EUROPEAN COMMISSION
Competition DG

CASE AT.38589 – Heat Stabilisers

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 29/06/2016

EUROPEAN
COMMISSION

Brussels, 29.6.2016
C(2016) 3920 final

COMMISSION DECISION

of 29.6.2016

amending Decision C(2009)8682 final of 11 November 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, to the extent that it concerns
GEA Group AG,
Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH, and
Chemson Polymer-Additive AG

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THE EUROPEAN COMMISSION

Having regard to the Treaty on the Functioning of the European Union[1],

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 of competition laid down in Articles 81 and 82 of the Treaty[2], and in particular Articles 7(1) and 23(2) thereof,

Having given the undertakings concerned the opportunity to make known their views on the envisaged amendment of Commission Decision C(2009) 8682 (final) following the judgments of the General Court on 15 July 2015 in Case T-45/10[3] and Case T-189/10[4],

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

Having regard to the final report of the Hearing Officer in this case,[5]

Whereas:

Background

(1) In Decision C(2009)8682 (final)[6] ("the 2009 Decision"), the Commission imposed fines on, amongst others, Aachener Chemische Werke Gesellschaft für

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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 ("the 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 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 1, 4.1.2003, p. 1.

3 Judgment of 10 July 2015, *GEA Group AG v Commission*, T-45/10, EU:T:2015:507.

4 Judgment of 15 July 2015, *GEA Group AG v Commission*, T-189/10, EU:T:2015:504.

5 Dated 9 June 2016

glastechnische Produkte und Verfahren mbH ("ACW"), Chemson Polymer Additive AG ("Chemson") and GEA Group AG ("GEA") for their participation in prohibited agreements and/or concerted practices related to tin stabilisers and expoidised soybean oil ("ESBO")/esters. ACW was held jointly and severally liable for the fine with Chemson and GEA. The fine imposed on ACW exceeded the ceiling of 10% of turnover ("10% ceiling") set by Article 23(2) of Regulation (EC) No 1/2003 as a result of an error in calculation. According to Article 23(2), the fine imposed on each undertaking may not exceed 10% of its total turnover relating to the business year preceding the date of the decision. To correct that error, the Commission adopted an amending decision in 2010 ("the 2010 Amending Decision"), which was addressed to ACW, Chemson and GEA.[7]

(2) On 20 April 2010, GEA lodged an action for annulment of the 2010 Amending Decision before the General Court. ACW and Chemson did not lodge any action contesting the 2010 Amending Decision. In its judgment of 15 July 2015, in Case T-189/10, the General Court annulled the 2010 Amending Decision in so far as GEA was concerned on procedural grounds, stating that the Commission had breached GEA's rights of defence by not giving GEA the opportunity to submit its views before deciding to amend the 2009 Decision.

(3) In view of the annulment of the 2010 Amending Decision and pursuant to Article 266 of the Treaty, the Commission considers that the 2009 Decision should be amended in respect of GEA. Under the applicable case law[8] the adoption of a new amending decision is not precluded, given that the 2010 Amending Decision was annulled by the General Court on the grounds that there had been a procedural error.

(4) By letter of 5 February 2016, the Commission informed GEA of its intention to amend the 2009 Decision and invited GEA, ACW and Chemson to submit their views in writing within one month. Upon GEA's request, the deadline to submit comments was extended by one further month. By letter of 24 March 2016, GEA submitted its written observations. ACW replied by letter of 22 February 2016, stating that it fully supports the Commission's course of action. Chemson did not submit any comments.

(5) Account taken of GEA's written submissions, the Commission considers that the 2009 Decision should be amended in order to indicate the extent to which GEA should be held solely liable for the fine imposed on it by the 2009 Decision, as amended by the 2010 Amending Decision, and the extent to which GEA should be held jointly and severally liable for that fine and with which other entities.

(6) The Commission considers that the fines imposed on ACW and Chemson respectively, and their joint and several liability, remain unchanged because these result directly from the 2009 Decision, as amended by the 2010 Amending Decision,

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6 Commission Decision C(2009)8682 (final) of 11 November 2009 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/38589 – HEAT STABILISERS)

7 Commission Decision C(2010) 727 (final) of 8 February 2010, amending Decision C(2009) 8682 final relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38589 – HEAT STABILISERS).

8 See Judgment of 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P, and C-254/99 P *Limburgse Vinyl Maatschappij and others v Commission*, EU:C:2002:582, paragraphs 59 to 63.

addressed to them. ACW and Chemson did not contest the 2010 Amending Decision and it has accordingly become definitive for them.

Setting the 10 % fine limit for ACW and GEA

(7) Under the 2009 Decision, as amended by the 2010 Amending Decision, the fine imposed on ACW was reduced so that it did not exceed the 10% ceiling, laid down in Article 23 (2) of Regulation (EC) No 1/2003. At the time of the adoption of the 2009 Decision ACW was no longer a subsidiary of GEA. Therefore, the 10% ceiling was calculated in respect of ACW on the basis of ACW's total turnover in the business year preceding the adoption of the 2009 Decision (2008).

(8) The fines for which GEA and Chemson are liable are not affected by the reduction of the fine imposed on ACW. As its parent company exercising decisive influence at the time of the infringement, GEA is jointly liable with ACW for the fine imposed on ACW, but this does not mean that GEA should benefit from the reduction of the fine imposed on ACW.

(9) In its letter of 24 March 2016, GEA argued that it should benefit from the reduction in the fine resulting from the application of the 10% ceiling laid down by Article 23 (2) of Regulation (EC) No 1/2003 to ACW, on the basis of the derivative nature of a parent's liability for fines imposed on its subsidiaries and on the basis of the principle of equal treatment. However, the Commission considers that the fine for which GEA is liable should be determined with reference to its own turnover, and the obligation to consider ACW's total turnover for the application of the 10% ceiling for GEA can not be drawn from either Article 23(2) of Regulation (EC) No 1/2003 or from the general principle of equal treatment.

(10) According to the case law, there may be individual circumstances that would justify a different fine for a parent company, compared to its subsidiary, even in the case of derived liability.[9] One such situation is the calculation of the 10% ceiling in respect of a parent company which has sold its infringing subsidiary before the adoption of the Commission decision imposing the fine. In its judgment in the *Kendrion* case, the Court of Justice recognised that it was not justified to also reduce the fine imposed on a former parent company when the fine imposed on a former subsidiary was reduced as a consequence of application of the 10% ceiling to the turnover of that former subsidiary.[10]

(11) Since the application of the 10% ceiling takes into account the circumstances of an undertaking at the time of the decision, the determination of the 10% ceiling is not a common element of the fine setting with a subsidiary that has been sold by that time. Moreover, the 10% ceiling has no link to factors which are relevant for the finding of an infringement. In view of the above, neither the derivative nature of liability nor the principle of equal treatment require that the ceiling for the fine imposed on GEA be the same as the ceiling for the fine imposed on its former subsidiary ACW.

(12) It therefore follows that the ceiling for the fine imposed on GEA should be determined with regard to GEA's own turnover and that the fine for which GEA is

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9 See for example Judgment of 26 November 2013, C-50/12 P, *Kendrion v Commission*, EU:C:2013:771, paragraph 66 and Cases T-436/10, *HIT Groep v Commission*, EU:T:2015:514, paragraphs 213 to 215.

10 Judgment of 26 November 2013, C-50/12 P, *Kendrion v Commission*, paragraph 66.

liable is not affected by the reduction of the fine imposed on ACW as a consequence of the application of Article 23(2) of Regulation (EC) No 1/2003.

Attribution of joint and several liability and sole liability

(13) The Commission considers that the reduction of the fine imposed on ACW, arising from the application of the 10% ceiling to the fine imposed on ACW by the 2009 Decision, as amended by the 2010 Amending Decision, has an impact on the amount of the fine for which ACW is jointly and severally liable with GEA and Chemson. For the amount of the fine exceeding the amended fine imposed on ACW, GEA should be held jointly liable with Chemson for one part and solely liable for the remaining part.[11]

(14) In its letter of 24 March 2016 GEA argued that the foreseen attribution of joint and several liability as well as sole liability would be to the disadvantage of GEA because GEA would be held solely liable for a larger part of the fine than if liability were to be attributed differently. GEA alleges that points (31) and (32) of Article 2 of the 2009 Decision attribute liability for different time periods and argues that the reduction of the fine imposed on ACW should be equally reflected in both points (31) and (32) of the 2009 Decision.

(15) However, contrary to GEA's claim, points (31) and (32) of Article 2 of the 2009 Decision do not attribute liability for different time periods, but rather group together the legal entities belonging to the same undertaking during the period of the infringement, up to the amount for which they are jointly and severally liable. The attribution of joint and several as well as sole liability to ACW, Chemson, and GEA respectively, following the reduction of the fine for which ACW is to be held liable, follows the approach of showing the respective maximum common liability of the entities belonging to the same undertaking during the infringement period. ACW, Chemson, and GEA should accordingly be held jointly and severally liable for the highest fine amount they share in common (EUR 1 086 129) , Chemson and GEA should then be held jointly and severally liable up to the highest remaining common fine (EUR 827 842), while, finally, GEA should be held solely liable for the remaining amount of the fine (EUR 1 432 229).

(16) Further, the Commission notes that the alleged disadvantage for GEA assumes a given apportionment of the liability between GEA and Chemson on the one hand and ACW on the other. However, the Commission considers that the apportionment of the fine proposed by GEA does not follow from either the 2009 Decision, as amended by the 2010 Amending Decision for Chemson and ACW, or from this Decision. Indeed, in this Decision, the Commission does not intend to provide for any particular apportionment of the common liability between different legal entities of one undertaking held jointly and severally liable for the same fine. On this point, the Court of Justice has ruled that it is not for the Commission but for the national courts to determine such internal allocation.[12]

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[11] See recital 28.

[12] Judgment of 10 April 2014, C-231/11 P to C-233/11 P, *Commission v Siemens Österreich and others and Siemens Transmission & Distribution Ltd and others v Commission*, EU:C:2014:256, paragraphs 62 and 74.

Alleged elapse of limitation period

(17) The 2009 Decision found that GEA had participated in an infringement and imposed the applicable fine on GEA. The 2010 Amending Decision did not change either the finding of the infringement against GEA or the level of the fine for GEA.[13]

(18) In its judgment of 15 July 2015 in Case T-45/10 the General Court rejected GEA's pleas regarding both its liability for the infringement and the amount of the fine and fully upheld the 2009 Decision as far as it related to GEA.[14] Therefore, the substantive finding of infringement and the imposition of the fine in the 2009 Decision stand. It is a final judgment because GEA did not lodge an appeal against it.

(19) This Decision accordingly should not change the overall amount of the fine for which GEA is liable, but should only determine the extent to which GEA is to be held jointly and severally liable with other entities, and the extent to which GEA should be held solely liable.

(20) In its letter of 24 March 2016 GEA submitted that the 2009 Decision and the 2010 Amending Decision are contradictory as regards the joint and several liability. Since the 2010 Amending Decision has become a final decision as regards ACW and Chemson, GEA argued that the 2009 Decision could not be "revived" for GEA. GEA claimed that there is no decision presently in existence. GEA concluded that the 10 year limitation period provided for by Article 25 of Regulation (EC) No 1/2003 expired in 2015 and the adoption of this Decision is therefore time-barred.

(21) The Commission considers that this argument cannot be accepted. Contrary to what is claimed by GEA, the fine imposed on GEA in the 2009 Decision and confirmed by the General Court in its judgment in Case T-45/10 remains in place. There is no contradiction between the 2009 Decision and the 2010 Amending Decision as far as the fine imposed on GEA is concerned. As this Decision does not impose a new fine on GEA, but merely determines the joint and several liability and the sole liability for the fine already imposed by the 2009 Decision, the limitation period provided for in Article 25 of Regulation (EC) No 1/2003 does not apply.

(22) Furthermore, in addition to the fact that this Decision does not alter the fine imposed by the 2009 Decision, this Decision is intended to comply with the judgment in Case T-189/10. In accordance with the applicable case law, when taking the necessary measures to comply with a judgment annulling a Commission decision, in order to assess the limitation period in respect of the Commission's power to impose a fine, account should be taken of the date on which the Commission decision imposing the fine on GEA was adopted, namely the date of adoption of the 2009 Decision.[15]

(23) The Commission considers that the 2009 Decision remains the basis for the fine, as it was upheld by the General Court in the judgment in Case T-45/10. The fines imposed on ACW, Chemson and GEA were payable within three months of the notification of the 2009 Decision. In the letter of 9 February 2010 notifying the 2010 Amending Decision, the Commission stated that the fine was to be paid within three months from the date of that letter. By way of derogation from the last paragraph of

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13 See recital 3 of the 2010 Amending Decision.

14 Judgment of 15 July 2015, Case T-45/10, *GEA Group AG v Commission*.

15 See judgment of 6 October 2015, T-250/12, *Corporación Empresarial de Materiales de Construcción / Commission*, EU:T:2015:749, paragraph 77.

Article 2 of the 2009 Decision and in line with the letter notifying the annulled 2010 Amending Decision, this Decision should confirm that the fines imposed on GEA were payable within three months from the date of notification of the 2010 Amending Decision. In applying that date as the date upon which payment was due, the Commission will not seek to claim any interest from GEA for the period between the due dates in the 2009 Decision and the 2010 Amending Decision. Within that period, GEA provided bank guarantees, but those guarantees referred to the 2010 Amending Decision and became unusable when that Decision was annulled. Given that by its letter of 22 December 2015 GEA refused to replace those guarantees with new guarantees or to make a provisional payment of the outstanding fine, the Commission considers that late payment interest is due from the moment when GEA's fine was no longer covered by any guarantee. That date is 15 July 2015, which corresponds to the date of the judgement in Case T-189/10 annulling the 2010 Amending Decision, to which the previously provided guarantees of GEA referred. The interest rate to be applied in the event of late payment is specified in the last paragraph of Article 2 of the 2009 Decision[16].

No oral hearing of GEA

(24) As the Hearing Officer noted in his decision of 21 April 2016, in response to the request made by GEA, the Commission considers that no new oral hearing was necessary before the adoption of this Decision, since the Commission letter of 5 February 2016 was not a Statement of Objections in the sense of Article 10 of Regulation (EC) No 773/2004, given that no new objections were raised against its addressees.

(25) Following the adoption of the Statement of Objections on 17 March 2009, GEA was given the opportunity to develop its arguments at an oral hearing held on 17 and 18 June 2009. A second oral hearing would only be required if the Commission had raised new objections against GEA.[17] However, this Decision relates to the same objections as those in respect of which the addressees have already had an oral hearing.

No consequences for other addressees of the 2009 Decision

(26) This Decision only confirms the 2010 Amending Decision with regard to ACW and Chemson and has no consequences for the other addressees of the 2009 Decision.

Conclusion

(27) In conclusion, the Commission considers that it is necessary to adopt this Decision to amend the 2009 Decision as upheld, without any changes to the operative part, by the judgment in Case T-45/10. Accordingly, the amounts of the fines imposed in Article 2 of the 2009 Decision should not be amended by this Decision. However, it is necessary to determine the extent to which GEA should be held solely liable for the fine imposed on it by the 2009 Decision, and the extent to which, and with which

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16 That paragraph reads as follows: "After the expiry of the time-limit laid down in the first paragraph of this article, 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".

17 See Judgment of 15 October 2002, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P, and C-254/99 P, *Limburgse Vinyl Maatschappij NV (LVM)*, v *Commission*, paragraphs 93 and 97 to 98.

entities, GEA should be held jointly and severally liable for the fine. This is necessary both to comply with the judgment in Case T-189/10, and to reflect the reduction in the fine imposed on ACW in the 2010 Amending Decision (which is still in force and has become a final decision for ACW and Chemson) as a result of the application of the 10% ceiling.

(28) The relevant joint and several, and sole liabilities should therefore be as follows:

(a) GEA Group AG, Aachener Chemische Werke Gesellschaft für Glastechnische Produkte und Verfahren mbh and Chemson Polymer-Additive AG are jointly and severally liable for EUR 1 086 129,

(b) GEA Group AG and Chemson Polymer-Additive AG are jointly and severally liable for EUR 827 842,

(c) GEA Group AG is liable for EUR 1 432 229,

HAS ADOPTED THIS DECISION:

Article 1

In order to determine the joint and several and the sole liability of GEA Group AG, Aachener Chemische Werke Gesellschaft für Glastechnische Produkte und Verfahren mbh and Chemson Polymer-Additive AG, points (31) and (32) of Decision C(2009) 8682 final addressed to GEA Group AG are replaced by the following :

"(31) (a) GEA Group AG, Aachener Chemische Werke Gesellschaft für Glastechnische Produkte und Verfahren mbh and Chemson Polymer-Additive AG are jointly and severally liable for EUR 1 086 129;

(b) GEA Group AG and Chemson Polymer-Additive AG are jointly and severally liable for EUR 827 842;

(32) GEA Group AG is liable for: EUR 1 432 229;"

Article 2

The first sentence in the third paragraph of Article 2 of Decision C(2009)8682 final addressed to GEA Group AG is replaced by the following :

"The fines shall be paid in euro no later than 10 May 2010 to the bank account held in the name of the European Commission with

Pohjola Bank Pic

Teollisuuskatu 1b

00510 Helsinki

IBAN: FI1450000120266977

BIC: OKOYFIHH"

Article 3

This Decision is addressed to:

GEA Group AG, Peter-Müller-Strasse 12, 40468 Düsseldorf, Germany

Aachener Chemische Werke Gesellschaft für glastechnische Produkte und Verfahren mbH, Rostocker Strasse 40, 41199 Mönchengladbach, Germany

Chemson Polymer-Additive AG, Industriestrasse 19, 9601 Arnoldstein, Austria

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

Done at Brussels, 29.6.2016

For the Commission
Margrethe VESTAGER
Member of the Commission