well as the sales of parking heaters in the aftermarket in Germany and Austria (as defined in section 4).

(84) The Commission normally takes the sales made by the undertakings during the last full business year of their participation in the infringement.[48] If the last year is not sufficiently representative, the Commission may take into account another year /or other years for the determination of the value of sales. Based on the foregoing and on the information provided by the undertakings, the sales to be used for the purposes of this Decision should be those in 2010, which is the last full business year of the participation of the undertakings in the infringement.

(85) Accordingly, the value of sales set out in Table 1 should be taken into account for each undertaking:

Table 1: The value of sales

Undertaking	**Value of sales (EUR)**
Webasto	[…]
Eberspächer	[…]

8.3.2. Determination of the basic amount of the fine

(86) The basic amount of the fine consists of an amount of up to 30% of an undertaking's relevant sales, depending on the degree of gravity of the infringement, multiplied by the number of 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 duration.[49]

[47] Point 12 of the Guidelines on fines.
[48] Point 13 of the Guidelines on fines.
[49] Points 19-26 of the Guidelines on fines.

8.3.2.1. Gravity

(87) 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 will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

(88) In the light of the fact that horizontal price-fixing and market-sharing agreements are, by their very nature, among the most harmful restrictions of competition, the proportion of the value of sales to be taken into account in this case should be set at the higher end of the scale.[50]

(89) It should also be taken into account that: (i) the infringement featured several kinds of anti-competitive elements; (ii) the infringement covered the entire EEA; and (iii) the combined market share of Webasto and Eberspächer is well above 80%.

(90) Given the specific circumstances of this case, in particular taking into account the nature and the geographic scope of the infringement as well as the market shares of the undertakings, the proportion of the value of sales to be taken into account is 18%.

8.3.2.2. Duration

(91) In calculating the fine to be imposed on each undertaking, the Commission also takes into consideration the duration of the infringement, as described in Section 4.4. The increase for duration is calculated on the basis of full months.

Table 2: Duration

Entity	**Duration**	**Multipliers**
Webasto	13 September 2001 to 15 September 2011	10
Eberspächer	13 September 2001 to 15 September 2011	10

8.3.3. Determination of the additional amount

(92) The infringement committed by Webasto and Eberspächer concerns horizontal price-fixing and market sharing within the meaning of point 25 of the Guidelines on fines. The basic amount of the fine to be imposed should therefore include a sum of between 15% and 25% of the value of sales to deter the undertakings from even entering into such illegal practices on the basis of the criteria listed in recital 88 with respect to the variable amount.

(93) Taking into account the factors indicated in Section 8.3.2.1 relating to the nature and the geographic scope of the infringement as well as the market shares of the undertakings, the percentage to be applied for the purposes of calculating the additional amount is 18%.

[50] Point 23 of the Guidelines on fines.

8.3.4. Calculations and conclusions on basic amounts

(94) Based on the criteria explained in recitals (82)-(93), the basic amount of the fine to be imposed on each undertaking is as set out in Table 3.

Table 3: Basic amounts of the fine

Undertaking	Basic amount (EUR)
Webasto	[…]
Eberspächer	[…]

8.4. Adjustments to the basic amount of the fine

8.4.1. Aggravating or mitigating circumstances

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

(96) There are no aggravating or mitigating circumstances in this case.

8.4.2. Specific increase for deterrence

(97) Particular attention should be paid to the need to ensure that fines have a sufficiently deterrent effect; to that end, the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates may be increased.[51]

(98) In this particular case, the fines should not be increased for deterrence.

8.5. Application of the turnover limit of 10%

(99) Article 23(2) of Regulation (EC) No 1/2003 provides that for each undertaking participating in the infringement, the fine imposed must not exceed 10% of its total turnover in the preceding business year. That 10% ceiling is applied before any reduction is granted for leniency or for settlement, or both.[52]

(100) In this case, the worldwide turnover of Webasto in 2014 was EUR 2 469 417 000. Thus, the adjusted basic amount of Webasto's fine should be reduced to EUR 246 941 700.

[51] Point 30 of the Guidelines on fines.

[52] Points 32 and 34 of the Guidelines on fines and points 32 and 33 of the Settlement Notice. See also Judgment of the General Court of 29 November 2005, *SNCZ v Commission*, T-52/02, ECLI:EU:T:2005:429, paragraph 41.

8.6. Application of the Leniency Notice

8.6.1. Immunity from fines

(101) Webasto submitted a marker application under the Leniency Notice on 15 November 2012 and was granted conditional immunity from fines on 11 July 2013. Webasto's cooperation fulfilled the requirements under the Leniency Notice. Webasto should, therefore, be granted immunity from fines in this case.

8.6.2. Reduction of fines

(102) Eberspächer applied for immunity or, in the alternative, a reduction of fines under the Leniency Notice, and did so at an early stage of the investigation (two weeks after the inspection).

(103) Eberspächer provided the Commission with evidence of the cartel which represented significant added value with respect to the evidence already in the Commission's possession at the time it was provided. Eberspächer provided several oral statements supported by contemporaneous documents corroborating certain information already submitted by Webasto and explaining the evidence gathered during the inspections. Moreover, the information provided by Eberspächer facilitated the Commission's task of proving that the cartel covered all car and truck manufacturers in the EEA. Finally, Eberspächer provided evidence strengthening the Commission's ability to establish the duration of the cartel.

(104) On the other hand, at the time of Eberspächer's leniency application, the Commission was already in the possession of a certain amount of evidence regarding the alleged cartel. This evidence had been provided by Webasto and gathered during the inspection.

(105) In view of the assessment in recitals (102)-(104), a reduction of the fine of 45% should be granted to Eberspächer.

8.7. Application of the Settlement Notice

(106) According to point 32 of the Settlement Notice, the reward for settlement results in a reduction of 10% of the amount of the fine to be imposed after the 10% of turnover cap has been applied having regard to the Guidelines on fines. Pursuant to point 33 of the Settlement Notice, when settled cases involve leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.

(107) As a result of the application of the Settlement Notice, the amount of the fine imposed on Eberspächer should be reduced by 10% and that reduction should be added to its leniency reward.

8.8. Conclusion: final amount of individual fines to be imposed in this Decision

(108) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are as set out in Table 4.

Table 4: Fines

Undertaking	Fines (in EUR)
Webasto	0
Eberspächer	68 175 000

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, from 13 September 2001 to 15 September 2011, in a single and continuous infringement covering the whole EEA consisting in the coordination of prices and the allocation of supplies of fuel-operated parking heaters and fuel-operated auxiliary heaters for cars and trucks:

(a) Webasto SE, Webasto Thermo & Comfort SE and Webasto Fahrzeugtechnik GmbH;

(b) Eberspächer Gruppe GmbH & Co. KG, Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH.

Article 2

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

(c) Webasto SE, Webasto Thermo & Comfort SE and Webasto Fahrzeugtechnik GmbH jointly and severally liable: EUR 0

(d) Eberspächer Gruppe GmbH & Co. KG, Eberspächer Climate Control Systems GmbH & Co. KG and Eberspächer GmbH jointly and severally liable: EUR 68 175 000.

The fines shall be paid in euros, within three months of 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.40055

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

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.[53]

Article 3

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

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

Article 4

This Decision is addressed to

Webasto SE, Kraillinger Strasse 5, D-82131 Stockdorf, Germany;

Webasto Thermo & Comfort SE, Friedrichshafener Strasse 9, D-82205 Gilching, Germany;

Webasto Fahrzeugtechnik GmbH, Jochen-Rindt-Strasse 19, A-1230 Vienna, Austria;

Eberspächer Gruppe GmbH & Co. KG, Eberspächerstrasse 24, D-73730 Esslingen, Germany;

Eberspächer Climate Control Systems GmbH & Co. KG, Eberspächerstrasse 24, D-73730 Esslingen, Germany;

Eberspächer GmbH, IZ NÖ-Süd 2/Hondastraße 2, Objekt M47, A-2351 Wiener Neudorf, Austria.

[53] 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).

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.Done at Brussels, 17.6.2015

For the Commission
Margrethe VESTAGER
Member of the Commission