



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

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Brussels, 29.6.2016
C(2016) 3933 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**

Akzo Nobel N.V. and Akcros Chemicals Ltd

(AT.38589 – HEAT STABILISERS)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union¹,

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 Treaty², and in particular Article 7(1) and Article 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 of 15 July 2015 in Case T-47/10³ and in Case T-485/11⁴,

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

Having regard to the final report of the hearing officer in this case⁵,

Whereas:

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 15 July 2015, T-47/10, *Akzo Nobel N.V. v Commission*, EU:T:2015:507.

⁴ Judgment of 15 July 2015, T-485/11, *Akzo Nobel and Akros Chemicals v Commission*, EU:T:2015:517.

⁵ Dated 9 June 2016

Background

- (1) In Decision C(2009)8682 final⁶ (“the 2009 Decision”), the Commission imposed fines on, amongst others, Akzo Nobel N.V. (“Akzo Nobel”) and Akcros Chemicals Ltd (“Akcros”), for their participation in prohibited agreements and or concerted practices related to tin stabilisers and epoxidised soybean oil (“ESBO”)/esters. For some parts of the fines Akzo Nobel was held jointly and severally liable with its subsidiaries Akcros, Akzo Nobel Chemicals GmbH and/or Akzo Nobel Chemicals B.V. For other parts of the fines, Akzo Nobel and Akcros were held jointly and severally liable with Elementis plc, Elementis Holdings Limited and/or Elementis Services Limited (Elementis plc, Elementis Holdings Limited and Elementis Services Limited, jointly referred to as “Elementis”).
- (2) The 2009 Decision was adopted more than 10 years after Elementis had ended its participation in the infringements. At the time of the 2009 Decision, the Commission took the position that the limitation period for the imposition of fines under Article 25(5) of Regulation (EC) No 1/2003 had been suspended because, in April and July 2003 respectively, Akzo Nobel Chemicals Ltd and Akcros had contested, before the General Court, certain investigatory measures adopted by the Commission in the relevant proceedings.⁷ However, in a subsequent judgment of 29 March 2011 in the *Arcelor Mittal* case, the Court of Justice ruled that an annulment action brought against a Commission investigative action during the administrative proceedings does not have *erga omnes* suspensory effect on legal entities not having contested such investigative action.⁸
- (3) On 30 June 2011, the Commission adopted Decision C(2011)4612⁹ repealing the 2009 Decision with regard to Elementis and Decision C(2011)4651¹⁰ amending the 2009 Decision with regard to Akzo Nobel and Akcros (“the 2011 Amending Decision”). The 2011 Amending Decision determined that Akzo Nobel and Akcros were no longer jointly and severally liable with Elementis for the fines originally imposed on the latter as a consequence of Decision C(2011)4612.
- (4) Akzo Nobel and Akcros lodged two actions for annulment contesting the 2009 Decision and the 2011 Amending Decision (Cases T-47/10, Akzo Nobel and others v Commission and T-485/11, Akzo Nobel and Akros v Commission, respectively). On

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 See Judgment of 17 September 2007, Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, EU:T:2007:287, paragraph 21.

⁸ Judgment of 29 March 2011, Joined Cases C-201/09 P C-216/09 P and C-216/09 P, *Arcelor Mittal Luxembourg SA v Commission* and *Commission v Arcelor Mittal Luxembourg SA and Others*, EU:C:2011:190, paragraphs 127 to 147.

⁹ Commission Decision C(2011)4612 final of 30.6.2011 repealing Decision C(2009)8682 final of 11 November 2009, relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, to the extent it was addressed to BASF Specialty Chemicals Holding GmbH and BASF Lampertheim GmbH, as well as to Elementis plc (UK), Elementis plc (USA), Elementis Holdings Limited, Elementis UK Limited and Elementis, Services Limited (Case COMP/38589 – Heat Stabilisers).

¹⁰ Commission Decision C(2011) 4651 final of 30.6.2011 amending Decision C(2009)8682 final of 11 November 2009, relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, to the extent it was addressed to Akzo Nobel N.V. and Akcros Chemicals Ltd (Case COMP/38589 – Heat Stabilisers).

15 July 2015, the General Court rendered its judgments in Cases T-47/10 and T-485/11.

- (5) In its judgment in Case T-47/10, regarding the 2009 Decision, the General Court annulled the fines imposed on the two Akzo Nobel subsidiaries, Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals B.V., because the limitation period in Article 25 (2) of Regulation (EC) No 1/2003 had expired in their respect.¹¹ The General Court upheld the fines imposed on their parent Akzo Nobel and on Akcros, but granted both Akzo Nobel and Akcros a 1% reduction in the total amount of the fine on the grounds of the excessive duration of the proceedings, to ensure equal treatment with the other parties.¹² Akzo Nobel filed an appeal against that judgment in Case C-516/15 P, which is still pending.¹³
- (6) In its judgment in Case T-485/11, regarding the 2011 Amending Decision, the General Court annulled that decision on the grounds that there had been a procedural error. The General Court stated that the Commission had breached Akzo Nobel and Akcros' right of defence by not having granted them enough time to reply to its letter and e-mail explaining that the Commission intended to amend the 2009 Decision.¹⁴

Reasons for amending the 2009 Decision

- (7) Pursuant to Article 266 of the Treaty and in view of the annulment of the 2011 Amending Decision by the General Court in Case T-485/11, the Commission considers that the 2009 Decision should be amended to the extent it concerns Akzo Nobel and Akcros. Under the applicable case law¹⁵, the adoption of an amending decision is not precluded in the circumstances of this case, given that this new amending decision does not establish any new finding of liability on the part of Akzo Nobel or Akcros, but, rather, follows from the annulment of the 2011 Amending Decision in Case T-485/11 on the grounds that there had been a procedural error.
- (8) By letter of 5 February 2016, the Commission informed Akzo Nobel and Akcros of its intention to amend the 2009 Decision and invited them to submit their views in writing within one month after receipt of the letter. By letter of 17 March 2016, Akzo Nobel submitted initial comments, asked for an extension of the deadline for submitting its views and raised questions. The Commission replied to the said questions by letter of 18 March 2016 and extended the deadline as requested by an additional two weeks following receipt of the Commission's letter. By letter of 1 April 2016 Akzo Nobel informed the Commission that it had no further comments to present. Akcros did not present any comments.
- (9) In its letter of 17 March 2016 Akzo Nobel suggested that the Commission should postpone the adoption of the envisaged amending decision until the Court of Justice had rendered its judgment in Case C-516/15 P. The Commission takes note that the fine imposed on Akzo Nobel, as reduced in relevant parts by the judgment in Case T-

¹¹ Judgment of 15 July 2015, T-47/10 *Akzo Nobel NV v Commission*, paragraphs 126 to 129.

¹² Judgment of 15 July 2015, T-47/10 *Akzo Nobel v Commission*, paragraphs 329 and 331.

¹³ Case C-516/15 P, *Akzo Nobel and others v Commission*.

¹⁴ Judgment of 15 July 2015, *Akzo Nobel and Akcros Chemicals v Commission*, T-485/11, paragraph 82.

¹⁵ 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*, ECLI:EU:C:2002:582, paragraphs 59 to 63.

47/10, is still disputed in the appeal proceedings in Case C-516/15 P and will eventually be decided by the Court of Justice.

- (10) Account taken of the observations submitted by Akzo Nobel, the Commission sees no valid reason to postpone the envisaged amendment of the 2009 Decision. The adoption of a new decision amending the 2009 Decision is appropriate in order to clarify that Akzo Nobel and Akcros are still jointly and severally liable for parts of the fine imposed by the 2009 Decision and that Akzo Nobel is solely liable for other parts.¹⁶
- (11) Moreover, the Commission considers that the adoption of a new decision amending the 2009 Decision is necessary, pursuant to Article 266 of the Treaty, to comply with the judgment in Case T-485/11, which annulled the 2011 Amending Decision, and to reflect the effect of Decision C(2011)4612 repealing the 2009 Decision with regard to Elementis. It also reflects the 1% reduction in the fine resulting from the judgment in Case T-47/10 for the addressees of this Decision.
- (12) Finally, in contrast to what is provided for in the third paragraph of Article 2 of the 2009 Decision and in line with the annulled 2011 Amending Decision, the fines imposed on Akzo Nobel and Akcros should be deemed to be payable no later than three months from the date of notification of the 2011 Amending Decision. By applying that due date, the Commission intends to confirm that it will not claim any interest from Akzo Nobel or Akcros for the period between the due dates in the 2009 Decision and in the 2011 Amending Decision. In this respect, it should be clarified that the basis for the fine remains the 2009 Decision, in as far as it was upheld by the General Court in its judgment in Case T-47/10. In principle, a due date later than the one stated in the 2009 Decision would not be justified. However, in this case, the due date for payment of the fine by Akzo Nobel and Akcros should be that indicated in Article 2 of the 2011 Amending Decision and in the letter notifying it to them. The Commission notes that the due date set in the annulled 2011 Amending Decision and reconfirmed in this Decision represents more favourable treatment for Akzo Nobel and Akcros as compared to the due date of the 2009 Decision.

Conclusion

- (13) For the above reasons the Commission considers it appropriate to amend the 2009 Decision in so far as it was addressed to Akzo Nobel and Akcros, as partially annulled and amended by the judgment of the General Court in Case T-47/10.
- (14) To that end, it is necessary to remove Elementis from the addressees held jointly and severally liable, and to indicate the respective joint and several and sole liabilities of Akzo Nobel and Akcros, as follows:
 - (i) For the infringement(s) in the tin stabiliser sector:
 - Akzo Nobel N.V. and Akcros Chemicals Ltd should be held jointly and severally liable for: EUR 5 940 990;
 - Akzo Nobel N.V. should be held liable for: EUR 15 641 010.
 - (ii) For the infringement(s) in the ESBO/esters sector:

¹⁶ See recital 14.

- Akzo Nobel N.V. and Akcros Chemicals Ltd should be held jointly and severally liable for: EUR 5 940 990
- Akzo Nobel N.V. should be held liable for: EUR 12 671 010,

HAS ADOPTED THIS DECISION:

Article 1

In order to determine the joint and several and the sole liability of Akzo Nobel N.V. and Akcros Chemicals Ltd, Decision C(2009)8682 final is amended as follows:

(1) the first paragraph of Article 2, referring to the infringement(s) in the tin stabiliser sector, is amended as follows :

(a) points (1), (2), (4) and (5) are replaced by the following:

"Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 5 940 990"

(b) points (3), (6) and (7) are replaced by the following:

"Akzo Nobel N.V. is liable for: EUR 15 641 010"

(2) the second paragraph of Article 2, referring to the infringement(s) in the ESBO/esters sector, is amended as follows:

(a) points (18), (19), (21) and (22) are replaced by the following:

"Akzo Nobel N.V. and Akcros Chemicals Ltd are jointly and severally liable for: EUR 5 940 990"

(b) points (20), (23) and (24) are replaced by the following:

"Akzo Nobel N.V. is liable for: EUR 12 671 010"

Article 2

The first sentence in the third paragraph of Article 2 of Decision C(2009)8682 final, addressed to Akzo Nobel N.V. and Akcros Chemicals Ltd, is replaced by the following :

"The fines shall be paid in euro no later than 4 October 2011 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:

Akzo Nobel N.V., Christian Neefstraat 2, 1077 WW Amsterdam, Netherlands

Akcros Chemicals Ltd, Lankro Way, Eccles, Manchester - M30 0BH, United Kingdom

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