38.620

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, **03.05.2006**
C(2006) 1766 final

COMMISSION DECISION

of 03.05.2006

relating to a proceeding pursuant to Article 81 of the EC Treaty

and Article 53 of the EEA Agreement

(Case COMP/F/38.620 – Hydrogen Peroxide and Perborate)

(Only the English, French and Italian texts are authentic)

Public Version

(Text with EEA relevance)

TABLE OF CONTENTS

Remark :

Throughout the decision, '***[Deleted]***' signifies a passage which was removed for publication purposes by the Commission, while'***[name of the company]***' replaces one of the addresses' names.

COMMISSION DECISION

of 03.05.2006

relating to a proceeding pursuant to Article 81 of the EC Treaty

and Article 53 of the EEA Agreement

(Case COMP/F/38.620 – Hydrogen Peroxide and Perborate)

(Only the English, French and Italian texts are authentic)

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

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, Articles 7(1) and 23(2) thereof,

Having regard to the Commission Decision of 26 January 2005 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 Articles 10 and 12 of 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],

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 OJ L 1, 4.1.2003, p.1. Regulation as amended by Regulation (EC) No 411/2004 (L 68, 6.3.2004, p.1).
2 OJ L 123, 27.4.2004, p.18.
3 OJ C 303, 13.12.2006, p. 27-29.

1. SUMMARY OF THE INFRINGEMENT

(1) This Decision is addressed to the following undertakings:

- Akzo Nobel NV
- Akzo Nobel Chemicals Holding AB
- EKA Chemicals AB
- Degussa AG
- […]
- FMC Corporation
- FMC Foret S.A.
- Kemira OYJ
- L'Air Liquide SA
- Chemoxal SA
- Snia SpA
- Caffaro Srl
- Solvay SA/NV
- Solvay Solexis SpA
- Total SA
- Elf Aquitaine SA
- Arkema SA

(2) The addressees of this Decision participated in a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement regarding **hydrogen peroxide** and its downstream product **sodium perborate**, covering the whole EEA territory, hereinafter "the infringement". The infringement started at least on 31 January 1994 and lasted at least until 31 December 2000 and consisted mainly of competitors exchanging commercially important and confidential market- and/or company relevant information, limiting and/or controlling production as well as potential and actual capacities, allocating market shares and customers, and fixing and monitoring (target) prices.

2. THE INDUSTRY SUBJECT TO THE PROCEEDING

2.1. The products

(3) **Hydrogen peroxide** (hereinafter "**HP**" or "**H_2O_2**") is a strong oxidising agent which has several industrial applications. It is a clear, colourless liquid which is available commercially as an aqueous solution in concentrations mainly ranging from 30% to 70%. It is usually stored at 50% concentration. Some properties of HP are listed in the table below:

Properties of hydrogen peroxide

Properties of 50% solution in water:	
Specific gravity at 25° C	1.19
Freezing point	-52° C
H_2O_2 partial pressure at 25° C	13.5 mm Hg
Boiling point	114° C

(4) HP can be transported safely at concentrations up to 70%. To ensure safe transport and to limit decomposition if the solution is diluted for on-site storage HP solutions are often stabilised with additives. Transport costs are an important item in the calculation of the ultimate selling price. The investigation has shown that the logistics (transport and storage) costs amount to over one third of the total HP production costs[4].

(5) As a final product HP is used as a bleaching agent in the pulp and paper manufacturing industries, for the bleaching of textiles, for disinfection and for other environmental applications such as sewage treatment. HP is also used as a raw material for the production of other downstream peroxigen products, such as persalts (which include sodium perborate and sodium percarbonate) and peracetic acid.

(6) In particular, a chemical reaction between HP, caustic soda and boron-minerals (such as sodium borate) produces **sodium perborate** (hereinafter "**PBS**"), which is mainly used as an active substance in synthetic detergents and washing powders, whilst a reaction between HP and soda ash produces sodium percarbonate (hereinafter "**PCS**"), also mainly employed for the manufacturing of detergents and washing powders. PCS could be considered a technical development of PBS, differing from PBS as regards the degree of effectiveness and the resulting differences in the (downstream) production chain[5].

(7) Information provided to the Commission by several undertakings uses the term "persalts" when referring to PBS and/or PCS. **Persalts** can be considered a group of crystalline chemicals which are manufactured from HP and a number of secondary raw materials. Although other types of persalts exist, in the current Decision the term "persalts" refers solely to PBS and PCS jointly.

---

4 ***[deleted]***.

5 As regards the differences in the production chain as well as the different degree of effectiveness, see the replies to the Commission's request for information dated 15 July 2003 by FMC Foret and EKA, page 16513 and 3859 of the file; see also the response given by Solvay to a specific question during the meeting on 4 April 2003: "Question: are the two products, both PBS and PCS, to be considered as entirely substitutable or does it depend on the application? Response: Percarbonate is a substitute of perborate for a part of its function. They share the same functionality for detergents but they differ in their chemical formulae, their manufacturing processes and their performances". The original French text reads as follows: « Question: les deux produits, le [sodium] perborate et le [sodium] percarbonate, sont-ils considérés comme substituables dans leur entièreté ou cela dépend-il de l'application? Réponse: Le percarbonate est un substitut du perborate pour une partie de la fonction. Ils partagent la même fonctionnalité pour les produits détergents mais diffèrent par leurs formulations chimiques, leurs procédés de fabrication et leurs performances ». See pages 2086-87 of the file.

(8) Persalts are used exclusively as a raw material in the formulation of powdered detergents (in both powder and tablet form). They are not themselves active ingredients but serve as carrier substances for active oxygen, which is released as H_2O_2 carried within the persalts, and is the actual bleaching agent. The incorporation of persalts in washing powders therefore enables the active oxygen to be released into the water.

(9) PBS accounted for approximately 45% of all persalts production in 2002 (around 380 KTons), while PCS accounted for 55%. The production percentage of PCS has progressively been increasing over the last five/six years, during which a gradual substitution of PBS by PCS has taken place, due to the lower environmental concerns related to PCS. Other factors are that PCS has dual functionality (as a bleaching agent and source of alkali), a higher dissolution rate, reduces the chemical load per wash and avoids the large-scale use of boron, which is not environmentally-friendly. However, some detergent manufacturers have deliberately chosen not to change their production formula containing PBS, either in order to minimize the risks inherent to changing formula or because they also sell detergents in countries having a particularly hot and humid climate (the stability of PCS in such conditions being inferior to that of PBS). For those reasons amongst others, there exists only a limited level of substitutability between PBS and PCS, in spite of their similar uses.

(10) PBS exists in several nearly identical varieties, the two most important of which are sodium perborate monohydrate ("PBS1") and sodium perborate tetrahydrate ("PBS4"). The reference to these two varieties is made because of their use as reference products for the price increases that were discussed between the producers of PBS. PBS4 is manufactured by reacting HP with sodium metaborate under aqueous conditions followed by crystallisation, separation by centrifuge and fluid bed drying. Sodium metaborate is prepared by the reaction of caustic soda with boron. PBS1 is manufactured by further fluid bed drying of PBS4 to remove the water of crystallisation. PBS1 provides a high available oxygen content equivalent to 32% HP, namely 50% more active oxygen than the same weight of PBS4.

(11) PBS1, PBS4 and PCS contain different concentrations of available oxygen:

PBS1	15% available oxygen
PBS4	10% available oxygen
PCS	13% to 13.5% available oxygen.

This means that a washing powder needs a different concentration of persalts, depending on which type is used, in order to deliver the same volume of available oxygen for the washing process.

(12) In previous merger decisions[6], the Commission considered the market for HP to be distinct from those of other bleaching agents, including that of persalts. For some

[6] Commission decisions in cases IV/M.197 Solvay/Laporte OJ C 165, 02.07.1992; COMP/M.2690 Solvay/Montedison-Ausimont, OJ C 153, 27.06.2002, p.11.

applications and when it is used as a raw material for persalts, there are no possible substitutes for HP. For disinfecting applications, other possible products could be used but there is no alternative product which is as environmentally friendly.

(13) A number of other bleaching chemicals exist, which could theoretically be in competition with HP and PBS/PCS respectively, since they have similar applications, such as peracetic acid and chlorine dioxide. Peracetic acid is mainly used for bleaching of pulp and paper and for disinfecting. Chlorine dioxide is used for pulp and paper bleaching and as a raw material for the production of sodium chlorite (used for water purification). However, the latter products do not enter into competition with HP and PBS/PCS because they could become substitutable products only if major changes were made in the production chain used by the customers. Their equipment is adapted to a particular group of bleaching agents, so that switching to a different agent involves very high switching costs.

(14) Even though PBS and PCS have been jointly referred to by certain undertakings involved in the current proceedings, the investigation has not shown that the infringing behaviour also extended to PCS. This Decision therefore covers unlawful behaviour only as regards HP and PBS, not as regards PCS.

2.2. The Market Players

(15) The following undertakings participated in the agreements and/or concerted practices relating to HP and PBS described in this Decision.

2.2.1. Akzo Nobel, Akzo Nobel Chemicals Holding and EKA Chemicals[7]

(16) The Akzo Nobel group of companies is active in the areas of healthcare, coatings, chemicals, and, until the end of 1999, fibres. The ultimate holding company of the group is Akzo Nobel N.V. based in Arnhem, the Netherlands.

(17) Since 1993-1994, the Akzo Nobel group has been organised on the basis of a two-layer structure: a "corporate centre" and directly underneath approximately 20 Business Units ("BUs"). The corporate centre co-ordinates the most important tasks with regard to general strategy of the group, that is to say finance, legal affairs and human resources. The BUs each have their own General Manager, management team and supporting services responsible for the entire operational management of the BU. The BU management operates within the limits of the financial and strategic targets set out by the corporate centre and are bound by the "Business Principles" and "Corporate Directives" applicable to the entire Akzo Nobel group. The person in charge of each organisational unit at a specific level has a duty to report on those activities to a higher level.

(18) The BU responsible for HP production and sales during the period 1994 to the present day has been the Pulp & Paper Chemicals BU, which consists of the following legal entities active in the EU and/or EEA:

---

[7] The information about Akzo has been drawn from the replies to Commission's requests for information as well as from the Akzo and EKA corporate internet sites. ***[deleted]***. See the website www.ekachemicals.com as well as the webpage www.akzonobel.com/company/business.asp.

– Eka Chemicals AB, Bohus, Sweden, active in production and sales;

– Eka Kemi AB, Alby, Sweden, a HP production unit for EKA Chemicals which later merged into Eka Chemicals AB in 1999;

– Eka Chemicals Rjukan A/S, Rjukan, Norway, which is 100% owned by Eka Chemicals Norge A/S, which is in turn 100% owned by EKA Chemicals AB[8].

(19) **Eka Chemicals AB** (hereinafter "**EKA**") is a company incorporated under Swedish law based in Bohus, near Gothenburg. Founded in 1895 under the name ElektroKemiska Aktiebolaget AB, EKA started to manufacture HP in 1930. It was acquired by Nobel Industrier in 1986 and was renamed EKA Nobel AB. On 25 February 1994, Nobel Industrier was acquired by Akzo and became a part of the Akzo Nobel Group. Following this, EKA Nobel AB changed its name into EKA Chemicals AB in April 1996. After the acquisition by Akzo, the company directly and wholly controlling EKA was, until 31 December 2003, the Swedish (holding) company Akzo Nobel Chemicals Holding AB, which in turn was controlled by Akzo Nobel AB, Stockholm, Sweden. This last company was in turn controlled by Akzo Nobel NV. On 1 January 2004 the latter acquired direct control over EKA Chemicals AB, which is therefore currently 100% controlled by **Akzo Nobel NV** (hereinafter "**Akzo**")[9].

(20) EKA still manufactures HP but it produced and sold PBS only until 1996-1997, when it developed the capacity to produce PCS which it manufactured up to 2001. Hence, currently EKA does not produce persalts any longer.

(21) The world-wide turnover of Akzo was EUR 13,000 million in 2005. Akzo Nobel Chemicals Holding AB had no turnover in 2005 while EKA's turnover in 2005 was EUR 437 million world-wide. The world-wide and EEA-wide turnover relating to the HP business during the last years of the infringement was as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[85-95]**	**[50-60]**
1999	**[90-100]**	**[45-55]**

(22) EKA belongs to the undertaking that is headed by Akzo Nobel N.V. Akzo controlled EKA through a number of intermediary companies (all with 100% shareholding) until 1 January 2004, when EKA became a direct 100% subsidiary of Akzo. Even though the highest entity of the undertaking that participated in the infringement is Akzo (or its predecessors), the undertaking will be referred to as EKA for the purposes of this Decision, given that this was the name of the legal entity belonging to the Akzo group that was directly involved in the infringement and to which the evidence used in this Decision refers.

2.2.2. Degussa[10]

8 ***[deleted]***.
9 ***[deleted]***.
10 ***[deleted]***.

(23) **Degussa AG**, (hereinafter "**Degussa**") based in Düsseldorf, Germany, was founded in 1873. It started manufacturing HP in 1908 and PBS in 1904. PCS has been produced since the 1970s, but only since 2002 has it been sold in large quantities.

(24) Degussa's main shareholder is currently the German company RAG AG (the former Ruhrkohle AG, hereinafter "RAG"), based in Essen, which holds more than 97% of the shares. The remaining approximately 3% is floated.

(25) Between 1994 and 1997 the major shareholder in Degussa was the German Gesellschaft für Chemiewerte mbH ("GFC") with a 36.4% shareholding, the other shares being dispersed. Between 1997 and 2000, Degussa's main shareholder was Veba AG (via 64.6%), which acquired GFC's 36.4% share. Degussa merged with the chemical undertaking Hüls AG, the result being the company Degussa-Hüls AG. The E.ON Group, in turn, resulted from the merger between Viag AG and Veba AG on 16 June 2000. From 16 June 2000 until 31 January 2001, E.ON held 64.7% in Degussa-Hüls AG. On 1 February 2001, Degussa-Hüls AG and SKW Trostberg AG merged and the current Degussa was created. From 1 February 2001 until 31 January 2003, E.ON held 64.5% of Degussa. Following a public offering in January 2003, RAG and the E.ON Group of companies each held 46.5% of Degussa until 30 June 2004. From 1 July 2004 until January 2006, RAG held 50.1% and E.ON held 42.86%, with 7.04% being floated. On 25 January 2006, RAG made a public acquisition offer to the remaining shareholders of Degussa which enabled RAG to acquire more than 4% of the floated shares. After that, E.ON transferred its shares to the RAG Projektgesellschaft mbH, a wholly owned (indirect) subsidiary of RAG. Consequently, as stated in the previous recital, RAG AG today holds more than 97% of Degussa's shares.

(26) Degussa manufactures various specialty chemicals. It currently has three divisions: Technology Specialties, Consumer Solutions and Specialty Materials. The "Construction Chemicals division" was sold to the BASF group in early 2006, although the sale is subject to the approval of the competent competition authorities.

(27) Degussa's other subsidiaries involved in the production and sales of the products concerned are:

– MedAvox Srl (hereinafter MedAvox), which is a company incorporated under Italian law active in the production and sales of persalts. MedAvox was founded in October 2001, that is to say, after the end of the infringement. Initially it was equally owned (50/50) by Degussa and Ausimont SpA. The members of the Board were appointed by Ausimont and Degussa. Following the Commission's decision of 9 April 2002, in the framework of the acquisition of Ausimont by the Solvay group, Ausimont's 50% share in Medavox was sold to Degussa with effect from 1 January 2003. Thus MedAvox is today a 100% subsidiary of Degussa.

– Aktivsauerstoff GmbH, which is a company incorporated under Austrian law founded in 1994 and active in the production and sale of PBS and PCS in Austria and in eastern European countries. Degussa CEE GmbH (a wholly owned subsidiary of Degussa) owns a 51% share, whereas the Austrian Company Treibacher Industrie AG owns the remaining 49%. Both Degussa CEE and Aktivsauerstoff GmbH are consolidated in Degussa.

(28) Degussa's world-wide turnover (including its direct subsidiaries) was EUR 11,750 million in 2005. The world-wide and EEA-wide turnovers relating to the HP and PBS business were as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[140 - 150]**	**[25 - 35]**
1999	**[160 - 170]**	**[30 - 40]**
2000	**[200 - 230]**	**[25 - 35]**

	PBS World-wide	**PBS EEA-wide**
1998	**[55 - 65]**	**[40 - 50]**
1999	**[70 - 80]**	**[40 - 50]**
2000	**[80 - 90]**	**[30 - 40]**

	HP and PBS world-wide in the last year of the infringement	**HP and PBS EEA-wide in the last year of the infringement**
2000	**[285 - 315]**	**[65 - 75]**

2.2.3. *[Deleted]* (and Ausimont)[11]

(29) ***[Deleted]*** For the period of the infringement described in this Decision, the entity […] involved in the production and sales of HP and persalts was the company **Ausimont SpA** (see section 2.2.4). During this period (until 2000) Ausimont was 100% controlled by the company Montecatini SpA, which in turn was wholly owned by Montedison SpA. In the restructuring, Montedison absorbed its electricity and natural gas production subsidiary "Edison". It was joined with other businesses controlled by the company Italenergia Bis SpA, which operated as the vehicle for the restructuring. Montedison then adopted the current Edison name in 2002. Italenergia Bis completed the reorganisation in 2003 by absorbing Edison into Italenergia SpA, a separate subsidiary of Italenergia Bis. Italenergia SpA then took on the "Edison" name. ***[Deleted]***.

(30) [***Deleted***].

2.2.4. Ausimont (currently Solvay Solexis)[12]

11 ***[deleted]***.

12 ***[deleted]***.

(31) The Italian company **Solvay Solexis SpA** (hereinafter "**Solexis**", to avoid any confusion with the current parent company Solvay SA) was formerly named **Ausimont SpA** (hereinafter "**Ausimont**"). It was founded in 1981 and was wholly owned by Montecatini SpA, which in turn was 100% controlled by Montedison SpA ***[deleted]*** until 2000. Between the year 2000 and the sale of the company to Solvay, in May 2002, Ausimont was a majority owned subsidiary of Montedison SpA through the intermediate company Agorà SpA. Agorà SpA, which had a 100% shareholding in Ausimont, was controlled at 80% by Montedison, the remaining 20% being owned by the company Longside International SA. After the sale to Solvay in May 2002 (thus after the end of the infringement) and the subsequent restructuring, Ausimont merged into Agorà SpA, which changed its name to Ausimont SpA in the summer of 2002[13]. On 1 January 2003 Ausimont SpA was renamed Solvay Solexis SpA and it is now ***[indirectly nearly]*** 100% owned by Solvay.

(32) Ausimont was active in the development, production and marketing of fluorine materials and peroxigen products, including HP and persalts. After Solvay's acquisition, as part of an overall business strategy, Ausimont's assets were joined with the fluoropolymer activities of Solvay. In the course of 2002 the assets relating to the production of HP in Italy and to all persalts were sold to Degussa[14].

(33) The 2005 world-wide turnover of Solexis was EUR 256.2 million. The world-wide and EEA-wide turnovers relating to the HP and PBS business of Ausimont were as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[25 - 35]**	**[15 - 25]**
1999	**[30 - 40]**	**[20 - 30]**
2000	**[30 - 40]**	**[20 - 30]**

	PBS World-wide	**PBS EEA-wide**
1998	**[25 - 35]**	**[15 - 25]**
1999	**[30 - 40]**	**[20 - 30]**
2000	**[30 - 40]**	**[20 - 30]**

	HP and PBS world-wide in the last year of the infringement	**HP and PBS EEA-wide in the last year of the infringement**
2000	**[70 - 80]**	**[45 - 55]**

13 ***[deleted]***.

14 ***[deleted]***.

2.2.5. FMC Corporation/FMC Foret[15]

(34) **FMC Foret S.A**. (hereinafter "**FMC Foret**"), based in San Cugat del Vallés, Barcelona, Spain, is a company wholly owned by **FMC Corporation** (hereinafter "**FMC**"), based in Philadelphia, USA. FMC's ownership of FMC Foret is effected through FMC Chemicals Netherlands B.V., based in Farmsum, the Netherlands, a (holding) company which holds 100% of shares of FMC Foret and is in turn wholly owned by FMC.

(35) FMC Foret sells the goods manufactured by FMC Industrial Chemicals B.V., a company incorporated in the Netherlands, which was until 1999 directly controlled by FMC Foret. In 1999 FMC Foret sold its 100% shareholding in FMC Industrial Chemicals BV to FMC Chemicals Netherlands B.V.

(36) FMC Foret's activities are organised in five product lines, one of which is the "peroxigens" line, including HP and persalts. Two thirds of the sales of these products relate to detergent applications. The manufacture of PBS started in 1945 while the commercialisation of PCS started only in 2002.

(37) In 2005 FMC Foret's total turnover was EUR 221.8 million, whereas FMC's world-wide turnover was USD 2,150 million[16]. The world-wide and EEA-wide turnovers relating to HP and PBS business were as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[20 - 30]**	**[20 - 30]**
1999	**[25 - 35]**	**[20 - 30]**
2000	**[30 - 40]**	**[30 - 40]**

	PBS World-wide	**PBS EEA-wide**
1998	**[30 - 40]**	**[20 - 30]**
1999	**[40 - 50]**	**[20 - 30]**
2000	**[35 - 45]**	**[20 - 30]**

	HP and PBS world-wide in the last year of the infringement	**HP and PBS EEA-wide in the last year of the infringement**
1998	**[55 - 65]**	**[45 - 55]**

2.2.6. Kemira[17]

---

15 ***[deleted]***.

16 According to FMC Corp's estimates, this corresponds to 1,822 million EUR.

(38) Kemira is a Finnish undertaking established in 1933 and based in Helsinki. The company name has changed several times over the years. Between 1972 and 1997 its name was Kemira Chemicals OY, a limited company listed on the Helsinki stock exchange as from 1994. On 1 September 1997 Kemira changed its name into Kemira OYJ. The chemicals business was operated under the company Kemira Chemicals and was wholly owned by the holding company Kemira OYJ. As from 1 January 2004 Kemira Chemicals merged into **Kemira OYJ** (hereinafter "**Kemira**") and was dissolved as a separate legal entity. The Finnish State holds at present 56.2 % of Kemira's shares and votes. The core areas of its business are pulp and paper chemicals, water treatment chemicals and paints and coatings. Plant nutrients and industrial chemicals are also significant products. Kemira is active in the production, marketing and sales of HP and PCS (the latter since 1998). It does not manufacture PBS.

(39) Other companies of the Kemira group (all 100% owned by Kemira) involved in the production and/or sales of the products concerned (HP only, Kemira not producing PBS, but PCS) in the EEA are:

- Kemira Chemicals BV, Rozenburg, the Netherlands (production and sales);
- Kemira Kemi AB, Helsingborg, Sweden (production and sales);
- Kemira Chemie GmbH, Alzenau, Germany (sales);
- Kemira Chimie SA, Paris, France (sales);
- Kemira Iberica SA, Barcelona, Spain (sales);
- Kemira Chemie GmbH, Krems, Austria (sales).

(40) The name used in this Decision to refer to all entities in the Kemira group that participated in the infringement is 'Kemira'.

(41) Kemira Group's world-wide net sales were EUR 1,994 million in 2005. The world-wide and EEA-wide turnover relating to the HP business was as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[45 - 55]**	**[35 - 45]**
1999	**[80 - 90]**	**[40 - 50]**
2000	**[90 - 100]**	**[45 - 55]**

2.2.7. L'Air Liquide/Chemoxal[18]

(42) Founded in 1902 and based in Paris, France, **L'Air Liquide SA** (hereinafter "**Air Liquide**") is a leading company in the sector of industrial and medical gases and

---

17 ***[deleted]***.

18 ***[deleted]***.

related services. The company's core business is the supply of oxygen, nitrogen, hydrogen and many other gases and services to various industries. In the period until 1998 (when the group exited the markets) the following companies of the Air Liquide group were involved in the production and sale of HP and persalts:

– **Chemoxal SA** (hereinafter "**Chemoxal**"), Paris, France, which was founded in 1990 under the name Altichem SA and was 100% controlled by Air Liquide. The company was renamed Chemoxal SA shortly after. In March 1991 responsibility for marketing activities in relation to bleaching agents, including HP and persalts, which did not belong to the core business of Air Liquide, was allocated to Chemoxal. In the sector of bleaching agents Chemoxal sold HP and persalts (mainly PBS) manufactured by Oxysynthèse SA (and later also by Oxysynthèse Deutschland GmbH) only until 1998, when it stopped being active in that industry. More precisely, Chemoxal stopped selling persalts in 1994 and the sales of HP mid 1998.

– Chemoxal Chemie GmbH was the 100%-owned German sales subsidiary of Air Liquide Deutschland GmbH (itself a 100% subsidiary of the Air Liquide group) until June 1998, when it was sold to the Elf Atochem group. It used to sell the products purchased from Chemoxal SA in Germany.

– Oxysynthèse SA was, until May 1998, jointly owned (50/50) by Air Liquide and Atochem (for the description of Oxysynthèse SA see section 2.2.10) and produced both HP and persalts. In June 1998 Air Liquide sold its share to Elf Atochem.

– Oxysynthèse Deutschland GmbH, 50/50 equally owned by Air Liquide Deutschland GmbH and Elf Atochem Deutschland GmbH, owned the production plant of Leuna. The 50% share was also sold by Air Liquide to the group Elf Atochem in 1998.

(43) In this Decision Air Liquide's name is used to indicate the activities of the Air Liquide group in the business and in the infringement.

(44) The Air Liquide group of companies had a consolidated world-wide turnover of EUR 10,400 million in 2005. Chemoxal had a turnover of EUR 2.05 million in 2005. The world-wide and EEA-wide turnovers relating to the HP and PBS business in the last full years of sales of each product (in EUR millions) were as follows:

	HP World-wide	**HP EEA-wide**
1996	**[15 - 25]**	**[10 - 20]**
1997	**[10 - 20]**	**[10 - 20]**

	PBS World-wide	**PBS EEA-wide**
1993	**[5 - 15]**	**[5 - 15]**
1994	**[0 - 10]**	**[0 - 10]**

2.2.8. Snia/Caffaro[19]

(45) Caffaro SpA based in Milan, Italy, was established in 1906 and was listed on the Italian stock exchange until 2000. After the delisting, Caffaro SpA, at that stage wholly controlled by **Snia SpA** (hereinafter "**Snia"**), formerly "Snia BPD SpA", a holding company quoted on the Italian stock exchange, merged into Snia. Subsequently, Caffaro Spa's 100% subsidiary Industrie Chimiche Caffaro SpA was renamed Caffaro SpA, today **Caffaro Srl** (hereinafter "**Caffaro**"). Snia was the major shareholder in Caffaro SpA throughout the period of the infringement described in this Decision. Caffaro SpA (only) produced PBS, until 1994 directly and from 1994 to 1999 through Industrie Chimiche Caffaro SpA. In 1999 the group ceased the production of PBS and exited the market of bleaching agents. In this Decision Caffaro's name is used to indicate the activities of all entities of the Snia group in the infringement.

(46) The Snia group had a world-wide turnover of EUR 124 million in 2005 while Caffaro had a total turnover of EUR 120 million in 2005. Caffaro had the following world-wide and EEA-wide turnover relating to PBS business in the last full years of sales of the product (in EUR millions):

	PBS World-wide	**PBS EEA-wide**
1997	**[10 - 20]**	**[10 - 20]**
1998	**[10 - 20]**	**[5 - 15]**

2.2.9. Solvay[20]

(47) **Solvay SA/NV** (hereinafter "**Solvay**") based in Brussels, Belgium, is a public limited company. Its shares are listed on the Euronext Brussels stock exchange and certain other stock exchanges. Solvac SA, an investment company whose sole activity is to hold shares in Solvay, holds approximately 26% of all Solvay shares. One of the 16 directors of Solvay is also a director of Solvac, but is said not to have any influence on the policy and strategic decisions of Solvay. Solvay is active in many chemical sectors and organised into four main sectors (according to the BUs): (a) chemical sector, (b) plastics sector, (c) processing sector, (d) pharmaceutical sector. Until 1997, the BU "chemical sector" was split into two units, namely the alkali products and the peroxygen products. The latter dealt with the HP and persalts business. The new chemical sector was divided into a number of different "Strategic Business Units" (SBUs). The SBUs of relevance are the "Hydrogen Peroxide SBU" (which covers HP and Sodium Chlorate) and the "Detergents SBU" (which covers persalts).

(48) The subsidiaries that are involved in the production and sales of HP and persalts are:

– Finnish Peroxides OY/AB (hereinafter "**Finnish Peroxides**"), renamed Solvay Chemicals Finland OY/AB as of 1 January 2006, based in Voikkaa, Finland, which manufactures and sells HP mainly in the Nordic countries. The company was initially a four-way JV between Solvay, Laporte, Nokia and Kymmene. In

19 ***[deleted]***.

20 ***[deleted]***.

1991 the Solvay group acquired Laporte's 25% shareholding through the subsidiary Solvay Interox Holding BV (see below) and in 1997 it acquired Nokia's 25% shareholding directly. Subsequently Solvay transferred its shareholding in Finnish Peroxides to Solvay Interox Holding BV. In March 2005 Solvay acquired the remaining 25% shareholding from UPM-Kymmene. The holding of 50% of the shares in the period 1991-1997 allowed Solvay, as Solvay itself has stated[21], to exercise decisive influence over the business of Finnish Peroxides. Therefore it is the Commission's conclusion that Finnish Peroxides formed part of the undertaking Solvay for the entire duration of the infringement;

– Ausimont SpA, which was acquired on 7 May 2002 from Montedison SpA (now Edison, see recital (31)) and Longside International SA. Following the merger decision of the Commission of 9 April 2002[22], Ausimont's Italian HP business and its entire persalts business (mainly administrated by MedAvox) were sold to Degussa in December 2002. Ausimont SpA changed its name to Solvay Solexis SpA as from 1st January 2003 (see heading 2.2.4);

– Solvay Interox SA, Brussels, Belgium;

– Solvay Interox Holding BV, Weesp, the Netherlands, which is also a vehicle for the possession of holdings in other subsidiaries, such as Finnish Peroxides;

– Solvay Interox SA, Paris, France;

– Solvay Chimica Italia SPA, Milan, Italy;

– Solvay Interox SA, Barcelona, Spain;

– Solvay Interox GmbH, Hanover, Germany;

– Solvay Interox Production Peroxidados Lda, Lisbon, Portugal;

– Solvay Interox Ltd, Warrington, United Kingdom.

(49) The name used in this Decision to refer to all legal entities in the Solvay group that participated in the infringement is 'Solvay'.

(50) The consolidated world-wide turnover of the Solvay group amounted to EUR 8,562 million in 2005. The world-wide and EEA-wide turnover relating to the HP and PBS business was as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[180 – 210]**	**[60 - 70]**
1999	**[190 - 220]**	**[65 - 75]**
2000	**[215 - 245]**	**[70 - 80]**

21 ***[deleted]***.

22 Case COMP/M.2690, quoted above.

	PBS World-wide	PBS EEA-wide
1998	**[90 - 100]**	**[45 - 55]**
1999	**[95 - 105]**	**[50 - 60]**
2000	**[90 - 100]**	**[40 - 50]**

	HP and PBS world-wide in the last year of the infringement	HP and PBS EEA-wide in the last year of the infringement
2000	**[310 - 340]**	**[120 - 130]**

2.2.10. Total/Elf Aquitaine/Arkema[23]

(51) **Arkema S.A.** (hereinafter "**Arkema**"), based in La Defense, Puteaux, France, was created under the name Atochem S.A. (hereinafter "**Atochem**") on 30 September 1983 from the merger of Cloè Chimie (a joint venture company then owned by Elf, CFP and Rhone-Poulenc), Ato Chimie and the biggest part of the chemical activity of the group Pechiney Ugine Kuhlmann. During the infringement, **Elf Aquitaine SA** (hereinafter "**Elf Aquitaine**") was the main shareholder (97.5%) of Atochem which had changed its name to Elf Atochem SA in 1992. The company became Atofina SA (hereinafter '**Atofina**') on 17 April 2000, after a takeover of the Elf group by the TotalFina group by means of a public offering. Atofina changed its name to Arkema on 4 October 2004. Since April 2000 Atofina has been controlled (96.48%) by Elf Aquitaine, which is now in turn almost wholly owned (99.43%) by **Total SA** (formerly TotalFinaElf SA, hereinafter "**Total**"), a company listed on the Paris stock exchange. Atochem/Atofina was involved in the production and sale of both HP and persalts. However, the PBS plants were closed down in September 1999[24].

(52) Another company of the Total group involved in the production of HP and persalts was:

– Oxysynthèse SA, Paris, France. Until May 1998 this company was owned equally (50/50) by Elf Atochem SA and Air Liquide SA (see above, section 2.2.7), both of which had an equal right to appoint the members of the board. Oxysynthèse SA was active in the production of both HP and persalts (the latter only until 1994). The products manufactured by Oxysynthèse used to be sold to both Atochem and Chemoxal, which dealt with the marketing and sales. In May 1998 Atochem bought Air Liquide's 50%-share becoming the sole stakeholder of Oxysynthèse SA. In 1999 Oxysynthèse was incorporated into Elf Atochem SA and disappeared as a separate legal entity.

---

23 ***[deleted]***. See also the Atofina corporate website http://www.atofina.com/groupe/gb/f_elf_2.cfm

24 ***[deleted]***.

(53) The name used in this Decision to refer to all entities in the Total group is "**Atochem**" or "**Atofina**", since most documents referred to use Arkema's previous names Elf Atochem, Atochem and Atofina. Atofina's new name **Arkema** will be used to report its replies to the Statement of Objections.

(54) The world-wide consolidated turnover of Arkema was approximately EUR 5.7 billion in 2005, whereas the consolidated turnover of Elf Aquitaine in 2005 was approximately EUR 120 billion and the consolidated turnover of Total in 2005 was EUR 143.2 billion. The world-wide and EEA-wide turnovers relating to the HP and PBS business in the last years of the infringement were as follows (in EUR millions):

	HP World-wide	**HP EEA-wide**
1998	**[45 - 55]**	**[20 - 30]**
1999	**[100 - 110]**	**[35 - 45]**
2000	**[125 - 135]**	**[45 - 55]**

	PBS World-wide	**PBS EEA-wide**
1997	**[10 - 20]**	**[10 - 20]**
1998	**[10 - 20]**	**[10 - 20]**
1999	**[5 - 15]**	**[5 - 15]**

	HP and PBS world-wide in the last year of the infringement	**HP and PBS EEA-wide in the last year of the infringement**
1999	**[110 - 120]**	**[45 - 55]**

2.3. Description of the market

2.3.1. The supply

(55) HP: in the EEA there were six main suppliers throughout the period of the infringement: the leading company was Solvay with an approximate market share of **[20-30]**%, followed by EKA. The other players were Atochem, Kemira, Degussa and FMC Foret. Air Liquide and Ausimont sold HP until June 1998 and May 2002 respectively. Finally there were a small number of resellers importing HP from Eastern European countries and from outside Europe. There have been no new market entrants in recent years.

(56) PBS: the undertakings active in the EEA during the whole of, or part of, the period of the infringement were: Degussa, FMC Foret, Solvay, Caffaro (which however suspended its production in 1999), Atochem (which ceased production in 1999), Air Liquide (stopped in 1994) and Ausimont.

(57) The total amount of HP sales in the EEA was approximately EUR 340 million in 2000[25]. Estimated EEA-wide market shares for HP[26] in 1999 and 2000 were as follows:

EEA-wide market shares for HP in 1999 and 2000

	1999	2000
Company	**EEA**	**EEA**
Solvay	**[20-30]**%	**[20-30]**%
Eka	**[10-20]**%	**[10-20]**%
Kemira	**[10-20]**%	**[10-20]**%
Degussa	**[10-20]**%	**[5-15]**%
Ausimont	**[5-15]**%	**[5-15]**%
FMC Foret	**[5-15]**%	**[5-15]**%
Atochem/Atofina	**[10-20]**%	**[10-20]**%
Air Liquide/Chemoxal	**[0-10]**%	**[0-10]**%
Others[27]	**[0-10]**%	**[0-10]**%

(58) The total amount of PBS sales in the EEA was approximately EUR 135 million in 2000[28]. Estimated EEA-wide market shares for PBS[29] in 1999 and 2000 were as follows:

---

25 The size of the market estimated by the Commission is based on the various responses given by the undertakings to the Commission's request for information. However, the sum of the sold quantities declared by each of the companies is greater than the total market dimension indicated by everyone. The Commission considers that the size of the market is more likely to correspond to the sum of the individual sales. On this basis the Commission has calculated the market share for each competitor both in 1999 and in 2000.

26 The estimated market shares are based on sales (Euros). In case of data submitted in other currencies, the yearly exchange rates published on the website http://www.ecu-activities.be/documents/statistiques/yearly_average_1975_1998.htm fixed as from 1999 were used.

27 "Others" are represented by small players, like the companies Aragonesas, Sokolov, Belinka, Pulawy etc. i.e. actors operating in local markets (for example in Spain or in the Eastern countries) but with very little market share at EEA level.

28 The size of the PBS market estimated by the Commission is based on the various responses given by the undertakings to the Commission's request for information. However, the sum of the sold quantities declared by each of the companies is greater than the total market dimension indicated by everyone. The Commission considers that the size of the market is more likely to correspond to the sum of the individual sales. On this basis the Commission has calculated the market share for each competitor both in 1999 and in 2000.

29 The estimated market shares are based on sales (in Euros). In case of data submitted in other currencies, the yearly exchange rates published on the website http://www.ecu-activities.be/documents/statistiques/yearly_average_1975_1998.htm fixed as from 1999 were used.

EEA-wide market shares for PBS in 1999 and 2000

	1999	2000
Company	**EEA**	**EEA**
Solvay	**[30-40]**%	**[30-40]**%
Degussa	**[20-30]**%	**[25-35]**%
FMC Foret	**[10-20]**%	**[10-20]**%
Ausimont	**[10-20]**%	**[10-20]**%
Caffaro	**[0-10]**%	**[0-10]**%
Atochem	**[0-10]**%	**[0-10]**%

2.3.2. The demand

(59) During the period of the infringement, in the EEA the main purchasers of HP were relatively small in number (six to eight) and mainly from the pulp and paper segment, which negotiated EEA-wide contracts at EEA-wide prices.

(60) Major customers (such as Scandinavian and German pulp and paper manufacturers) negotiated contracts with a single price for multi-site supplies throughout the EEA. Transport costs were thus borne by the supplier, who may therefore have had an interest in obtaining HP from a source situated geographically close to the plants of the customers.

(61) In the persalts domain during the period of the infringement, a very small number of large multinational companies existed on the demand side: 75-80% of EEA purchases of persalts was concentrated in the hands of four of the so-called "big soapers": Unilever, Procter&Gamble, Henkel and Recklitt-Benckiser. They each had centralised European purchasing operations that negotiated purchases twice a year[30]. They usually purchased persalts from more than one supplier, seeking to maintain a certain degree of competitive pressure.

2.3.3. Geographic scope

(62) The infringement covered the whole of the EEA where demand of the products under investigation existed.

3. PROCEDURE

[30] ***[deleted]***.

3.1. The Commission's investigation

(63) In November 2002 representatives of Degussa informed the Commission[31] of the existence of a cartel in the HP industry as well as in the HP-linked PBS market and formally expressed their willingness to co-operate with the Commission pursuant to the Notice on immunity from fines and reduction of fines in cartel cases (hereinafter "the Leniency Notice")[32]. On 13 December 2002 the same representatives produced the relevant information relating to the unlawful behaviour for these products[33].

(64) On 27 January 2003 the Commission granted Degussa conditional immunity from fines in accordance with point 15 of the Leniency Notice on the basis of the information provided on 13 December 2002[34].

(65) On 25 and 26 March 2003 investigations were carried out at the premises of the undertakings Atofina, Solvay and Degussa[35] in accordance with Article 14 of Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty[36].

(66) On 29 March 2003 EKA submitted an application in relation to HP under section A (immunity) or alternatively section B (reduction of fines) of the Leniency Notice[37].

(67) On 31 March 2003 a meeting at the Commission's offices was held during which representatives of EKA made an oral statement concerning HP and persalts under section B of the Leniency Notice.

(68) On 3 April 2003, at 13:15hrs, a representative for Solvay sent a fax expressing readiness to co-operate with the Commission under section A or B of the Leniency Notice regarding HP, and requesting a meeting for the next day[38]. However, the fax did not have any documents or information annexed.

(69) On 3 April 2003, at 15:50hrs, a representative for Atofina sent a fax to the Commission applying for immunity or leniency (reduction of fines) for several products and annexing 13 documents relevant to HP and PBS[39].

(70) On 3 April 2003, at 17:24hrs, a representative for Solvay sent a fax expressing readiness to meet the Commission on that same day or the next day for a statement

---

31 ***[deleted]***.

32 OJ C 45, 19.2.2002, p. 3.

33 ***[deleted]***.

34 ***[deleted]***.

35 See pages from 174 to 888 of the file.

36 OJ 13/62, 21.2.1962, p. 204; Regulation repealed by Regulation (EC) No 1/2003.

37 ***[deleted]***.

38 See page 2024 et seqq. of the file. In the document appearing on page 2026, the applicant asks the Commission: "Would you be so kind as to confirm your availability for a meeting tomorrow?". The original French text reads as follows: "Auriez-vous l'amabilité de nous confirmer votre disponibilité pour une réunion demain?"

39 ***[deleted]***.

regarding HP. Solvay then confirmed by fax at 17:28hrs a meeting with the Commission to be held on 4 April 2003 at 14:15hrs[40].

(71) On 4 April 2003 Solvay met the Commission and made an oral statement concerning both HP and PBS, which included a statement by some individual officers of the company. A request for immunity or reduction of fines regarding HP as well as a request for immunity/reduction concerning PBS was made. A fax arrived at 18:45hrs on the same day and repeated the application for immunity/reduction of fines, in particular for persalts, as a confirmation of the earlier application.[41]

(72) On 9 April 2003 a further meeting with representatives of Solvay was held. An oral statement concerning PBS was made.

(73) On 11 April 2003, written confirmation of the declarations of Solvay made during the meetings of 4 and 9 April 2003 in relation to PBS was sent to the Commission[42].

(74) On 16 April 2003, written confirmation of the declarations made by Solvay during the meetings of 4 and 9 April 2003 in relation to HP, including a report concerning some additional facts, was sent by fax to the Commission[43].

(75) On 7 July 2003 a letter from Solexis concerning an application for immunity or reduction of fines relating to HP and persalts under section A or B of the Leniency Notice was received by the Commission.[44] The application included a statement by the company regarding an infringement in the sector of both HP and persalts.

(76) On 18 September 2003 Kemira submitted to the Commission an application under section A or B of the Leniency Notice for HP mainly regarding sales in Northern Europe. It included a corporate statement with 11 annexes[45].

(77) On 26 January 2005, the Commission initiated proceedings in this case and adopted a Statement of Objections notified to the addressees of this Decision.

(78) The companies had access to the Commission's investigation file in the form of a CD ROM, sent contemporaneously with the Statement of Objections, which contained accessible material in the file. Regarding five oral statements, the parties were given the opportunity to listen to the recordings and to read the transcripts at the Commission's premises. On 3 May 2005 the Commission sent to all parties another CD-ROM with additional documents to which access could be granted.

(79) Having replied in writing to the Statement of Objections, all the addressees of this Decision also attended the oral hearing, which was held on 28-29 June 2005.

---

40 ***[deleted]***.
41 ***[deleted]***.
42 ***[deleted]***.
43 ***[deleted]***.
44 ***[deleted]***.
45 ***[deleted]***.

(80) On 21 and 24 February 2006 the Commission addressed requests for information under Article 18 of Regulation No 1/2003 asking for turnover figures and further company details which have been included in the present Decision.

3.2. Previous investigations

(81) The markets for HP and PBS were the subject of a Commission decision concerning Article 85 of the Treaty (currently Article 81) in 1984[46]. The undertakings involved in the agreements and/or concerted practices concerned were Solvay, Laporte Industries Plc[47], Degussa, Air Liquide and Produits Chimiques Ugine Kuhlmann ("**PCUK**", which then became part of Atochem, now merged into Atofina/Arkema).

(82) According to that Commission decision, those producers had conducted their commercial operations in HP and PBS in the Community on the basis of an agreement or understanding applicable from 1961 onward that each national market was to be reserved for the producers which manufactured inside the territory in question (the "Home Market Rule").

(83) Fines were imposed on the following undertakings in respect of the infringements found in so far as they applied after the coming into force of Regulation No 17:

- Solvay et Cie, Brussels, ECU 3 000 000
- Laporte Industries (Holdings) plc, London, ECU 2 000 000
- Degussa AG, Frankfurt, ECU 3 000 000
- L'Air Liquide SA, Paris, ECU 500 000
- Atochem SA, Paris (as successor of PCUK), ECU 500 000

(84) No appeal was introduced against that decision of the Commission.

3.3. The main evidence relied on in this Decision

(85) The facts as set out in the next section are based principally, but not exclusively, on the following evidence:

- the immunity application submitted by Degussa on 13 December 2002[48] as well as its subsequent statements and replies to questions;
- documents collected during the inspections carried out under Article 14 of Regulation No 17 at the premises of Atofina and Solvay on 25/26 March 2003[49];

---

46 Commission decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 – *Peroxygen products*), OJ L 035 of 7.2.1985, p. 1-19.

47 In 1992 the Solvay Group acquired the HP and persalts' business of Laporte Plc. On 1st April 2001 Degussa acquired the undertaking Laporte.

48 ***[deleted]***.

– leniency applications from EKA dated 29 March 2003, by Atofina dated 3 April 2003 and by Solvay dated 4 April 2003, as well as further submissions by these companies[50];

– answers to various requests for information, in particular those made in the period from 16 April 2003 to 18 March 2004.

(86) The evidence relied on in this Decision is based on (contemporaneous) documents as well as written and oral statements provided by various parties. The content of the statements has been generally corroborated by statements from other parties or by (documentary) evidence in the Commission file, as referred to in the Decision. In so far as the Commission relies on facts or occurrences for which the source is a statement from a single undertaking, the Commission considers the information to be reliable in view of the other evidence in its possession and in view of the fact that that the information has remained uncontested. Notably as regards the information supplied by Degussa, the Commission considers that the evidence obtained from other parties confirms to a very significant degree the information supplied by Degussa in its application for immunity and/or in its later submissions. As a result, the Commission believes that the facts described in this Decision for which the statement of Degussa is the only source to be sufficiently credible to allow the firm conviction that they took place as described. The same is true for the facts that are based on statements by other parties, in so far as no other corroborating sources have been mentioned. Further aspects which add to the credibility of the evidence supplied in those statements are that the evidence is based on information obtained from company employees who directly participated in (and were therefore direct witnesses of) the unlawful contacts[51]. Also, these individuals often held senior positions, which adds to the credibility of the information. Furthermore, the information was supplied to the Commission after mature reflection. Another aspect is that the facts to which the information relates have remained uncontested after the Statement of Objections, unless indicated. Lastly, and more generally, where information from a single source is used, it is considered credible in the light of the existence of a body of consistent evidence, that consists to a larger degree of documentary, contemporaneous information.

3.4. Inter-state Trade

(87) There are a limited number of European sites where HP and PBS were manufactured.

(88) During the period of the infringement, the European producers sold their products in almost every EEA country, both directly to end-users and through a network of subsidiaries or independent distributors in the different European countries. Therefore, the market was characterised by important trade flows between Member States of the Community, as well as between the Contracting Parties to the EEA Agreement.

---

49 See pages from 174 to 888 of the file.

50 ***[deleted]***.

51 For Degussa, for instance, the persons concerned are ***[deleted]*** and ***[deleted]***, directly subordinated to ***[deleted]***).

4. DESCRIPTION OF EVENTS

(89) The complex of agreements and concerted practices described in this Decision and in contravention of Article 81 of the Treaty has to be seen in the light of a number of developments between the end of the 1980s and mid 1990s in the sectors of HP and PBS, as described in recitals (90) to (97).

4.1. Technical developments in pulp bleaching: a limited switch from ECF to TCF technology by customers of HP

(90) At the beginning of the 1990s environmental activist groups claimed that the "ECF-method"[52] for bleaching pulp was not environmentally-friendly and exercised pressure to replace ECF by a TCF process, using HP as a bleaching agent instead, as it was thought that TCF was more environmentally-friendly.

(91) Therefore, in the first half of the 1990s, there were strong expectations in Europe that HP would become increasingly important as a bleaching agent. Several pulp and paper producers developed projects to substitute ECF-based production processes with TCF-based processes. However, the view that TCF was the less polluting method and thus preferable was subsequently renounced as further research showed that the environmental advantages were much less than foreseen. TCF-methods, therefore, did not develop as much as expected and remained mainly used in the Nordic countries[53].

(92) In the meantime, all HP producers in Europe were investing extensively and building new production facilities or extending capacity in the existing ones. However, the increase in demand did not meet the expectations of the HP producers so that the additional HP production plants built from 1992 onwards, mainly in Eastern Germany and in the Netherlands, led to an HP overcapacity.

4.2. Captive production: the switching from PBS to PCS

(93) Further market turbulence was created by the structural changes in captive demand that resulted from the switch from PBS to PCS, and which started in the mid 1990s[54]. Almost all existing manufacturers in the EEA, except Atofina and EKA, are vertically-integrated producers and use part of their HP production for captive production of persalts. Whilst the total amount of HP consumed for the production of persalts remained constant, the switch from PBS to PCS had particular effects on the HP capacity utilisation of producers not having PCS production plants and thus not prepared to make, or not capable of making, the switch from PBS production process to PCS. The subsequent reduction of the production of PBS caused therefore a

---

52 ECF is a chlorine dioxide-based technology for bleaching pulp, where chlorine dioxide is used as a bleaching agent in addition to HP. Alternatively, sulphate pulp can also be bleached with the TCF-method which uses a combination of oxygen, HP and ozone and contains no chlorine-containing agents. The bleaching element in TCF-method is HP.

53 ***[deleted]***.

54 ***[deleted]***.

decrease of captive use of HP by the producers of HP and PBS only, who consequently experienced a further increase in unused capacity.

4.3. Nordic countries: expansion of the producers active in Scandinavia to continental Europe

(94) Until approximately 1994, a certain division within Western Europe existed between on the one hand the continental European market and on the other hand the Nordic market (Sweden, Norway, Denmark and Finland). There were certain differences between these two regions as regards producers (basically EKA was present in the Nordic market only and Kemira's exports, to Benelux, Germany and France, were of limited size), and prices (according to ***[name of the company]***, the prices for HP in the Nordic region were steadily below the prices in continental Europe until 1994 and transport costs were too high to make the sales profitable[55]). Also, in terms of demand the regions showed different characteristics, the customers in the Nordic countries consisting principally of pulp producers, whereas in continental Europe textile and detergent producers constituted an important outlet market. Also, consumption patterns (ECF-TCF) resulted in differences in quantity used.

(95) Towards the mid 1990s, however, the manufacturers in Northern Europe increased their supplies in continental European countries, mainly as a result of the building of a new plant by Kemira in the Netherlands in 1992, and a production facility in Helsingborg, Sweden[56]. EKA too started selling into continental Europe, though later (in 1999-2000)[57]. Therefore competitive pressure throughout the European area became stronger.

4.4. Former German Democratic Republic (GDR). New plants built using available State aid

(96) Between 1991 and 1992 Solvay, Atochem and Ausimont announced the building of new plants in the eastern part of Germany[58], respectively at Bernburg, Leuna[59] and Bitterfeld, as the Federal Republic of Germany was striving to re-launch chemical production in the territory of the former GDR. ***[deleted]***[60]. Between 1995 and 1997 the production in those new plants started. As a result, some 115 000 tons of HP, more than 10% of the EEA capacity existing at that time, were added just as demand was stabilising[61].

---

55 ***[deleted]***.

56 ***[deleted]***.

57 See also the note found at ***[deleted]*** about ***[deleted]***, page 346 of the file.

58 ***[deleted]***.

59 Actually, the plant of Leuna used to belong to Oxysynthèse SA, the JV between Atochem and Air Liquide. As from 1999, following the merger of Oxysynthèse into Atochem, the Leuna plant was also transferred to Atochem.

60 ***[deleted]***.

61 According to information provided by EKA "In the late 1990s, the total EEA production capacity for HP amounted to 1.015.000 tons, whereas the total EEA production volume is estimated at 807 000 tons and the consumption (in EEA+Switzerland) at 764 000 tons. From this total EEA volume, it is considered that the Nordic market amounts to approx. 200 000 tons. The value of the EEA HP market

(97) This increase of the production capacity had an effect on the European-wide prices of HP, and partially on downstream products, which dropped steadily until they achieved a low point (around 250 EUR per metric ton) in 1997.

4.5. Organisation and structure of the cartel

4.5.1. General organisation

(98) The illicit contacts described below were not based upon any precise formula, although there was some pattern in the contacts that can be discerned. There were generally multilateral meetings every six months and furthermore bilateral contacts at irregular intervals as well as telephone contacts. The cartel meetings were held at different levels: preparatory meetings at the Business Unit level, that took place at different locations (but mainly in Brussels, in Paris or in different cities in Germany), meetings at top management level usually surrounding the half yearly meetings of the CEFIC association (European Chemical Industry Council).

4.5.2. The essential features of the collusive behaviour

(99) The infringing behaviour described below in section 4.6 concerning both HP and PBS shows a number of common features:

- a core group of the same undertakings, namely Solvay, Atofina, Degussa, EKA (although it closed down PBS production in 1997), FMC Foret and Ausimont (which sold HP until May 2002) were involved in the anti-competitive behaviour relating to both products;
- there is a direct link between the products under investigation as a considerable part of the HP produced is used as a raw material for the production of its downstream product PBS;
- certain meetings involved anti-competitive arrangements for both products;
- a number of representatives of the undertakings involved in the anti-competitive arrangements had responsibility for both products;
- the same mechanisms applied to both HP and PBS[62].

(100) As of 31 January 1994 competitors exchanged and discussed confidential market information about production volumes, their possible reduction and/or the prevention of new capacity being brought onto the market. The competitors also discussed the allocation of clients and market shares and discussed selling prices. ***[deleted]***. By the above mentioned exchange of confidential market information the competitors also ensured the implementation of the cartel agreements by the monitoring scheme

---

in the late 1990s was estimated at 520 million DEM". See page 15454 of the file. The investigation has furthermore shown that the name plate capacity in Western Europe at the end of 1997 was 1.064.000 tons while the actual capacity at the end 1998 was 1.110.000 tons. It arose to 1.170.000 tons at the end of 2001, namely +9,9% in four years. See for example the table at page 336 of the file.

62 For details on these common features see recital (332).

instituted by the conspirators whereby they regularly exchanged confidential market- and/or company relevant information, sales volumes and prices information. There is evidence of the implementation of price increases for both HP and PBS which were recognized and monitored at meetings among competitors. In addition the competitors engaged in reducing/mothballing capacity and regularly reviewed the market shares development at the multilateral meetings which made it possible to monitor the developments of each other's market shares. As regards PBS initial talks occurred where market sensitive data was exchanged with the aim of achieving an anti-competitive agreement and the ground was prepared for an outright agreement at least as of 15 May 1998.

4.6. The operation of the cartel

4.6.1. The general framework for the meetings between competitors: initial meetings

4.6.1.1. Initial meetings regarding HP

(101) As stated above, competitors involved in HP and persalts production generally met twice a year at CEFIC meetings. Sometimes meetings took place more frequently. At occasions general conversation about the HP market situation took place.

4.6.1.2. Initial meetings regarding PBS

(102) As regards PBS specifically, in the period between 1986 and 1997 official meetings of the working group "Perborates" took place twice a year in the fringe of CEFIC assemblies.

4.6.1.3. Other bilateral and multilateral meetings between Degussa and other competitors in the years 1992-1994 regarding HP

(103) ***[deleted]***[63].

4.6.2. Meetings during the period of infringing behaviour

4.6.2.1. Meetings in 1994, HP

(104) ***[deleted]***[64]. ***[deleted]***[65]. The Commission will refer to this category of information to which ***[name of the company]*** has referred as '*competition sensitive data*' throughout the present Decision. The information in the Commission's file originating from other sources show that the data exchanged referred to by ***[name of the company]*** as '*competition sensitive data'* was indeed commercially relevant and was exchanged with the aim of influencing competition. For instance, ***[deleted]***. Further corroboration of the content of what ***[name of the company]*** described as '*competition sensitive data*' can be found in relation to the meeting of 27 November 1996. ***[Deleted]***.

---

63 ***[deleted]***.

64 ***[deleted]***.

65 ***[deleted]***.

(105) According to ***[name of the company]***[66], an important element of these talks was the analysis of the CEFIC-statistics on the HP market. As these statistics gave only the total market figure, one of the main objects of these talks was to identify and verify competitors' market shares, including for those competitors which did not attend these meetings. These talks were also used to find out about customer behaviour, including why clients switched from one supplier to another. Companies which were seen as specifically active on the market were sometimes called to order by the threat of counter measures if a company's increase in market share at the cost of others continued.

(106) Documentary corroboration of the collusion of the nature described by ***[name of the company]*** was provided by ***[name of the company]*** an understanding that existed between suppliers not to enter each other's market. ***[deleted]*** provided information notably about arrangements existing between ***[deleted]*** and Kemira (see further below). Within the list of meetings that ***[name of the company]*** listed, one was a bilateral meeting that took place in Stockholm, on 31 January 1994, between representatives of ***[name of companies]***. According to an internal contemporaneous document of ***[name of the company]***[67], Kemira had conducted negotiations with their competitors Air Liquide, Degussa and Solvay, and informed ***[name of the company]*** about the negotiations. The document states (information in square brackets is added by the Commission to facilitate the reading): "***[deleted]***"[68]. The documents relating to this meeting show that a common understanding existed between the companies that prices in (continental) Europe and Scandinavia would not rise soon due to Air Liquide which "***[deleted]***"[69]. Furthermore, Air Liquide would participate in TCF-bleaching in Scandinavia and elsewhere. They discussed the risks of retaliatory measures against Air Liquide. Since this "***[deleted]***"[70], ***[name of the company]*** said not to take any measures for the moment, because Degussa had informed ***[name of the company]*** that Air Liquide's capacity could soon be sold out. Nevertheless, ***[name of the company]*** would be prepared to take such measures if the situation became worse: "***[deleted]***"[71].

(107) They further discussed prices in general, and prices and (declining) sales of Kemira in France ("***[deleted]***"[72]).

(108) Information about the Scandinavian market was exchanged: "***[deleted]***."[73] Finally, the parties exchanged information on Kemira's expected deliveries in 1994, especially the "loss" of the key account ***[deleted]*** for the whole of 1994 to Air Liquide. Only one subsidiary of ***[deleted]*** would buy its supplies from Kemira. Kemira wanted ***[name of the company]*** to buy the difference due to the "loss" of ***[deleted]*** (i. e. 4 650 tons), but ***[name of the company]*** was only prepared to accept 1 600 tons.

---

66 ***[deleted]***.
67 ***[deleted]***.
68 ***[deleted]***.
69 *Ibidem*.
70 *Ibidem*.
71 *Ibidem*.
72 *Ibidem*.
73 *Ibidem*.

(109) ***[name of the company]*** stated that on the same date a bilateral meeting occurred between ***[name of companies]*** in Frankfurt am Main[74]. ***[name of the company]*** confirmed this meeting having taken place[75] by stating that it concerned a negotiation about the licence for the HP production which ***[name of the company]*** had acquired from ***[name of the company]***. During this meeting "market-related information"[76] on the European HP market was exchanged as well, according to ***[name of the company]***.

(110) According to ***[name of the company]***, a number of other bilateral meetings took place during 1994. Representatives from ***[name of companies]*** met in Jønkoping on 2 May 1994[77]. As is seen from the contemporaneous notes of this meeting[78], the participants discussed HP volumes for common customers for the second half of 1994 and for 1995. In the document it is read: "***[deleted]***"[79]. The discussion mainly regarded Scandinavian customers but the overall Danish market was mentioned as well: "***[deleted]***"[80].

(111) Also according to ***[name of the company]***[81], representatives of ***[name of companies]*** met in Gothenburg on 2 November 1994 and discussed HP in Europe[82].

(112) ***[deleted]***.

(113) ***[deleted]***[83].[84].

(114) According to ***[name of the company]***, "*competition sensitive data*" on the HP market and competitors' behaviour were exchanged with growing intensity during multilateral meetings, starting from the overall CEFIC-statistic about the HP market. In 1994, these meetings, with quite similar agenda, took place at the following dates and locations, surrounding official CEFIC meetings[85]:

- on 29 April 1994 in Rome, Italy
- on 25 November 1994 at the ***[hotel name]***, Zaventem, Belgium.

4.6.2.2. April/June 1995, several bi- and multilateral contacts concerning HP

---

74 See the diary of Mr. ***[deleted]*** of EKA where it reads "Frankfurt, lunch + afternoon" on 31 January 1994, ***[deleted]***.

75 ***[deleted]***.

76 For the explanation of the words "market-related information" see recital (104).

77 ***[deleted]***.

78 ***[deleted]***.

79 *Ibidem*. ***[deleted]***.

80 *Ibidem*: ***[deleted]***.

81 ***[deleted]***.

82 ***[deleted]***.

83 ***[deleted]***.

84 ***[deleted]*** .

85 ***[deleted]***.

(115) After Degussa and Solvay had repeatedly tested the availability of HP competitors to meet in order to discuss "*competition sensitive issues*", a meeting was eventually organised in Paris at Air Liquide's premises in April or May 1995. According to ***[name of the company]***, ***[deleted]***.[86] Purpose of the meeting was to establish a steady contact between the competitors. ***[name of the company]*** admitted to the existence of such discussions by stating that "***[deleted]***"[87].

(116) According to ***[name of the company]***[88], the participants discussed the market trends and the new entrances on the European HP market as Degussa and Solvay aimed to keep the market and their existing respective positions as stable as possible.

(117) ***[deleted]*** confirmed in its reply to the Statement of Objections[89] having participated in this meeting and stated ***[deleted]***[90]. ***[deleted]*** argued that this contact had no anti-competitive nature and did not lead to any agreement. For a reply to this argument of ***[deleted]***, reference is made to section 6.2.1.2.

(118) On 11 or 12 May 1995, surrounding the CEFIC assembly, in Dresden, Germany, the competitors had several bilateral contacts, during which, according to ***[name of the company]***[91], expected price decline on the HP market due to the forthcoming completion of the new facilities in the former GDR by Solvay, Atochem and Ausimont[92], and the expected additional volume of HP becoming available on the market were discussed. Participants in these contacts included Atochem, Degussa, EKA, Kemira and Ausimont.

(119) Solexis stated that the contacts in Dresden had a licit content (as the discussion only regarded in a general way the forthcoming new capacity to become available in the market, also thanks to Ausimont's new German plant.) For the Commission's reply to this argument, reference is made to section 6.2.1.2.

(120) A bilateral meeting, between Atochem and Air Liquide, was held in June 1995. As stated by ***[name of the company]***, representatives of both companies met and exchanged HP sales data, i.e. actual figures for 1994 and early 1995 as well as forecasts for 1995 for several accounts by calculating for each customer the respective share to be attributed to each manufacturer per client. The table that ***[name of the company]*** submitted has the heading "*HPPAPPDM*" (which the Commission believes to be the abbreviation for Hydrogen Peroxide, Pâte A Papier, Parts De Marché) and reflects the probable outcome of this meeting. The table presents a detailed overview

---

86 ***[deleted]***.

87 ***[deleted]***.

88 ***[deleted]***.

89 See ***[deleted]***.

90 ***[deleted]***.

91 ***[deleted]***.

92 Furthermore, FMC built a new facility for HP in the Netherlands also thanks to state aid, which was eventually declared incompatible with the common market by the Commission. See the Commission Decision of 21 January 1998 on aid granted by the Netherlands to a hydrogen peroxide works in Delfzijl (OJ L 171, 17.6.1998 p. 36).

on a per customer as well as a per producer basis (the producers concerned being Atofina, Chemoxal, FMC Foret, Degussa, Kemira, Solvay and Ausimont), showing a hypothesis of attribution of HP shares for pulp and paper customers for 1995[93]. In the table the first three columns show actual French market figures for 1994, the Atofina envisaged and real figures for the period January-May 1995. The other six columns show possible shares for certain clients. In its reply to the Statement of Objections Chemoxal stated that meetings with Atofina were frequent in that period due to the Oxysynthèse 50/50 JV but there is no evidence that this meeting of June 1995 took place. As to the table referred to by ***[name of the company]***, Chemoxal claimed that it had no knowledge of the sales figures of other competitors and the description of the behaviour of Chemoxal made by others in that period allows it to doubt the credibility of the statement by ***[name of the company]***, including the table annexed to it. The Commission replies that the contemporaneous note submitted by ***[name of the company]*** shows a high degree of detail, especially for Atofina and Chemoxal figures, so that the data must have been drawn from a direct source, namely Atofina and Chemoxal themselves. The same degree of detail is not retrieved in other columns (see for example the question marks in the FMC column). The Commission therefore concludes that a meeting between Atofina and Chemoxal actually took place in June 1995 whereby the two companies exchanged the above mentioned data.

(121) Another bilateral meeting, between a representative of Degussa and representatives of Atochem, was held, according to ***[name of the company]***[94], in Paris at Atochem's premises on 20 June 1995. The subject of discussion was the forthcoming overcapacity expected on the European HP market due to the building of new plants in the former GDR. In its written reply to the Statement of Objections, ***[name of the company]*** confirmed that this meeting had indeed taken place.

(122) A few days later, on 29 June 1995, representatives from Degussa and EKA had a bilateral meeting in Frankfurt am Main regarding a possible commercial agreement[95]. Alongside, according to ***[name of the company]***, they discussed possible cooperation on the European HP market. This and other subsequent talks ***[deleted]*** were seen ***[deleted]*** in the framework of confidence building among the European HP producers[96].

(123) ***[name of the company]*** further stated that in general, for more than one year, several bilateral meetings had been held between the main actors in the "continental" part of the European market. These meetings took place respectively between Atochem, Solvay and Degussa, where proposals about sales quota and control of overcapacity were made. Degussa and Solvay then used to synthesize the discussions at the joint meetings[97].

---

93 See the excel sheet reporting such figures, ***[deleted]***. ***[Deleted]***.

94 ***[deleted]***.

95 Details on the content of this agreement are confidential. ***[deleted]***.

96 ***[deleted]***.

97 ***[deleted]***.

(124) ***[name of the company]*** confirmed in the reply to the Statement of Objections this analysis by ***[name of the company]*** while ***[name of the company]*** stated that although producers were discussing and exchanging information in this period (1995), there was no agreement between them as they had diverging views which could not be reconciled. ***[name of the company]*** stated that, except sporadic contacts among competitors which took place on the fringe of the CEFIC meetings, no agreement was reached among them, not even a general understanding. Furthermore, the evidence submitted by ***[name of the company]*** would be neither substantiated nor would it be confirmed by the statement of ***[name of the company]***. At the same time, however, ***[name of the company]*** does acknowledge that attempts were undertaken to establish permanent contacts among competitors in order to exchange market-related information[98].

(125) For the reply to ***[name of the company]***'s and ***[name of the company]***' remarks about the allegedly licit nature (i.e. that according to them no agreements had been reached) of the meetings in 1995, the Commission refers to section 6.2.1.2, and in particular to the case-law mentioned there.

4.6.2.3. October 1995, Paris and Milan, HP

(126) A trilateral meeting was held on 23 October 1995 in Paris, at Atochem premises, at the request of Degussa. Participants in this meeting were Atochem, Degussa and Chemoxal.

(127) According to ***[name of the company]***[99], the subject of the meeting was Degussa to report the state of negotiations with FMC Foret and Ausimont about a possible coordination of their behaviour on the market of HP following the building of new plants. An offer of a market share in Germany to Oxysynthèse (the JV of Air Liquide/Atochem later acquired by Atochem) had been made by Degussa. At this meeting, the occurrence of which has been confirmed by ***[name of the company]***, a further subject was (again) the opening of the new three plants in the former GDR by Solvay, Oxysynthèse and Ausimont. According to ***[name of the company]*** the meeting was also used for the further development of a pattern for the allocation of market shares and a 'reasonable' utilisation of the actual European capacity[100]. The statements of ***[names of companies]*** are supported by the contemporaneous handwritten note submitted by ***[name of the company]***[101]. The note shows amongst others the positions of Ausimont (A^t) and FMC Foret (FMC), refers to a proposal for a sharing out of the production coming from the new plants ("*2/3 of the total growth of the market to the investors, 2/3 Iox* [Interox, namely Solvay] + *Degussa, 1/3 others*"[102]), as well as to an "*agreement on prices Q and S but for annual volumes maxi*[mum] *(pressure on the customer)*"[103]. The note further states:

---

98 ***[deleted]***.

99 ***[deleted]***.

100 ***[deleted]***.

101 ***[deleted]***.

102 *Ibidem*. ***[deleted]*** .

103 *Ibidem*. ***[deleted]***.

" ***[deleted]***" [104].

(128) A bilateral meeting was held in Milan, Italy, in a restaurant, on 30 October 1995. Representatives of Atofina and Ausimont attended the meeting. It was a preparatory meeting for the multilateral meeting of the producers' group referred to as "Group B", scheduled for the next day (see recital (132) ff.). According to ***[name of the company]***, representatives of both companies met to discuss specifically the following points:

- *"possible co-producing agreements in order to improve Ausimont's 'daily'?;*
- *state of play on the situation at Bitterfeld's plant of Ausimont being built;*
- *state of play on certain large Italian customers* [client names follow]*;*
- *Presentation of the position of FMC on the forthcoming general discussions on the day after"* [105].

(129) In particular, the handwritten note annexed to ***[name of the company]***'s statement reads amongst others as follows: "*ready to sell product to co-producers but it depends on the price / agreements done outside the global framework.* ***[deleted]***". More below the note reads as follows, as regards the position of FMC Foret and its new plant: "*FMC: move foreseen in 2-3 weeks (...). It wants agreement but global meeting + local. It wants to sell quantities in USA for prices much higher than what it can hope from the global framework*". [106]

(130) Given that the "Nordic companies" (mainly EKA and Kemira) had quite different positions and approaches to the market compared to the continental producers, Degussa and Solvay decided to organise the discussions by splitting the producers into two groups. The idea was to have on the one hand a **group "A"**, composed of Solvay, Degussa, EKA and Kemira, namely the market leaders and the "Northern Europe" group. This group was to be coordinated by Solvay, which was also active in Northern Europe through its subsidiary ***[3rd party]*** [107]. On the other hand a **group "B"**, consisting of Ausimont, FMC Foret, Air Liquide and Atochem, namely the companies which were active more generally in continental Europe. This last group was nicknamed the

---

104 *Ibidem*. ***[deleted]***.

105 ***[deleted] [deleted]***.

106 ***[deleted]***. ***[deleted]***.

107 See the statement by ***[deleted]***: "group A was composed of Degussa, Solvay, EKA and Kemira". ***[deleted]*** "the group 'A' was composed of Degussa and Solvay but the understanding of Ausimont management was that the latter company was taking into consideration agreements reached with the Scandinavian companies as well (i.e. Akzo and Kemira), that were not "formally" part of any groups. In particular these companies were granted [with] a market share in Europe in exchange of a limited competition in their countries. The group 'B' was composed of Ausimont, Foret, Atochem and Air Liquide". See page 16064 of the file. ***[deleted]*** (…) Both notes originate from ***[name of individual]*** (…) ***[name of the company]*** assumes that the "Group B" was a concept used in relation to HP. (…) ***[name of individual]*** was appointed as head of ***[deleted]*** in March 1997. ***[Deleted]***, there was no division of the different producers of HP into different groups during the infringement of competition rules that started in September 1997. For that reason, ***[deleted]***(…) ***[deleted]***. It would appear that the designation "Group B" (…) was used as part of an attempt to maintain existing market shares, while producers were individually reorganising their capacities." See pages 17046-47 of the file.

group of "bad guys" by Degussa and Solvay, because they wanted to increase overall capacity in Europe, to the detriment of prices. Group B was to be coordinated by Degussa.

(131) According to ***[name of the company]***, the existence of two separate groups of producers was also explicitly referred to by the participants at the Seville meeting of May 1997 (see recital (158)), during the finalisation work of the pattern for the allocation of the market shares. Indeed, the companies belonging to group "B" were supposed to decide how to allocate among them the aggregated market shares defined by group "A", taking into consideration both the production plant capacity and the historical market shares.

(132) The first meeting of the Group "B" was held on 31 October 1995 in Milan, in a hotel[108]. ***[name of the company]*** submits that participants in the meeting included Atochem, Degussa, Chemoxal and Ausimont. ***[deleted]*** the meeting took place and the companies which took part in the meeting[109] and stated that it believed the meeting was in fact held at Ausimont's premises.

(133) As stated by ***[name of the company]***[110], this meeting of 31 October 1995 ***[deleted]***. The overall system proposed to the competitors was similarly described later by ***[name of the company]*** to explain the proposal submitted at the Seville meeting of May 1997 (see recital (161)). The handwritten note submitted by ***[name of the company]*** states the following: "*2/3 of the growth for the new capacities 1/3 for others*" as refers to the growing exploitation of the new plants (in the former GDR) during the first three years[111]. The note also shows a table with volumes and their development and contains the following references:

"– *Ok proposal of C D F* [Ausimont, FMC Foret, Air Liquide] - *Otherwise no meeting*

– *E [Atofina] accepts split north/south*

– *E accepts position ABG* [Solvay, Degussa, Kemira] *(if no imports from Sweden)*[112]".

4.6.2.4. November 1995, Brussels, HP

(134) Surrounding the official CEFIC meeting, held on 21-22 November 1995 at the CEFIC offices in Brussels, bilateral contacts between Atochem, Degussa, Solvay and Kemira occurred[113].

---

108 In the first instance ***[name of the company]*** stated that the meeting took place on the 1st November 1995. Then in the reply to the request for information of 18 March 2004, the company corrected the date by indicating 31 October 1995 as the right date. See page 15775 of the file.

109 ***[deleted]***.

110 ***[deleted].***

111 In the handwritten note ***[deleted]*** it reads as follows: "2/3 of the growth for new capacities 1/3 for others. 40% or mini 96, 50% 97, 60% 98". In the original French: « 2/3 de la croissance pour les nouvelles capacités 1/3 pour les autres. 40% ou mini 96, 50% 97, 60% 98 ».

112 In the bottom of the handwritten note ***[deleted]*** it reads: "Ok proposition de CDF – Si non pas de meeting - E accepte split Nord/Sud. E accepte position A B G (si pas d'import de Suède)".

113 ***[deleted]***.

(135) The subject of these contacts was again the exchange of "*competition sensitive data*" about the HP market[114]. In its reply to the Statement of Objections, ***[deleted]*** stated that ***[deleted]***[115]. In assessing that argument the Commission notes that Solvay has not provided an explanation what the actual content of these contacts was. For the reply to this point reference is made to section 6.2.1.2, and in particular to the fact that the information in the Commission's possession supports the view that these contacts were a relevant element of the infringement described in this Decision.

(136) According to ***[name of the company]***, a local meeting was held on the same day in Italy between the sales managers of the companies active in Italy, namely Atochem, Solvay, Degussa and Ausimont. The aggressive attitude of Air Liquide on the Italian market was discussed. Market information was exchanged between Atochem and Degussa and price figures of HP for 1996 were defined, even though Atofina stated that these prices were never respected[116]. In particular, the handwritten note taken by the representative of ***[name of the company]*** present at the meeting, shows the FMC Foret official prices as well as the price figures for 1996 which were defined as follows: "1996 {*1800 distri*[bution] *1650 chemical 1550 P&P* [pulp and paper]"[117]. ***[Deleted]*** stated that no agreement was reached, although it did not deny its participation in this meeting. For the reply to this point, reference is again made to section 6.2.1.2.

4.6.2.5. February 1996, Paris, HP

(137) A meeting of group "B" was held on 12 February 1996 in Paris, at Atochem premises and at the ***[hotel name]***[118]. According to ***[name of the company]***[119], participants in this meeting were Atochem, Degussa, Chemoxal and Ausimont.

(138) The exact agenda could not be reconstructed by ***[name of the company]***, but the meeting was used to proceed with the overall discussions about the market already mentioned for the Group "B" meeting on 31 October 1995 (see recital (133)). However, it is likely, according to ***[name of the company]***, that participants entered into negotiations over the framework for sharing out the extra market growth, developed during the meeting of 31 October 1995[120].

4.6.2.6. 1st quarter 1996, Paris, HP

---

114 For the meaning of the term "competition sensitive data", refer to recital (104).

115 See pages 42-43 of Solvay's reply to the Statement of Objections. ***[deleted]***.

116 ***[deleted]***.

117 In the original French: {1800 distri
1650 chimie
1550 P&P [pâte à papier]

118 In its reply to the Statement of Objections ***[name of the company]*** has confirmed this meeting had taken place, ***[deleted]*** but has not confirmed that it organised this meeting as stated by ***[name of the company]*** and reported in the Statement of Objections.

119 ***[deleted]***.

120 ***[deleted]*** As stated in the footnote 118, ***[name of the company]*** did not confirm to have organised this meeting but confirmed its occurrence. ***[deleted]***.

(139) A bilateral meeting between Atochem and Solvay concerning HP was held in Paris at the beginning of 1996. According to ***[name of the company]***, the subject was the comparison of the different views on the market of group A (where Solvay was coordinator) compared with group B (which Atochem took part in)[121]. In reply to the Statement of Objections ***[deleted]*** again stated that the content of the meeting is uncertain and in any case did not lead to an agreement[122]. For the reply to this point, reference is again made to section 6.2.1.2.

4.6.2.7. April 1996, Leuna, HP

(140) According to ***[name of the company]***[123], a trilateral meeting concerning HP is likely to have taken place in Leuna, Germany, on 25 April 1996, the occasion being a "*logistics meeting*"[124] at the Oxysynthèse plant, which was supposed to start producing the following year. As stated in section 2.2.7, Air Liquide held a 50% shareholding in Oxysynthèse Deutschland GmbH. Representatives of Atochem, Chemoxal and Degussa took part in the about 45-minute long meeting. According to ***[name of the company]***[125], with a view to making an agreement on HP, was made. In its reply to the Statement of Objections ***[name of the company]*** could not confirm that this meeting had taken place at the indicated date and location, though ***[name of the company]*** did not exclude the possibility that the meeting may have taken place at another location, since several contacts occurred between Degussa and the owners of Oxysynthèse (i.e. Atochem and Air Liquide) in 1996 with a view to building a European market order for HP[126]. Chemoxal denied that any of its representatives attended this meeting, though provided no information as regards the whereabouts of the alleged representative identified by the Commission in the Statement of Objections[127].

4.6.2.8. May 1996, Gothenburg, HP

(141) A dinner at which several representatives of HP producers took part was held in Gothenburg, Sweden, on 24 May 1996, the day after the CEFIC session took place, at the Restaurant "***[restaurant's name]***"[128]. According to ***[name of the company]***[129],

---

121 ***[deleted]***. In the original French it reads as follows: «Point sur les positions du groupe A, confrontées à celles du groupe B». ***[deleted]***.

122 See paragraph 152 of Solvay's reply.

123 ***[deleted]***.

124 ***[deleted]***.

125 ***[deleted]***.

126 See ***[name of the company]***'s reply to the Statement of Objections, ***[deleted]***.

127 It concerns Mr. ***[name of individual]***, as referred to in recital 141 of the Statement of Objections. Chemoxal stated in its reply (page 58, original French text): « M. ***[name of individual]*** a précisé qu'il n'avait nullement participé en 1996 à une quelconque réunion à Leuna en présence de M. ***[name of individual]*** d'Atochem et, a fortiori, de MM. ***[names of individuals]*** de Degussa. Il a gardé souvenir de deux déplacements à Leuna en 1996, effectués en compagnie de M. ***[name of individual]*** pour discuter de questions de logistique avec M. ***[name of individual]***».

128 ***[deleted]***.

129 ***[deleted]***.

participants at the dinner included representatives of Atochem, Degussa, Kemira, EKA and Solvay[130].

(142) According to ***[name of the company]***, during this social event which had been organised on the fringe of the CEFIC assembly, "*competition sensitive data*"[131] about the HP market was exchanged between the representatives of the competitors present via bilateral contacts. A representative of ***[name of the company]*** stated: ***[deleted]***[132].

4.6.2.9. November 1996, Brussels, HP

(143) Further contacts occurred during a dinner in Brussels, on 27 November 1996. Representatives of Atochem, Degussa, EKA, Solvay, Chemoxal, Kemira and Ausimont participated at this dinner surrounding the CEFIC general assembly. According to ***[name of the company]***[133], the subject of these contacts was again the exchange of "*competition sensitive data*" [134] about the HP market.

(144) According to ***[name of the company]***[135], a meeting of group B is likely to have taken place in the course of the second semester of 1996. Given that no other multilateral meetings occurred apart from the one signalled by ***[name of the company]***, it is presumed by the Commission that this was the meeting at stake. It appears that the group B discussed a new proposal for the division of the European HP market. Tables referring to these discussions, including various hypotheses, were submitted to the Commission by ***[name of the company]***[136]. ***[name of the company]*** also submitted tables ***[deleted]***[137]. The table stated as follows:

Proposal A:

- *(1+) Group 42,5 % of the market*

- *A B G 57,5% of the market including Kemira*

- *Sales Scandinavia 9 Kt/year*

- *Selling prices DDV Mkt 850 1000 1200 1300*

Copro Ex work 650 700 850 [figure erased]

- ***[deleted]***

130 ***[deleted]***, Solvay did not participate in this meeting but the internal document ***[deleted]*** which testifies the presences at the ***[restaurant's name]***, ***[deleted]***, shows that Mr. ***[deleted]*** of Solvay was actually present at the dinner. Solvay denied the presence of its representative at the dinner by making reference to the travel log of this employee; however, no evidence was submitted about his actual whereabouts on that day. ***[deleted]***.

131 For the meaning of the term "competition sensitive data", refer to recital (104).

132 ***[deleted]***.

133 ***[deleted]***.

134 For the meaning of the term "competition sensitive data", refer to recital (104).

135 ***[deleted]*** .

136 ***[deleted]***.

137 ***[deleted]***.

- If S asks decrease of our 1+, only on purchases copro at prorate of respective purchases copro (26).

Figures to be made in market shares and not capacity since it is unknown how the market will be.

Response ATO

*- **[deleted]** to keep the right to participate at 9 KT Scandinavia*

- If S asks to decrease, Ato refuses to touch the mini market shares and 3 Kt to copro

- translate figures of (1^{+}) in % of market shares

Response [Chemo]XAL

- 33 KT on market, hardly acceptable. To be seen with its boss

- Wants to see what the current positions are

- ATO = 0 in Scandinavia

Proposal B

- under reserve of XAL agreement

- only group parameters, then plenary meeting if Ok, or group if not OK"[138] .

(145) In its written reply to the Statement of Objections ***[deleted]*** claimed that no agreement was reached during this meeting, though it did not deny its participation at this dinner. For the reply to this point, reference is made to section 6.2.1.2.

4.6.2.10.1996-1997, various bilateral meetings concerning HP

(146) In 1997, in spite of the earlier coordination efforts, the prices for HP reached a record low. According to Atofina and FMC Foret, in the 3rd quarter of 1997 the sector sold at prices under variable cost.

(147) According to ***[name of the company]***[139], bilateral meetings were held at which Degussa's discussions with their competitors were mainly focussed on how to implement their plans to restructure the HP market in Europe in order to avoid or halt a slide in prices.

(148) ***[name of the company]*** stated that three bilateral meetings took place in Germany at the end of 1996 or the beginning of 1997 between representatives of Degussa and of Ausimont. The meeting places were Frankfurt (for the first two) and the German Ausimont's premises in Bad Homburg (for the third)[140].

---

138 ***[deleted]***..

139 ***[deleted]***.

140 ***[deleted]***.

(149) The subject of the first of these meetings was the 'German-speaking HP market' (i.e. Germany, Austria and Switzerland). Degussa had a particular interest to prevent imports from plants in Mediterranean countries into the region north of the Alps. In the same way Ausimont aimed to prevent exports to Italy from north of the Alps (e.g. by Degussa). There was the same agenda for the following two meetings, where the bad HP price situation in Europe was discussed and ways to prevent a further fall in prices. Ausimont, at that moment one of the smallest producers of HP in Europe, was the most difficult to convince. At the last two meetings in 1997 Degussa tried to dissuade Ausimont from flooding the market with its new products, since Ausimont was opening one of the three new HP production sites in the former GDR, by agreeing to give it a relatively high (in comparison to the other larger European competitors) increase in market share. In exchange Ausimont would refrain from its aggressive price strategy, in order to stop the price decline in Europe[141].

(150) In its reply to the Statement of Objections, ***[deleted]*** pointed out that it had only agreed to meet Degussa because this latter had concerns regarding the forthcoming new capacity that was the consequence of the opening of the new plants (including that of Ausimont). Solexis also submitted that Degussa forced Ausimont to have these bilateral meetings. According to Solexis, at these meetings the German company was threatening Ausimont with a possible commercial war if Ausimont did not accept the new market discipline proposed by Degussa. In reply to these arguments by Solexis, the Commission considers that the points made by Solexis actually confirm that these meetings had taken place and that their contents were anti-competitive. The fact that Degussa may have been the instigator of the contacts in no way sets aside that conclusion.

(151) According to ***[name of the company]***, another bilateral meeting between Degussa and FMC Foret took place in Barcelona either in the second half of 1996 or in the first half of 1997[142]. ***[name of the company]*** stated that the subject of the meeting was again the attempt by Degussa to construct a controlled European market for HP. The ***[representative of]*** Degussa[143] was looking for an agreement from other producers to the proposed plans "*in order to establish a European market order*"[144]. The ***[representative]*** of FMC Foret present at the meeting agreed with the fundamental idea of a coordinated price level increase up to the price of the previous year. The representative of FMC Foret denied only in general terms having met the Degussa's ***[representative]***.[145]

(152) A similar subject was discussed during a number of bilateral meetings held in 1996 and 1997 between Degussa and Air Liquide (Chemoxal), both in Paris and in

---

141 ***[deleted]***.

142 ***[deleted]***.

143 It is Mr. ***[deleted]*** as referred to in recital 149 of the Statement of Objections..

144 ***[deleted]*** .

145 See the declaration of Mr. ***[deleted]*** annexed to the ***[name of the company]*** reply to the Statement of Objections. At para 15 of this statement it reads as follows: "I believe that I only had contact with Mr. ***[deleted]*** at Cefic assemblies, and am confident that I never reached any agreement with him (or any other competitor) on pricing".

Frankfurt am Main[146]. According to ***[name of the company]***, Air Liquide agreed with the fundamental idea (the same as referred to in the previous recital) of a coordinated price level increase up to the price of the previous year.

(153) Chemoxal replied to the Statement of Objections by stating that ***[deleted]***. Therefore, according to Chemoxal, he could not have had contacts with Degussa in 1997. Furthermore this individual has recollection of contacts with Degussa in 1996, but only relating to HP deliveries, because Chemoxal feared Oxysynthèse becoming short on stock. In reply to these arguments the Commission notes that the fact that [name of the company's CEO] abandoned this position on 3 March 1997 does not of itself exclude that contacts with competitors were held in 1996 or in the first quarter of 1997. Secondly, the statement of ***[name of the company]*** is considered credible in the light of the description of other collusive contacts with a.o. Chemoxal, as referred to in sections 4.6.2.3 and 4.6.2.9. Furthermore, Chemoxal did not submit any evidence in support of its statement that these contacts were indeed confined to the issue of HP deliveries. Therefore, the arguments presented by Chemoxal are considered insufficient to set aside the information supplied by ***[name of the company]*** referred to in the previous paragraph.

(154) According to ***[name of the company]***[147], a meeting between ***[name of companies]*** relating in particular to the reduction of HP production capacity took place during spring 1997, in April or May, in Copenhagen. At this meeting ***[name of companies]*** discussed the over-supply situation as well as the price war and the price decrease in Europe. The representatives of ***[name of the company]*** asked whether ***[name of the company]*** would join the other producers in the coordinated efforts to reduce capacity in Europe and therefore whether it would consider shutting down capacity itself. ***[name of the company]*** responded that it was inclined to do so. ***[name of the company]***'s representative was aware of the plans of other European players to reduce capacity in Europe. He told ***[name of the company]*** that ***[name of the company]*** was going to interrupt the production at its plant in ***[deleted]***, that Degussa also would do it at its Belgian plant in Antwerp, FMC Foret at its plant in La Zaida and Kemira at its plant in Oulu. ***[deleted]***[148].

(155) ***[deleted]*** during this bilateral meeting a reduction of capacities was discussed as an attempt to counterbalance the substantial decrease in HP prices. Solvay suggested to EKA that it might reduce its capacity. But, as for previous occasions, Solvay stated that no actual agreement was reached at this meeting. In reply to this argument, the Commission again refers to the reasons provided for in section 6.2.1.2.

4.6.2.11.May 1997, Seville, HP and PBS

(156) Three meetings took place in Seville, Spain, surrounding the bi-annual CEFIC meeting. A first multilateral meeting was held on 28 or 29 May 1997 in the fringes of

146 ***[deleted]***.
147 ***[deleted]***.
148 ***[deleted]***.

the official assembly. According to ***[names of companies]***[149], representatives of Atochem, Degussa, FMC Foret, Solvay, Kemira and Ausimont participated in this meeting. ***[deleted]***[150].

(157) This meeting brought together group "A" with group "B"[151], in order to create an understanding between the two groups. Several representatives demonstrated nervousness due particularly to the attitude of the smaller producers. The participants decided to pay less attention to market share, which was the subject mainly discussed so far, in favour of an overall rise in the price. On the occasion of this meeting, therefore, a drastic action for a rise in the price of HP was decided, as well as a control of the volumes produced[152].

(158) ***[deleted]***[153].

(159) According to ***[name of the company]***[154], at this meeting not only HP market sensitive data and information about competitors and their behaviour on the market was exchanged, but an articulate agreement on the division of the European HP market among the competitors was also discussed.

(160) As stated in recital (150), plans to establish "*a new European market order*" for HP were becoming increasingly an issue. Participants now tried in a systematic way – starting from the official 'non identifiable' CEFIC-statistics – to reconstruct a reliable overview of the European market shares of each participant. The official statistic presented already a division in macro-areas (so called "CEFIC-Regions") from which the anonymous total deliveries were made "non-anonymous"[155], i.e. every supplier indicated on a working sheet its sales share. Thus a table was established for the years 1996/97, which was taken as a basis for the compilation of the future market figures. The sum of the individual figures could be checked by comparison to the published CEFIC-statistic. The outcome of this exercise was a more exact determination of every producer's market share. Also, taking account of theoretical capacity and actual production, the utilisation rate of each producer was revealed.

(161) ***[name of the company]*** submitted this working sheet to the Commission[156] and explained: ***[deleted]***[157].

(162) A second meeting occurred in Seville, regarding PBS, in which also representatives from Caffaro took part[158]. ***[name of the company]*** stated that ***[deleted]***[159].

---

149 ***[deleted]***.
150 ***[deleted]***.
151 ***[deleted]***.
152 ***[deleted]***.
153 ***[deleted]***.
154 ***[deleted]***.
155 ***[deleted]***.
156 ***[deleted]***.
157 ***[deleted]***.

(163) Finally, on the day following the official CEFIC-assembly a dinner took place at the restaurant "***[name of restaurant]***" where these discussions both as regards HP and PBS went on. Also the main problems related to the PBS market were discussed. Participants were representatives of Atochem, Caffaro, Kemira, Degussa and ***[3rd party]***[160].

(164) Due to the lack of confidence and to the opposition of some small European producers no final agreement was reached on this occasion. Actually, ***[deleted]***[161]. The discussions were thus carried over to a later meeting in August 1997.

(165) As regards the meetings in Seville regarding both HP and PBS, several parties commented in their replies to the Statement of Objections as follows. FMC Foret challenged the Commission position stating that FMC Foret's attitude during the meeting in Seville - FMC Foret being one of the small producers that would be resisting the views of Solvay and Degussa, as referred to in recital (162)) - would rather suggest non-participation than participation in a cartel. Next, FMC Foret stated that an attendance at cartel meetings cannot be deduced on the basis of attendance at the official CEFIC assembly. Furthermore, according to FMC Foret, its absence from participation in illegal behaviour would be demonstrated by the fact that it was not present at the ***[name of restaurant]*** dinner after the conclusion of the official CEFIC assembly. Solvay stated in its reply to the Statement of Objections that in Seville no agreement was reached among the competitors to increase the price of HP. Moreover, Solvay submitted that a representative of Kemira, which did not produce PBS, was present at the dinner, so that it is unlikely that any plans for an anti-competitive agreement had been discussed at this lunch which regarded PBS. According to Solvay, the presence of Caffaro, a client for HP, would have prevented the HP producers from seeking for a price agreement for HP at the dinner at "***[name of restaurant]***".[162]

(166) The Commission does not share the views of the parties presented above and replies as follows. Despite the comments by FMC Foret, the Commission considers that Solvay and Degussa left the meeting room not because the small producers refused to agree on a price increase as such, but rather because the smaller producers were apparently discontent with the proposal made, most likely given the share of the market that would be attributed to them, see recital (162)[163]. Therefore, contrary to the assertion by FMC Foret, there is no indication that FMC Foret actually rejected the idea itself of an agreement with the competitors or that it distanced itself from the proposed agreement as such. Moreover, regardless of the argument of FMC Foret, it should not be neglected that in any case confidential data was exchanged during the meeting, as set out in recital (159). Concerning the absence of FMC Foret at the ***[name of restaurant]*** dinner, it is true that there is no evidence that FMC Foret attended the dinner meeting

---

158 See the statement ***[deleted]*** on page 15908 of the file: "Caffaro has only taken part in the CEFIC-meetings of Seville and Evian-les-Bains". The original Italian text reads as follows: "Caffaro ha solo partecipato ai meetings CEFIC di Siviglia e Evian Les Bains".

159 ***[deleted]***.

160 See pages 15469 and 15482 of the file.

161 ***[deleted]***.

162 See page 26 of Solvay's reply to the Statement of Objections.

163 See page 4155 of the file. The original French text reads as follows: « ***[deleted]***».

after the CEFIC assembly, but as the information in the Commission's file clearly shows – and the Statement of Objections reports it at paragraph 159 – that illegitimate talks on PBS had already taken place in its presence as well, in the context of the CEFIC meeting, where FMC Foret was indeed represented.

(167) As regards the remark by Solvay, that the presence of Kemira at a lunch would have prevented the competitors from having discussions about PBS, the Commission considers that the presence of Kemira is not at odds with the fact and does not exclude that PBS was discussed at this meeting. As a preliminary remark, it is noted that Solvay itself was not present at the dinner at the restaurant "***[name of restaurant]***"[164]. Next, in a dinner setting it is not unreasonable to assume that various discussions were held more on a bilateral basis. Also, it may well be that Kemira as a producer of HP was interested in the developments expected in PBS as it is one of the main outlets for its HP production. Furthermore, the circumstance that one producer of HP only, namely Kemira, was present at this lunch where PBS was mainly discussed, rather strengthens the Commission's conviction that collusion regarding the HP and PBS were linked. It is equally noted in this respect that Kemira in its reply to the Statement of Objections[165] itself confirmed its participation to this meeting, stating that it "principally" concerned HP, thereby, it is considered, acknowledging that other issues were discussed too. As regards the argument of Solvay that the presence of Caffaro would have meant that HP was not discussed, the Commission refers to the above points.

4.6.2.12.Mid-1997, two meetings in Brussels, HP

(168) According to ***[name of the company]***[166], a bilateral meeting with ***[name of the company]*** was held in Brussels at ***[name of the company]***'s premises on 4 June 1997. At this meeting the parties discussed the HP price deterioration in Europe due to the over-capacity. Two further bilateral meetings with similar agendas were then held on 22 August and 2 September 1997[167].

(169) According to ***[name of the company]***[168], a bilateral meeting between Degussa and Solvay regarding HP was also held at Solvay's premises in Brussels mid-1997.

(170) ***[name of the company]*** stated that[169] this meeting was the first where members of the board of the respective companies personally took part in. The centre of the discussions was the halt of the current price decrease in the European HP market and the possibilities of a coordinated price increase. The participants attempted to find out, by exchanging confidential market related information, which price level would be necessary to make the HP sector profitable again. The parties agreed on the need for a

164 See page 61 of ***[name of the company]*** reply to the Statement of Objections.
165 See page 4 of Kemira's reply.
166 ***[deleted]***.
167 ***[deleted]***.
168 ***[deleted]***.
169 *Ibidem*.

price increase of about 100% up to about 1,100 DEM/ton[170]. As the implementation of this increase was judged to be difficult and hardly acceptable to the customers, further talks including the other competitors were considered as a necessary step[171]. These high-level meetings took place as from August 1997 (see next section).

4.6.2.13. August 1997, Brussels, HP

(171) A meeting regarding HP was held in Brussels in August 1997 as a follow up to the May meeting in Seville[172] which Degussa, Solvay and Kemira took part in. ***[name of the company]*** located this meeting in October 1997[173].

(172) During this meeting, as well as during the next three high-level meetings of February, April and September 1998 (see sections 4.6.2.22, 4.6.2.25 and 4.6.2.30), agreement was reached on an increase in the price for HP in a coordinated manner. At that time the price for HP was approximately 350-400 DEM per ton. A first objective of 650 DEM per ton was supposed to be implemented as from early October 1997. Further attempts to increase the price to 850 DEM from July 1998 and to 1,050 DEM as soon as possible were also agreed upon[174]. No other issues were discussed. Although only three companies participated in the high-level meetings, the discussions were supported by the entire sector. According to ***[name of the company]***[175], and as subsequently confirmed by ***[name of the company]***[176], both FMC Foret and Ausimont were always completely informed (generally by phone) about the outcome of the discussions.

(173) ***[name of the company]*** stated in its reply to the Statement of Objections that it admitted to having entered into a cartel by which it agreed to fix prices and/or share markets with its competitors, in breach of Article 81(1) of the Treaty from the period starting with the meeting held in Brussels in August 1997 up to and including 18 May 2000 (multilateral contacts in Turku).

(174) The Commission disagrees with the assessment of ***[name of the company]*** which alleges a reduced infringing period starting only in August 1997 and concludes that also in the period before August 1997 the collusive behaviour amounted to, and was part of, an infringement of Article 81. For a further reasoning as regards this argument reference is made to the arguments presented in section 6.2.1.2.

4.6.2.14. September 1997, Brussels, HP

---

170 ***[deleted]***.
171 ***[deleted]***.
172 ***[deleted]***.
173 ***[deleted]***.
174 ***[deleted]***.
175 ***[deleted]***.
176 ***[deleted]***.

(175) A trilateral meeting took place at Solvay's premises in Brussels in September 1997. According to ***[names of companies]***[177], representatives of Degussa, Solvay and Atochem were present. According to ***[name of the company]***[178], representatives of other producers, like Ausimont, took part as well.

(176) According to ***[name of the company]***[179], the meeting took place between June and September 1997. At this meeting the groups A and B decided to merge (excluding EKA, due to its absence from the continental market) and to fix the main rules to be followed by all co-conspirators. According to the contemporaneous hand-written note of this meeting submitted by ***[name of the company]***[180], the main "***[deleted]***"[181] were those listed below. In this document the Commission deduces that S stands for Solvay, D for Degussa, A for Ausimont, OS for Atochem/Air Liquide (Oxysynthèse) and F for FMC Foret. Other information between square brackets refers to the explanations provided by Mr ***[name of individual]*** of ***[name of the company]***[182].

"1) increase in October

2) no offer volume/price for 1998

3) no 97 prices before local meetings

*4) [**deleted]***

5) only exceptions in increase: in writing and listed in local meetings

6) no new customers → "no product"

7) local and global leaders [to be appointed]

8) speak as soon as possible regarding market shares

7) local meetings as soon as possible + unique leader:

*S UK/IR–BE/NL ← **[name of individual]** for AL* (ph.number-confidential)

*D AUT/GER/EE/DK ← **[name of individual]** for AL* (ph.number-confid.)

*A IT/GR ← **[name of individual]** for AL* (phone number – confidential)

*OS FRA/CH ← **[names of individuals]*** (phone number- confid.)

*F ES/POR ← **[name of individual]*** (phone number – confidential)

9) [issues on the state of play of ongoing discussions]

---

177 ***[deleted]***.
178 ***[deleted]***.
179 ***[deleted]***.
180 ***[deleted]***.
181 ***[deleted]***.
182 ***[deleted]***.

– *D*[egussa is the] *contact* [for Atochem]

– *Market share OK → basis Seville → meetings at CEFIC assembly*

(...)

– *26/11* [1997] *global presentation (preparation before) → Brussels, meeting the day before CEFIC*

– *14/10 [1997] preparation Å/XAL* ***[deleted]*** *(global purchases or by everyone)*

– *complete division between North and South* [Europe]

(…)

– *850/900 DEM Q1 – 1000/1200 DEM Q2* [of 1998; Q1 stands for 1st quarter, Q2 stands for 2nd quarter]

(…)"[183].

(177) ***[name of the company]*** stated: ***[deleted]***[184] which had been discussed and agreed at the meeting held in Brussels in August.

(178) Again according to ***[name of the company]***, the meeting was organised in order to overcome the lack of confidence between the players. Three particular points were discussed. Firstly, "***[deleted]***"[185]. Hence, the increase had to be implemented simultaneously and to the same price level. Secondly there were different views on whether to discuss market shares: "***[deleted]***"[186]. Thirdly there were some technical issues like how to convert the price agreed in local currencies, who should be the first to announce the increase, how to cope with the existing price differences between large and small customers[187] etc.

(179) The clients appeared to accept the initial price increase, as they apparently understood that the bottom price reached in summer 1997 was indeed at a very low level.

4.6.2.15.18 September 1997, Paris, HP

(180) A meeting took place in the apartment of the ***[individual's function]*** of ***[name of the company]***, in Paris, on 18 September 1997. Present were representatives of Chemoxal, Solvay, Degussa, Atochem, Kemira and of Ausimont. According to Atofina, FMC

183 ***[deleted]***. Original French text.
184 ***[deleted]***.
185 *Ibidem*.
186 *Ibidem*.
187 ***[deleted]***.

Foret was not physically present but a representative was connected via telephone to get information about the discussions[188].

(181) According to ***[name of the company]***[189], the meeting was organised by Air Liquide *"**[deleted]**"*[190]. The proposal of a common mechanism for the price increase was discussed as well. Tables with the French clients and the different positions were drafted. ***[name of the company]*** submitted the contemporaneous tables drafted at the meeting[191], whereas the person present at the meeting corrected his notes by drafting a new document, also available to the Commission[192]. According to the explanation given by ***[name of the company]***, in these documents A stands for Solvay, B stands for Degussa, C stands for Kemira, D stands for Ausimont, E stands for FMC Foret, F stands for Atochem and G stands for Chemoxal[193]. In this note it reads as follows:

"1) *Increase on 6th October for all customers not listed in the table*[194] *(date of sending)*

2) Neither offer in volume nor in price for 1998

3) No new customers/base Q3 97 *a) do not offer*

b) no product + announce trend 98 variable

(...)

4) price mini[mum] *1550 F/T 70% + 1000 F/T*

1500 F/T 50% + 500 F/T TQ (tel quel) for 10T

1450 F/T 35%

(...)

5) Exceptions to the increase

– *every case not listed, X + vol*[ume] *ctrl*

– [regional] *leader immediately to inform*" [195].

(182) ***[name of the company]*** confirmed that the meeting occurred and that Atofina, Air Liquide and Degussa participated in it[196]. The purpose of the meeting was to discuss

188 ***[deleted]***.
189 *Ibidem*.
190 ***[deleted]***.
191 ***[deleted]***.
192 ***[deleted]***.
193 ***[deleted]***.
194 ***[deleted]***.
195 ***[deleted]***.
196 ***[deleted]***.

how the price increases were to be implemented in France. There may also have been some discussion about the conversion rate between DEM and FRF.

(183) In its reply to the Statement of Objections Chemoxal contested the reconstruction of the facts in the Statement of Objections, by stating that neither Degussa nor Ausimont nor Kemira confirmed that this meeting took place with their participation. ***[deleted]***. It also stated that Chemoxal was not the local leader, so that it was inconceivable that it would organise a meeting on its own initiative ***[deleted]***. As to the evidence submitted by ***[name of the company***], Chemoxal pointed out that several question marks are put in the explanatory note that had been submitted by ***[name of the company]*** and intended to reconstruct the meeting on the basis of the contemporaneous notes. The question marks regard both the date and the location of the meeting. Chemoxal finally argued that the handwritten notes could have been 'falsified' before being delivered to the Commission and therefore asked that the Commission does not take these documents into account when assessing the evidence in its possession. FMC Foret denied both its participation and having received any phone calls during or after this meeting.

(184) The Commission cannot accept the arguments presented by Chemoxal. Two sources, ***[names of companies]***, have confirmed that this meeting took place, based on the account of the actual participants in the meeting. ***[name of the company]*** did not deny its participation (which it did do regarding other events). ***[name of the company]*** equally did not deny. ***[deleted]***.

(185) As to the alleged falsification of the documents claimed by Chemoxal, the Commission is in possession of two versions of the documents of ***[name of the company]*** referred to by Chemoxal. Annex 1 of the submission of ***[deleted]*** contains the same document as ***[deleted]*** while annex 2 ***[deleted]*** includes the tables which appear again ***[deleted]***. The first version was delivered by ***[name of the company]*** without any annotations (i.e. question marks or side notes). Only the second version thereof contained such annotations, the inclusion of which had been highlighted by ***[name of the company]***, in order to render the same documents more understandable. The Commission has no reason to believe, and Chemoxal brings no evidence in this respect, that the original documents were not complete contemporaneous notes, as prepared by the ***[name of the company + function]*** present at the meeting. The Commission therefore rejects the argument.

(186) In reply to FMC Foret's argument that no telephone calls were received by FMC's employees during or after this meeting, the Commission underlines that the fact that FMC Foret was contacted is considered to be credible given that it had been contacted before on more than one occasion and took part in other meetings as well, as the information in the Commission's possession shows, referred to in this Decision (see notably sections 4.6.2.17 and 4.6.2.18). The Commission therefore does not find the arguments of FMC Foret convincing.

4.6.2.16. October 1997, Frankfurt am Main, HP

(187) A trilateral top level lunch was held in Frankfurt am Main at Degussa's premises on 14 October 1997, to which high representatives of Degussa, Solvay and Kemira took part[197]. According to ***[name of the company]***[198], prices for HP were again discussed and the general will was to raise those prices by at least 60% from the existing 550 DEM level up to 850-900 DEM ca. until the begin of 1998 and up to 1,100 DEM by the third quarter of 1998. In its reply to the Statement of Objections ***[deleted***][199].

4.6.2.17.17 November 1997, Frankfurt am Main, HP

(188) A multilateral meeting among the HP producers took place in Frankfurt am Main, on 17 November 1997, at Degussa's premises. According to ***[name of the company]***, representatives of Degussa, Atochem, Kemira, Ausimont and Solvay attended the meeting. FMC Foret was not physically present but two employees of this company were contacted by phone during the meeting and given a report by the representative of Atofina[200].

(189) According to ***[name of the company]***, this local (i.e. for Germany) meeting was organised by Degussa, similarly to that organised by Air Liquide in France (see section 4.6.2.15), *"****[deleted]***"[201]. To a large degree, thus, this meeting served to monitor the developments on what had been agreed at the previous meetings. Firstly, the progress regarding the agreed general price level was discussed. The discussion started from the overall target price of 650 DEM per metric ton. On this basis the "exceptions", such as large customers, long term contracts etc. were further discussed. Furthermore it was agreed not to accept new customers if already in the quota of a competitor or in any case a "dissuasive" price should be offered. A table with customers and producers was drafted for the cases that did not follow the "general rule"[202].

(190) Solexis confirmed its presence at this meeting with Atochem and Degussa. The purpose of the meeting was to try to raise the price of HP due to its extremely low price level at that moment[203].

(191) In the reply to the Statement of Objections, FMC Foret's representatives present at the Oral Hearing, denied having received any phone call related to this meeting. FMC Foret stated that although the existence of the meeting was confirmed by ***[name of companies]***, ***[name of the company]*** was the only one to state that FMC Foret had been contacted by telephone. Therefore, according to FMC Foret, it should be considered that ***[name of the company]***'s statement concerning the phone call to FMC Foret has not been corroborated. The weight of evidence should be in favour of FMC Foret, or at least no more credit should be given to ***[name of the company]***'s

197 ***[deleted]***.
198 ***[deleted]***.
199 See page 51 of ***[name of the company]***'s reply to the Statement of Objections.
200 See the contemporaneous handwritten minutes of the meeting by Mr. ***[deleted]***.
201 ***[deleted]*** .
202 ***[deleted]***.
203 See page 16063 of the file.

allegation than to FMC Foret's rebuttal. Furthermore, the reliability of the information submitted by ***[name of the company]*** is questionable as it does not establish who exactly represented FMC Foret in such contacts.

(192) In reply to this argument, the Commission brings forward the following elements: Firstly, the information that FMC Foret was contacted by telephone follows from the account of a direct participant to the meeting, who has indeed referred to a particular contact person at FMC Foret[204]. This individual has stated that he himself contacted a named person at FMC Foret. Furthermore, FMC Foret is listed in the table that was made up in relation to the meeting[205], in which details of minimum prices per (exempted) client and per producer were provided. Also, FMC Foret is referred to by name in that document as the first company due to announce the price increase. For the plausibility of FMC Foret's participation as such, reference is furthermore made to recital (186), in which it is explained that the participation and or knowledge of collusive contacts by FMC Foret was not isolated or sporadic. Lastly, ***[name of the company]*** confirmed that it was represented at this meeting and stated in its reply to the Statement of Objections that it was indeed a representative of ***[name of the company]*** who called a FMC Foret representative[206]. On these grounds, the Commission rejects the arguments presented by FMC Foret.

4.6.2.18.21 November 1997, Paris, HP

(193) Another meeting took place in Paris only a few days later, on 21 November 1997, organised by Atochem. ***[name of the company]*** submitted[207] that Degussa, Solvay, Atochem and Kemira were present. FMC Foret was not physically present but FMC Foret's ***[representative]*** was connected by telephone by Atochem during the meeting and was asked for his agreement on the concerted price increase. According to ***[name of the company]***[208], the meeting was held in a hotel near Charles de Gaulle Airport.

(194) The meeting was aimed at implementing at French level the overall principles and practicalities of the price agreement discussed during the September meeting (see section 4.6.2.14). The date of implementation would be the 1st of January 1998, and the announcement would be made as late as possible. Furthermore a list of accounts, for which the prices should last for the following six months, was drafted. For other accounts the general duration was fixed to three months. In the table submitted by ***[name of the company]*** it is read as follows:

"*1) Increase on 1/1, to be announced as late as possible.*

2) <u>Prices</u> [for] <u>six months</u>: [names of clients]. *For the rest three months max, but no new agreement*

---

204 Namely Mr. ***[deleted]***, as referred to in recital 176 of the Statement of Objections.

205 See again pages 1961-62 of the file.

206 ***[deleted]***. FMC and FMC Foret were given the opportunity to comment on this. With letters dated 15 March 2006 both FMC and FMC Foret maintained their contestations but did not add new elements to change the Commission's conviction.

207 ***[deleted]***.

208 ***[deleted]***.

3) prices: 2000 FRF/ton Q1 (...) 70% mini and Δ 150 FRF/t mini

1600 FRF/ton Q1 (...) 50% mini and Δ 150 FRF/t mini

1450 FRF/ton Q1 (...) 35% mini (...)"[209].

(195) A rule fixing the status quo on volume and on customers compared with the period July-October 1997 was drafted. Basically, no one was allowed to acquire either new volumes or new customers[210]. Finally, an assessment was made regarding the price increase which occurred in October, according to the overall "rules of the game" fixed at the September meeting.

(196) FMC Foret denied having received any telephone calls from its competitors concerning any of the issues raised during this meeting. FMC Foret also pointed out the inconsistencies between the different statements as regards the content of this meeting. Firstly, according to FMC Foret, it should be noted that on the contemporaneous document submitted by Atofina there is no mention of FMC Foret[211], the call being only alluded to on the table drafted by Atofina later on[212]. Secondly, ***[name of the company]*** does not list FMC Foret as one of the likely participants to the meeting[213] and, finally, ***[name of the company]*** recalls the meeting as being a bilateral one with Atofina. FMC Foret also alleges that there are some inaccuracies regarding the place where the meeting actually took place, ***[name of the company]*** stated that the meeting was held at ***[deleted]*** premises, whereas ***[name of the company]*** stated the meeting took place at Paris Airport. All these elements would suggest that the evidence in the file is not sufficient to maintain the allegations against FMC Foret on this point.

(197) In reply to these arguments the Commission notes that in the explanatory document of the contemporaneous evidence submitted by ***[name of the company]***[214] there is no participants list at all, so there is no contradiction between the contemporaneous pieces of evidence provided and the list drafted afterwards. Moreover, the person listed by ***[name of the company]*** as the contact point at FMC Foret was indicated without question mark[215]. Furthermore, in the tables drafted at the meeting[216] FMC Foret's prices to customers are listed. On this point, the same conclusion as set out in recital (185) can be repeated. The partly discordant data provided by others ***[deleted]*** does not take away the conclusion that FMC was contacted about the planned price increase. Therefore the Commission upholds its view about this meeting and FMC Foret's level of involvement.

4.6.2.19.26 November 1997, Brussels, HP

---

209 See the tables submitted by ***[deleted]***.
210 ***[deleted]***.
211 ***[deleted]***.
212 ***[deleted]***.
213 ***[deleted]***.
214 ***[deleted]***.
215 ***[deleted]***.
216 ***[deleted]***.

(198) Again only a few days later, a multilateral cartel meeting was held at the restaurant "***[name of restaurant]***", in Brussels on the evening of 26 November 1997 organised by Solvay and Degussa[217]. This meeting took place on the eve of the CEFIC general assembly. This meeting was preceded in the afternoon by a short pre-meeting between representatives from Degussa, Solvay and Atochem during which the agenda of the upcoming dinner-meeting was discussed.

(199) According to several companies[218], attendees at the dinner were representatives of Degussa, Atochem, FMC Foret, Kemira, Solvay, Ausimont and EKA. In relation to FMC Foret and Kemira, although Kemira has denied its participation and FMC Foret refers to this evening as a purely social event, ***[names of companies]*** stated that these two companies were present, were absolutely aware of the illicit nature of the discussions and took indeed part in the discussions described below.

(200) The first subject of the discussions was the implementation and the assessment of the price increase which had already been agreed at the high-level meeting in August. Subsequently the further price increases that had been scheduled were discussed. Part of the time was used to convert in local currencies the agreed prices and to discuss the "price delta" between the largest customers (mainly pulp and paper mills) and other smaller customers.

(201) ***[deleted]***[219]. To this aim, regional responsibilities were given as follows: Benelux and United Kingdom to Solvay, Germany and Austria to Degussa, France to Atochem, Spain and Portugal to FMC Foret, Italy to Ausimont and finally the "Nordic market" to Kemira. Subsequently, local meetings were held in several countries in order to implement at a national level the overall agreement. For instance, ***[name of the company]*** stated that a local meeting for Italy was held on 12 March 1998 in Milan, organised by Ausimont[220]. According to ***[name of the company]***, both the framework and structure of the meeting were similar to those of the meetings held in France and Germany (see for instance sections 4.6.2.15 and 4.6.2.17). ***[name of the company]*** confirmed the existence of local meetings at Italian level, in order to carry out the agreement made by competitors and monitor the situation of the Italian HP market[221]. There were five to seven meetings. ***[name of the company]*** did not indicate any precise dates for these meetings. Only for one meeting ***[name of the company]*** stated that it took place in 1998 at Milan Linate Airport. Ausimont, Solvay, FMC Foret, Degussa (including an agent of it) as well as Atochem attended this meeting. The subject of the meeting "***[deleted]***"[222].

---

217 ***[deleted]*** .

218 The companies indicated as participating in this meeting ***[deleted]*** information to the Commission about this meeting. As regards the precise individuals, the Commission has based itself on the respective submissions of the undertakings concerned regarding the presence of their own employees. ***[deleted]***.

219 ***[deleted]***.

220 ***[deleted]***.

221 ***[deleted]***.

222 *Ibidem*.

(202) The producers also tried again to discuss market quotas and to regulate market growth on the basis of the principle of the available capacity.

(203) ***[deleted]***[223].

(204) The competitors decided that the announcement of the newly agreed prices should be staggered (in order to avoid suspicion about possible agreements) and agreed on the sequence of the announcements.

(205) Finally, ***[name of the company]*** stated that the participants tried to subdivide mutually among the European producers the forecasted market growth for 1998 and 1999. Two models were proposed, one started from the principle of the freezing of the current market shares, the second taking into account the free production capacity. No decision was taken since the small producers did not accept these proposals that seemed to damage the small ones by preventing their growth on the market[224].

(206) As stated above, FMC Foret did not contest that two of its employees took part in the dinner organised in the framework of the CEFIC meeting, but in its reply to the Statement of Objections it denied that these employees had engaged in any anti-competitive activities during this dinner. Moreover, according to FMC Foret, there are several discrepancies amongst the producers' list of attendees (see recital (199)), which would undermine the value of the evidence regarding this meeting. As a result, the Commission would not have enough elements to prove that FMC Foret's employees did not behave in accordance with the EU competition rules at this dinner.

(207) The Commission cannot accept the arguments put forward by FMC Foret. First of all, as to the presence at the dinner, although some minor discrepancies may exist in the different statements as to participants other tha[n] those of FMC Foret at the dinner, FMC Foret itself admitted the participation of two of its employees. Furthermore, as regards the participation in the substance of what was discussed, there are corroborating statements that establish the participation of FMC Foret to the discussions[225], given that various companies acknowledged the illegal nature of the discussions. It is considered to be sufficiently established that anticompetitive talks took place during the dinner regardless of certain divergences in the list of attendees. Also, there is no evidence in the file indicating that the representatives of FMC Foret publicly distanced themselves during the dinner from the illicit talks.

4.6.2.20.27 November 1997, Brussels, PBS

(208) As regards PBS, a meeting at management level was held in Brussels on 27 November 1997 at the occasion of the CEFIC sub-group meeting. According to ***[name of the***

223 ***[deleted]***.
224 ***[deleted]***.
225 ***[deleted]***.

company], attendees were representatives of Degussa, Atochem, FMC Foret, Kemira, Solvay, EKA and Ausimont[226].

(209) After the first contact at the Seville meeting, described in particular in recital (162), at this meeting the PBS producers decided amongst other matters to meet at the beginning of the following year for a multilateral meeting, for the first time not surrounding a CEFIC meeting, to discuss a better cooperation among all the European producers of PBS.

4.6.2.21. Meetings between Degussa and Kemira and between FMC Foret and Solvay, end of 1997 - beginning of 1998, HP

(210) Meetings were held between Degussa and Kemira during 1997 and 1998 (sometimes with the participation of Solvay) in relation to the price increase of HP. ***[names of companies]*** stated that FMC Foret did not take part in those meetings, allegedly due to a company compliance programme, however Solvay informed FMC Foret of the outcome of these meetings by means of telephone calls[227].

4.6.2.22. February 1998, Brussels, HP

(211) A further trilateral high-level meeting regarding HP was held on 3 February 1998 at Solvay's premises in Brussels[228]. The participants in this meeting were representatives of Degussa, Solvay and Kemira. At 10.00 a pre-meeting between Degussa and Solvay was held in order to elaborate a common position to represent later in the meeting with Kemira. The main meeting then started at 11.00. At this meeting, the group welcomed the good degree of implementation of the first HP price increase started in October/November 1997 and verified whether they all stuck to the implementation guidelines fixed during this and previous meetings.

4.6.2.23. February 1998, Paris, PBS

(212) A bilateral meeting between Atofina and Degussa was held on 26 February 1998 at Atofina's premises in Paris regarding PBS. ***[deleted]***[229]. ***[deleted]***[230] ***[deleted]***[231]. According to ***[name of the company]***[232], the subject of the meeting was the environmental concern in relation to the production of PBS1 and PCS. In addition it was also discussed whether Atochem would continue to consider the market of PBS as a core business or it would consider stopping the production of PBS. In this framework, a possible purchase by Degussa of the PBS business as well as the HP stocks of Atochem was discussed. Atochem showed itself to be interested in the

---

226 ***[deleted]***.

227 ***[deleted]***.

228 See the statements by ***[name of the company] [deleted]***. ***[Deleted]***, the date of 2 February 1998 was initially indicated. From the annex ***[deleted]*** it is however clear that the meeting took actually place on 3 February 1998.

229 ***[deleted]***.

230 Mr. ***[deleted]***, as referred to in recital 195 of the Statement of Objections.

231 ***[deleted]***.

232 ***[deleted]***.

proposal since, according to ***[name of the company]***, Atochem's PBS business was at that moment not profitable due to high variable costs for transporting HP (as the raw material) from the HP production plant to the PBS mill. The potential withdrawal from the PBS market by Atochem became part of the discussions between other PBS producers in the meetings of 12 May, 13 July and 1 October 1998 (see sections 4.6.2.26, 4.6.2.28 and 4.6.2.31).

4.6.2.24. March 1998, Paris and Düsseldorf, PBS

(213) A bilateral meeting between Atochem and Degussa was held on 27 March 1998 at Atochem premises in Paris. According to ***[name of the company]***[233], Degussa reported to Atofina about the follow-up to the planned visits to all European PBS producers and the efforts to unite the manufacturers behind a strategy for the management of the PBS overcapacity in Europe.

(214) Another bilateral meeting between Solvay and Degussa and regarding PBS was held in March 1998, in Düsseldorf. According to ***[name of the company]***[234], a representative of Degussa met two representatives of Solvay in a hotel. In this meeting the ***[market situation]*** was discussed. ***[deleted]***.[235].

4.6.2.25. April 1998, Frankfurt am Main, HP

(215) A further trilateral high-level meeting regarding HP was held on 1st April 1998 in a hotel at Frankfurt International Airport as a follow up to the top level meetings held in September 1997 and February 1998. Participants in this meeting were representatives of Degussa, Solvay and Kemira.

(216) According to ***[name of the company]***[236], the subject of the meeting was the control of the implementation of the agreement reached in October 1997 on the price increase for European HP sales. Further discussions over a possible freezing of market shares also took place. The investigation also has shown that the evolution of the prices was one of the discussed topics between Solvay and Degussa at the beginning of 1998[237].

(217) ***[Name of the company]***, in its reply to the Statement of Objections, ***[deleted]***[238]. In answer to this argument, the Commission notes that the Commission's inspection list[239] indeed indicates the name of this employee with a question mark, since the piece of evidence was found in his office, but it could apparently not be ascertained to whom the 1998 diary belonged. It could therefore well be that the diary had been used by the

---

233 ***[deleted]***.

234 ***[deleted]***.

235 *Ibidem*.

236 ***[deleted]***.

237 See three pages of the 1998 filofax organiser of an employee at Solvay where some notes read "Evolution of the prices" and "tension on the prices" on the occasion of meetings with Degussa. The text in original French reads: "Evolution prix" and "tensions prix". See pages 628-630 of the file.

238 See pages 628-630 of the file.

239 See page 904 of the file.

previous General Manager in charge for chemicals at that time (1998). The fact that diary has been found in the office of the person in charge of the chemical sector in 2003 does not exclude that certain documents that are from 1998 belong to the previous General Manager, simply because these documents were still present in that office. It does not change the value of the evidence which testifies to the existence of the meeting between the undertakings. Solvay did not deny that the diary in question actually refers to a 1998 meeting and failed to give another adequate explanation for the notes "evolution prices" and "tension prices" which can be read on the same page of this diary. Therefore, the Commission does not alter its conclusion as regards this meeting.

4.6.2.26. May 1998, Paris, PBS

(218) A bilateral meeting mainly concerning PBS was held at Atochem premises in Paris, on 12 May 1998. The attendees were Degussa and Atochem.

(219) According to ***[name of the company]***[240], the model which was going to be adopted at the forthcoming Evian meeting was analysed. It forecasted a saturation of the PBS production capacity of the small producers, as they were concentrating on a few sites of big clients to optimise logistics costs[241].

(220) According to ***[name of the company]***, the meeting also concerned a proposal of a temporary interruption or even definitive shutdown of the Atofina production of PBS, as a follow-up to the meeting held in Paris on 26 February and 27 March 1998[242]. Atofina stated not to be ready to immediately stop PBS production activity at its plant because large quantities of HP intended for use in the PBS manufacture were still unused. Degussa then offered to acquire the remaining HP available stock at Atofina's plant. This offer was successfully elaborated upon during the following top level meetings between both competitors[243].

4.6.2.27. May 1998, Evian-les-Bains, HP and PBS

(221) Two different meetings were held at the Hotel Royal Club in Evian-les-Bains, France, on 14 May 1998, surrounding the official bi-annual CEFIC assembly, one for HP and one regarding PBS.

---

240 ***[deleted]***.

241 ***[deleted]***.

242 See also the meeting of April – May 1997, recital (154). In this period, many companies agreed to halt or shut down certain production facilities or production lines, or at least, announced that they would do so. For instance, Degussa "mothballed" a plant by closing down a line of 40 000 tons in Antwerp in 1997. Kemira closed down 20 000 tons capacity in its plant in Oulu in July 1997. FMC confirmed a temporary shut down of 10 000 tons at La Zaida plant, in Spain, also in July 1997. In September 1997 also EKA decided to mothball a production line of 20 000 tons, and equally in 1997 Solvay closed its plant in Warrington, UK, of 25 000 tons.

243 See for instance the bilateral meeting of 26 October 1998 in Paris described in recital (246).

(222) According to ***[names of companies]***[244], participants in the HP meeting were representatives of Solvay, Degussa, Atochem, Kemira, FMC Foret and Ausimont.

(223) According to ***[names of companies]***, at the HP meeting there were mainly two points on the agenda. Firstly the scheduling of a new HP price increase and secondly a discussion on market shares.

(224) Regarding a further price increase, given that the first increase (of roughly 18%) had succeeded, the producers agreed on a new target price of around 950 DEM per ton from 1st July 1998 onwards[245].

(225) The second point of the agenda was volume quotas and market shares for EEA. ***[name of the company]*** stated that it was again proposed to split and allocate the market volume increase among the market players in order to establish a precise quota for each producer, given that only by keeping to its own market quota would no attempts be made to affect others' market shares by means of rebates on the agreed target price. ***[name of the company]*** confirmed these discussions[246], however ***[deleted]*** the meeting did not lead to concrete results since the sum of the sales indicated by the various people around the table amounted to much more than 100% of the total sales indicated in the official CEFIC statistics. Furthermore the small European producers did not want to agree to a fixing of market shares and of market growth shares. Hence, it was decided that further monitoring would take place at a later stage.

(226) Subsequent to the meeting on HP, a meeting regarding PBS took place. According to ***[name of the company]***[247], at the PBS meeting participants were Degussa, Solvay, Atochem, FMC Foret and Ausimont[248]. According to ***[name of the company]***[249], representatives of Degussa, Solvay, Atochem, FMC Foret, Ausimont and Caffaro were present. In the case of ***[name of individual]*** (Atochem), ***[name of individual]*** (FMC Foret), ***[name of individual]*** and ***[name of individual]*** (Ausimont), they also took part in the previous meeting regarding HP so that the PBS meeting could only start once the first one had finished.

(227) According to ***[name of the company]***, at the PBS meeting the starting point of the discussions among the competitors was the decline of the price for PBS in the EEA-market. The purpose of the meeting was therefore to try to achieve a stabilisation of the price in order to prepare a short-term price increase. The participants agreed to maintain the market shares of 1997 and to avoid price undercutting in order to increase their own market share at the expense of the competitors. A database fixing the status quo was agreed. An overview of the market shares and deliveries was prepared by

---

244 ***[deleted]***.
245 ***[deleted]***.
246 ***[deleted]***.
247 ***[deleted]***.
248 ***[deleted]***.
249 ***[deleted]***.

those present at the meeting on handwritten papers. An electronic version was later sent to all the participants[250]. ***[deleted]***[251].

(228) According to ***[name of the company]***, an excel sheet containing historical and prospective figures of the PBS market in 1997 and 1998 was presented and handed out by Degussa[252]. The purpose was to present historical PBS sales data in comparison with the estimate and to elaborate guidelines for a control of the market shares, the rationalisation/reduction of the actors by customer/country and a price increase[253].

(229) Subsequently, an increase of the price of PBS up to a level of 850 DEM in the 2nd semester of 1998 was agreed. ***[deleted]***[254].

(230) According to ***[name of the company]***[255], the price increases were implemented by competitors as agreed: the price for PBS4 went from 780-790 to 850 DEM per ton on average in the second semester of 1998 and subsequently almost to 900 DEM per ton, as it appears from a table supplied by ***[name of the company]***[256]. ***[name of the company]*** stated that the discussions were concentrated on PBS4. PBS1 was also part of the arrangement, however. According to ***[name of the company]***, prices of PBS products in general were directly linked to that of PBS4, so that an agreement on the price of PBS4 directly affected prices of other perborates. ***[name of the company]*** stated that[257] 1.65 tons of PBS4 was needed to make one ton of PBS1, i.e. it was understood that a ratio of 1.65 had to be applied to the price of PBS4 to calculate the price of PBS1. Accordingly PBS1 went from 940 DEM up to 1 000 DEM per ton on average in the first semester of 1999. Customers appeared to accept as credible the reason for the price increase given by the producers, which was indicated to be linked to the increase of the costs of raw materials. For particular complaining customers the competitors had some bilateral meetings in order to arrange for an appropriate strategy to adopt[258] to avoid any increase of the volumes delivered by a competitor at the others' expense.

(231) Finally, during the meetings in Evian the so called "regional agents"[259], i.e. undertakings with responsibility for a particular region, reported on incidents in the respective regional partial market they were responsible for and having a European-wide relevance. "***[deleted]***"[260]. For instance, customer reactions that led these customers in some cases to attribute delivery orders to another supplier which, according to prior agreement among the competitors, was not supposed to deliver to this customer, were considered as special incidents.

---

250 ***[deleted]***.
251 ***[deleted]*** .
252 ***[deleted]***.
253 ***[deleted]***.
254 ***[deleted]***.
255 ***[deleted]***.
256 ***[deleted]***.
257 ***[deleted]***.
258 ***[deleted]***.
259 ***[deleted]***.
260 ***[deleted]***.

(232) FMC Foret confirmed that its representative attended the official CEFIC meeting, but, in its reply to the Statement of Objections, denied having taken part in any improper discussions with its competitors as described above. In the event that such discussions had taken place, FMC Foret stated that these conversations could have been conducted in other languages than those known to its representative, which therefore could not participate in them. In answer to this argument the Commission notes that at least two other participants in the illicit talks have confirmed (see recital (222)) that FMC Foret was also implied in the discussions. Also, FMC Foret has provided no evidence that it actually distanced itself from the discussions. Therefore, the arguments of FMC Foret cannot be accepted.

4.6.2.28. July 1998, Königswinter, PBS

(233) A trilateral meeting regarding PBS was organised by Degussa and held in Königswinter, near Bonn, at the Restaurant "***[name of restaurant]***" on 13 July 1998. Representatives of Degussa, Solvay and FMC Foret took part in the meeting.

(234) According to ***[name of the company]***[261], the purpose of this high level meeting was to check the readiness of the three companies to convince Atochem to shut down its PBS production in order to reduce the capacity in PBS industry. In fact Atochem would possibly be likely to be convinced, by means of some further incentive, due to the non profitability of its PBS production plant (see recital (212)). Solvay showed itself ready to buy the technology for PBS production whereas Degussa would sign a long-term purchase contract with Atochem for the unused quantities of HP.

(235) In their respective replies to the Statement of Objections, ***[deleted]***[262], whereas FMC Foret denied that one of its representatives attended this meeting. According to FMC Foret, the person identified by ***[name of the company]*** as having participated in this meeting was in Barcelona on the given day, as would be confirmed by a taxi receipt that FMC Foret had submitted[263]. Moreover, according to FMC Foret, in ***[name of the company]***'s submissions there was no mention of such a meeting between Degussa, Solvay and FMC Foret.

(236) In answer to the arguments put forward by FMC Foret the Commission observes, firstly, that FMC Foret showed the receipt of a Barcelona taxi with the aim of demonstrating that the person who used a taxi that day in Barcelona could not have been in Germany on the same day. However, even if it could be accepted that this receipt actually refers to a trip made by the person who was supposed to have taken part in the talks in Königswinter, it might well be that this receipt was issued at

---

261 ***[deleted]***.

262 See page 67 of ***[name of the company]***'s reply to the Statement of Objections. In the pleading it reads as follows: ***[deleted]***. FMC and FMC Foret were given the opportunity to comment on this. In their letters dated 15 March 2006, however, they did not add any new element to change the Commission's conviction.

263 This receipt annexed to the pleading is issued to the name of "***[name of individual]***" and seems to show that ***[name of individual]*** took the taxi numbered B-9731PX on 13/7/1998 in Barcelona from 'Corcega' to 'Foret Z.Franca', however no time is indicated for this trip.

another moment in the day than the trilateral meeting. There is not necessarily a contradiction or incompatibility between using a taxi in Barcelona and participating in the talks described in Königswinter the same day. Secondly, as to the argument that this meeting was not mentioned by ***[name of the company]*** in its submissions, the Commission notes that ***[deleted]***[264]. Therefore the Commission considers it credible, ***[deleted]***, that this meeting took place with the participation of FMC Foret.

4.6.2.29. September 1998, Lyon, PBS

(237) A multilateral top level meeting among the major PBS producers was held in Lyon on 16 September 1998, at the ***[hotel name]*** in Tassin-la-Demi-Lune.[265] The participants in this meeting were Degussa, Solvay, FMC Foret and Ausimont. According to ***[name of the company]***, Atochem was physically present as well whereas, according to ***[name of the company]***, Atochem was informed by telephone of the outcome of this meeting.

(238) At this meeting, there were mainly two points on the agenda: firstly, the scheduling of a new PBS price increase and, secondly, a discussion on market shares. Regarding a further price increase, the producers agreed on a new target price around 900 DEM per ton as from January 1999. As regards volumes and customers to be set in each country, the proposed agreement foresaw that each producer would keep its volumes and customers in the countries where it was active and that PBS price overall would be raised, as set out above.

4.6.2.30. September 1998, Brussels, HP and PBS

(239) A high-level meeting regarding HP as well as PBS was held on 28 September 1998 in Brussels[266]. According to ***[name of the company]***, the participants in this meeting were senior representatives of Degussa and Solvay.

(240) The subject of the meeting was the overseeing of the implementation of the agreement reached in October 1997 on the price increase for European HP sales. Further discussions (see meeting of 1st April 1998, in particular recital (215)) over a possible freezing of HP market shares took place as well. Also the measures agreed for the improvement of the PBS sector (see recital (238)) were discussed.

(241) Subsequently (in the afternoon), a bilateral meeting between one senior representative of Degussa and one of FMC Foret took place still in Brussels. The subject of the meeting was a debriefing by Degussa of the morning meeting[267].

---

264 ***[deleted]***.

265 ***[deleted]***

266 ***[deleted]*** .

267 ***[deleted]***. The participation of Kemira could not be confirmed.

(242) In its reply to the Statement of Objections ***[name of the company]*** although it confirmed the taking place of this meeting, considered that in the morning meeting PBS would not have been discussed, given that Kemira did not manufacture PBS. However, in its reply to the Statement of Objections ***[name of the company]***, though it could itself not confirm the participation of Kemira in the meeting, expressly confirmed that during the meeting with Solvay PBS was also raised (the joint plan for the closing down of the Atochem PBS plant was discussed)[268]. Therefore the Commission maintains its conviction that in this meeting both products were discussed.

4.6.2.31. October 1998, Paris, PBS

(243) A trilateral meeting regarding PBS was held in Paris at Atochem premises on 1 October 1998[269]. According to ***[name of the company]***, senior representatives from Degussa, Solvay and Atochem participated in this meeting. ***[name of the company]*** confirmed in its reply to the Statement of Objections that one of its employees attended this meeting[270].

(244) The aim of the meeting was to present to Atochem the proposal agreed between Degussa, Solvay and FMC Foret at the meeting of 13 July 1998 in Königswinter (see section 4.6.2.28). Atochem acknowledged that its PBS production was not profitable mainly due to too high transport costs from the HP plant to the PBS production plant and wanted to close down its plants. ***[deleted]***.[271] Eventually, however, the French company agreed to the proposal presented by Solvay and Degussa. ***[name of the company]*** stated furthermore that FMC Foret also took part in the agreement with Atochem by providing in exchange some compensation in Spain.

(245) Therefore, Solvay and Atochem agreed to sign a purchase and licence contract for the production of PBS. According to ***[name of the company]***, the real interest of Solvay in the purchase regarded two patents.[272] However, according to ***[name of the company]***, the patents were partly obsolete. "***[deleted]***"[273]. According to ***[name of the company]***, the price above the market value was paid for this technology in order to convince Atochem to abandon the PBS production. A "HP purchase and sale agreement"[274] between Degussa and Atochem was then signed on 7 July 1999 with favourable conditions for Atochem, as Degussa compelled itself to buy the whole quantity of HP (24 500 metric tons) that had already been produced by Atochem and had become free following the closing down of Atochem's PBS productions plants (in particular the

---

268 See page 39 of the ***[deleted]*** to the Statement of Objections. The original German text reads as follows: „***[deleted]***".

269 See the ***[deleted]***on page 9236 of the file. See also page 9408.

270 See page 67 of the ***[name of the company]***'s reply to the Statement of objection as well as footnote 262.

271 ***[deleted]***.

272 ***[deleted]***.

273 ***[deleted]***".

274 ***[deleted]***.

Leuna plant), although Degussa already had a sufficient production level to cover its own requirements[275].

(246) Atochem and Degussa met subsequently in Paris, at Atochem premises, on 26 October 1998[276]. ***[deleted]***[277].

4.6.2.32. October 1998, Düsseldorf, HP

(247) A meeting was held on 12 October 1998[278], at the Atochem premises in Düsseldorf. According to ***[name of the company]***, participants in this meeting were Atochem, Degussa, Solvay, Kemira and Ausimont. FMC Foret was not physically present but a representative was connected by telephone during the meeting[279].

(248) The agenda of this meeting was mainly the follow-up of the discussions made during the spring about volumes and market shares for HP. According to ***[name of the company]***[280] and ***[name of the company]***[281], as the HP price had actually increased and attained the foreseen level 850 DM/t, at this meeting volumes and market shares became an issue again. Atochem and Degussa tried to discuss a reallocation of volumes and of overall market shares as well as a possible allocation between Nordic and continental producers.

(249) According to ***[name of the company]***, a new proposal for the allocation of market shares was presented to the competitors by Atochem, which was however rejected by Ausimont[282]. In particular, according to the contemporaneous document submitted by ***[name of the company]***[283], Ausimont did not agree with a proposed market share of 11.9% (which represented a total of 43,000 tons on the basis of the CEFIC 1997-figures), which would prevent the company's increase in sales. In general, the group pointed out the need for a check up of the market shares, which would take place in the course of the weeks that followed[284]. ***[name of the company]*** also wanted to discuss a reallocation of volumes and of market shares. ***[name of the company]*** stated it was opposed to discussions on volumes and market shares, but nevertheless agreed

---

275 Notwithstanding that Degussa had the contractual possibility to spread the purchases over four years until 31 August 2003, subsequently it completed those purchases by August 2001, with a small rebate on the last deliveries. See the letter by Degussa of 18 January 2001 found at Atofina's premises on page 17683 of the file.

276 ***[deleted]***.

277 ***[deleted]***.

278 The date was initially supposed by Atofina and subsequently confirmed by ***[name of the company]***; ***[deleted]***.

279 ***[deleted]***.

280 ***[deleted]***.

281 ***[deleted]***.

282 ***[deleted]*** According to the new proposal elaborated by Atochem, Solvay would have had a 30,2% market share, Degussa 21,1%, Atochem 20,2%, Ausimont 11,9%, Foret 10,5% and Kemira 6,1%. For Ausimont this corresponded to 43 000 tons, while Ausimont wanted to have a minimum quota of 48 000.

283 ***[deleted]***.

284 ***[deleted]***.

to participate in the meeting as it did not want to jeopardise the improved climate among the competitors[285].

(250) ***[name of the company]*** stated that Atochem and Degussa took the position that market shares should be calculated on the basis of capacity shares rather than on the basis of the effective sales. ***[name of the company]*** also stated that ***[name of the company]*** wanted to have a higher market share than its capacity share[286]. It was agreed to discuss this issue during a next joint meeting. In addition certain data such as the European market shares and production capacity of each participant were exchanged.

(251) It merits to be mentioned that although in the first instance ***[name of companies]*** had placed this meeting in the first part of the year (March/April), ***[name of the company]*** later corrected this by placing the meeting on 12 October[287]. ***[name of the company]***, when requested to confirm that this meeting took place, stated that its employees did not have any recollection of such a meeting held in March[288]. Given the content of this meeting, notably the reference to the price increase for HP which had been agreed in Evian, in May 1998, the Commission believes that this meeting has indeed taken place thereafter, most likely in October.

(252) In its reply to the Statement of Objections FMC Foret denied having received any telephone call during or about the above meeting. ***[deleted]***.

(253) In reply to these remarks, the Commission notes that the statements of ***[name of the company]*** are credible in the framework of the evidence in Commission's possession. As to the corroboration of the information, three other companies have confirmed that this meeting has taken place. The Commission makes therefore reference to what has been already stated in recital (186).

4.6.2.33. November 1998, Brussels, HP and PBS

(254) An important multilateral meeting among the HP producers was held at restaurant "***[name of restaurant]***", in Brussels on the evening of 25 November 1998 surrounding the CEFIC autumn plenary session.

(255) According to ***[name of the company]***[289], attendees at the dinner were representatives of Degussa, Atochem, FMC Foret, EKA, Kemira, Solvay and Ausimont. Kemira confirmed that its representatives attended the dinner[290].

---

285 ***[deleted]***.
286 ***[deleted]***.
287 ***[deleted]***.
288 ***[deleted]***.
289 ***[deleted]***.
290 See page 14113 of the file.

(256) According to ***[name of the company]***[291], the subject of the meeting was the control of the implementation of the agreement on the HP price increases and the maintaining of the price level in order to prevent a new price war in the HP market. According to ***[names of companies]***, the targeted price increase up to 1050 DM/t for the 1st semester starting on 1st January 1999, namely from 5 to 8%[292] was discussed as well. Finally, individual market shares of 1998 were assessed and discussed, but no agreement was reached in order to compensate producers who had not achieved sales to the level of the agreed quotas[293].

(257) On the following day, bilateral and multilateral contacts between PBS producers according to ***[name of the company]*** representatives of Ausimont, Caffaro, Degussa, Atochem, FMC Foret and Solvay were present) took place during the break of the CEFIC assembly with the purpose to discuss the implementation of the PBS price increase agreed at the Evian meeting in May[294].

(258) Caffaro denied the participation of its representative in any illegitimate talks on this occasion by pointing out that ***[name of the company]*** generically speaks about "representatives of the undertakings" without mentioning the names and ***[name of the company]*** does not mention Caffaro at all. The Commission cannot accept this argument. ***[name of the company]*** has clearly stated that particular representatives took part in the official PBS meeting and that during this meeting there were illicit contacts among such individuals (nobody excluded; this has not been denied or corrected by ***[name of the company]*** in its reply to the Statement of Objections). ***[name of the company]*** placed the illicit contacts in the same context without prior knowledge of ***[name of the company]***'s statements, so that the Commission believes that such talks have actually taken place with the participation of the individuals quoted by ***[name of the company]***.

4.6.2.34. Beginning of 1999, Milan, PBS

(259) A multilateral meeting among PBS producers was held at the ***[hotel name]*** in Milan, at the beginning of 1999. According to ***[name of the company]***[295], representatives of Solvay, Degussa, FMC Foret and Ausimont took part in the meeting.

(260) The purpose of the meeting was to monitor whether the agreements made during the previous meetings concerning the price increase in two steps on the European market of PBS, the fixing of market shares and the exchange of supply shares on certain national markets had been implemented. The tables regarding the market and supply shares established at the meeting in 1998 in Evian formed the basis for the discussions in Milan. To prepare the meeting Degussa standardised some tables and made them

291 ***[deleted]***.
292 At that time the price of HP had risen up to 950-1000 DEM/t for the big pulp mills ***[deleted]***.
293 ***[deleted]***.
294 ***[deleted]***.
295 ***[deleted]***.

electronically available. Diskettes with the outcome of this exercise were handed out at the meeting[296].

(261) Beside the two tables already distributed at the Evian meeting in May 1998 (see recital 228), a third table headed "actual 1998" was added. It included details on the supply shares for the PBS market for each competitor. It also included aggregate figures which would allow for the monitoring of the implementation of the arrangements, for which the 1997 figures were the basis[297].

(262) In its reply to the Statement of Objections ***[name of the company]*** stated that Atofina was not present at this meeting; however Atofina's representative responsible for PBS did exchange prior to this meeting the data concerning 1998 deliveries with the representative of Degussa, who inserted such data into the table distributed during the meeting. In return Degussa delivered subsequently to Atofina a copy of the complete diskette with the figures concerning the other competitors.

(263) It is also noted that in its reply to the Statement of Objections ***[deleted]***. Furthermore it stated that during the meeting soon the (legitimate) discussion, which initially concentrated on the counteractions vs. the anti-boron movement, strayed into conversations relating to future pricing and market sharing for PBS, though FMC Foret alleges that its representative paid "little attention" to these discussions since FMC Foret expected to soon convert its production to PCS[298]. ***[deleted]***[299]. As a result, it is considered established that the FMC Foret's representative was present during illicit discussions and did not distance himself from the discussions in front of the other participants.

4.6.2.35. April 1999, Estoril, HP

(264) According to ***[name of the company]***, the next multilateral meeting regarding HP was held in the bar room of ***[hotel in Estoril]***, Portugal, on 30 April 1999, the official occasion being the bi-annual CEFIC peroxigen general assembly[300]. Representatives of Solvay, Degussa, Atochem, Kemira, FMC Foret and Ausimont were present.

(265) According to ***[name of the company]***[301], the contacts occurred on the evening of the official assembly in the lounge bar of the ***[hotel name]***. On this occasion general information on the HP market was exchanged. Multiple bilateral discussions also occurred. The subject of these contacts was the behaviour of the customers and third competitors (other than the competitors involved in the single bilateral contact) on the HP market. Again it was requested to keep market discipline in order to avoid any new decrease of prices as occurred in 1996 and 1997.

---

296 ***[deleted]***.
297 ***[deleted]***.
298 See page 45 of FMC Foret's reply to the Statement of Objections.
299 ***[deleted]***.
300 ***[deleted]***.
301 ***[deleted]***.

4.6.2.36. July 1999, Brussels, PBS

(266) A bilateral meeting regarding PBS took place between Solvay and Degussa in Brussels, on 9 July 1999. According to ***[name of the company]***[302], the reason for the meeting was an accident at a Solvay plant which had caused injuries to several people. Possible actions by Degussa to help Solvay and avoid the interruption of Solvay's deliveries of PBS were discussed. But ***[name of the company]*** stated that the meeting was also used to check the implementation of the Milan agreement of the beginning of 1999 among the PBS producers regarding the second price increase and the freezing of market shares[303].

4.6.2.37. Summer 1999, Basel, PBS

(267) A meeting among PBS producers was held mid 1999 in Basel, in a hotel. According to ***[name of the company]***[304], representatives of Degussa, FMC Foret, Solvay and Ausimont were present. ***[name of the company]*** confirmed the meeting having taken place[305].

(268) ***[name of the company]*** stated that the meeting was aimed at discussing issues arising from the restructuring at the major customers which had changed their needs as well as the decrease of PBS demand in favour of PCS, at that time mainly produced by Solvay. Some producers wanted to proceed with the PBS price increase whereas Solvay did not want it, because it thought that thanks to the measures agreed and implemented after the meetings held at end 1997 and beginning 1998, the price of PBS had eventually achieved a reasonably high level. ***[name of the company]*** stated furthermore that its increase in PCS production was balanced by a decrease in the PBS market share and therefore its new technology should not affect the market share of the competitors[306]. ***[name of the company]*** confirmed the meeting as being a bilateral contact ***[deleted]*** aimed at discussing details about the coming establishment of the joint venture ***[deleted]***. According to ***[name of the company]***, alongside this issue, the situation of the Italian market for bleaching agents, as seen from both sides, was discussed[307].

(269) In its reply to the Statement of Objections FMC Foret stated that there is no precise and consistent evidence of its participation in any cartel activity related to this meeting. The evidence used by the Commission is not reliable as only ***[name of the company]*** contends that FMC Foret was represented; ***[name of the company]*** does not mention FMC Foret and ***[name of the company]*** recalls it as a bilateral meeting with ***[name of the company]***.

---

302 ***[deleted]***.

303 ***[deleted]***.

304 ***[deleted]***.

305 ***[deleted]***.

306 At that time ***[deleted]*** was striving to replace in an accelerated way PBS by PCS, due to the development of a new production technology.

307 ***[deleted]***.

(270) The Commission believes however that the information submitted by ***[name of the company]*** is credible given the general framework in which that information was submitted.

4.6.2.38. August/September 1999, several meetings concerning HP

(271) According to ***[name of the company]***, several bilateral meetings between Degussa and other competitors took place mainly in Brussels during the second half of 1999. Attendees were the Sales Directors for bleaching chemicals in Europe from Degussa and representatives respectively from Atofina, Kemira, Solvay and Ausimont[308].

(272) The subject of these meetings was, amongst others, the introduction of sales director's successor in the role of new product and marketing manager for HP. Overall discussions about the development of the European HP market were held as well.

4.6.2.39. November 1999, Brussels, HP

(273) A multilateral meeting was held on 16 November 1999 in Brussels, where the official bi-annual CEFIC assembly was scheduled for the following day.[309] Representatives of Atochem, Degussa, FMC Foret, Solvay, Kemira and Ausimont attended the meeting.

(274) The subject of the meeting was an updated overall analysis of the HP market and of the registered price fall in the European market due to the behaviour of some producers compared with the agreements formerly reached. Moreover, according to ***[name of the company]***, almost all undertakings declared having lost market shares in some regional markets or at key accounts due to a behaviour contrary to the agreement and wanted to detect who had gained such quotas. The participants used again as reference for the discussions the figures of the 3rd quarter of 1997 and tried with the aid of handwritten figures to reconstruct the actual sales. ***[name of the company]*** confirmed that there were discussions about market shares and its control. New minimal HP prices to apply from 2000 onwards were discussed as well.

(275) In its reply to the Statement of Objections ***[name of the company]*** confirmed having participated in the unofficial meeting. FMC Foret's representative, who admitted having attended the official CEFIC meeting, denied having participated in any illicit activities during or in the framework of the assembly or having heard of any discussions of the kind of those described by the Commission. However, in the light of the confirmation given by ***[name of the company]*** to the statement of ***[name of the company]***, and the non-contestation by Atofina, Kemira and Solexis of the content of this meeting as described in the Statement of Objections, the Commission does not change its conclusion on this meeting, given that it considers credible that this meeting occurred in the same framework and with the same modalities which characterised the taking place of other cartel meetings in the same period as well as the FMC Foret's involvement.

---

308 For details of each bilateral meeting ***[deleted]***.

309 See the statement by ***[name of the company][deleted]***.

4.6.2.40. December 1999, Freiburg, PBS

(276) A multilateral meeting regarding PBS was held on 13 December 1999 in Freiburg, Germany, in a conference room of ***[hotel name]***[310]. The participants in this meeting were representatives from Degussa, FMC Foret, Ausimont, as well as from Solvay. The Solvay representatives arrived with some delay[311].

(277) The subject of the meeting, organised by Degussa under a cover[312], was the control of the implementation of the agreement regarding the PBS price increase and the market shares. In particular it was discussed how to split up the market volume which was becoming free following the shutting down of the Atofina and Caffaro production plants. The Caffaro and Atofina shares in the PBS market were in principle to be assigned to Solvay, Degussa and FMC Foret according to their actual market share. However Solvay did not receive a quota proportionate to its market share because it had already become quite strong in the new PCS market and the more than proportional allocation of the PBS quotas to the other competitors was intended as a sort of compensation[313].

(278) According to ***[name of the company]***, Solvay did not accept any further agreement and on the contrary announced that it would cut down PBS production and accelerate in reconverting its plants to PCS. In the future it would therefore mainly concentrate itself on the manufacture of PCS[314]. ***[name of the company]*** confirmed this circumstance[315]. The other producers present at the meeting got therefore distrustful and concluded that as from this moment regarding PCS Solvay would apply a stronger competitive policy in order to achieve a larger market share in the persalts market in order to pay back its investment in the new technology. Hence, it was generally understood that multilateral meetings among PBS/PCS manufactures would no longer make sense. The following multilateral meetings therefore regarded only the HP domain. Sporadic bilateral meetings, for instance regarding persalts in Spain, took place nevertheless (see recital (282)).

(279) ***[deleted]***. It also confirmed that such discussions collapsed at this meeting and no further meetings regarding PBS occurred. For the Commission's reply to this argument reference is made, *mutatis mutandis*, to recital (263).

4.6.2.41. March 2000, Milan, HP

(280) A bilateral meeting was held in Milan, in a restaurant, between Degussa and Ausimont in March 2000. According to ***[name of the company]***[316], the subject of the meeting was the bad follow up of the price agreement for HP as regards the Italian area, where

---

310 ***[deleted]***.
311 See pages 12857-58.
312 ***[deleted]***.
313 ***[deleted]***.
314 See the reply to the request for information of 15 July 2003 and ***[deleted]***.
315 ***[deleted]***.
316 ***[deleted]***.

sales agents of several producers were present. This rendered the implementation of the price increase much more difficult. Both Degussa and Ausimont had lost a significant market share in Italy and wanted to understand whether such share was lost to the traditional Mid-European HP producers rather than to the newcomers into continental Europe (namely EKA or Negev[317]).

4.6.2.42. May 2000, Turku, HP

(281) Surrounding the official CEFIC-meeting scheduled the following day another multilateral meeting took place on 18 May 2000, at ***[hotel name]*** in Turku, near Helsinki, Finland. Representatives of Atofina, Degussa, Solvay, Kemira, FMC Foret and Ausimont attended this meeting.

(282) On this occasion, however, ***[deleted]*** FMC Foret announced that it would not take part anymore in unofficial meetings. Also Atofina ***[deleted]*** would no longer take part in unofficial meetings from then on[318]. According to ***[name of the company]***, this followed the implementation of compliance policies in both companies. Nevertheless, some bilateral contacts, which both Solvay and FMC Foret's employees attended, which mainly related to persalts' sales in Spain, were still held until end of 2000[319]. ***[deleted]***[320]. Nevertheless, ***[name of the company]*** declared that ***[deleted]***[321] and stated that prices stayed on the same actual level of about 1050 DEM for the whole year 2000[322].

4.6.2.43. May/June 2000, HP

(283) A bilateral meeting took place in Krefeld, at the premises of the Degussa subsidiary ***[3rd party]***, between Degussa and Solvay, in May or June 2000[323].

(284) According to ***[name of the company]***, the subject of the meeting was the possibility of HP swaps in Europe, mainly for the UK and Austrian markets, because Solvay used to supply Austrian customers with products made at its British plant and Degussa transported products from the plant in Austria to the United Kingdom. After discussions an agreement could eventually not be found. Possible reactions to the recent entrance of EKA into the continental market for HP[324], in spite of attempts led by both companies to convince EKA to abstain, were discussed as well.

---

317 Negev is an Israeli chemical company.

318 ***[deleted]***.

319 ***[deleted]***.

320 ***[deleted]*** .

321 ***[deleted]***.

322 ***[deleted]*** .

323 ***[deleted]***.

324 EKA gained market share especially in Germany, but also in Belgium and in the Netherlands. According to the sales data sheet submitted by EKA, the Swedish company entered these national markets between 1999 and 2000 and it achieved in 2000-2001 a market share in Germany of [0-10%], corresponding to 5-10,000 tons, in Belgium of [10-50%], in the Netherlands of [0-10%]. On the

(285) Solvay conveyed to Degussa that further discussions among producers on market, capacity shares as well as a reallocation thereof, were no longer the way to go forward, given the negative outcome of the recent multilateral meeting of May 2000 and the situation of distrust among the HP producers.

4.6.3. Years 2001-2002, other bilateral contacts between competitors regarding both HP and PBS

(286) ***[deleted]***.

5. THE TREATY AND THE EEA AGREEMENT

5.1. Relationship between the Treaty and the EEA Agreement

(287) The arrangements described in section 4.6 applied to the whole of the territory of the EEA for which a demand for hydrogen peroxide and perborate existed, as the cartel members had sales in practically all the Member States and in the EFTA States which are parties to the EEA Agreement.

(288) The EEA Agreement, which contains provisions on competition analogous to those of the Treaty, entered into force on 1 January 1994.

(289) In so far as the arrangements affected competition in the Common Market and trade between Member States, Article 81 of the Treaty is applicable; as regards the operation of the cartel in EFTA States which are part of the EEA and its effect upon trade between the Community and EEA States or between EEA States, this falls under Article 53 of the EEA Agreement.

5.2. Jurisdiction

(290) In the present case, the Commission is the competent authority to apply both Article 81 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement, since the cartel had an appreciable effect on competition in the Common Market as well as on trade between Member States, as described in section 4.6.

6. APPLICATION OF ARTICLE 81 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

6.1. Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement

(291) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or

---

opposite it lost market share in Denmark and in Sweden. See pages 17390 of the file. See also a report about EKA found at Atofina's offices during the inspection, page 346 of the file.

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.

(292) Article 53(1) of the EEA Agreement (which is modelled on Article 81(1) of the Treaty) contains a similar prohibition. However, the reference in Article 81(1) of the Treaty to "trade between Member States" is replaced in the former provision by a reference to "trade between Contracting Parties" and the reference to competition "within the common market" is replaced by a reference to competition "within the territory covered by … [the EEA] Agreement".

6.2. The nature of the infringement in the present case

(293) Articles 81(1) of the Treaty and 53(1) of the EEA Agreement prohibit *agreements* between undertakings, *decisions by associations of undertakings* and *concerted practices*, where the conditions for the application of those provisions are met[325].

6.2.1. Agreements and concerted practices

6.2.1.1. Principles concerning agreements and concerted practices

(294) An *agreement* for the purposes of Article 81(1) of the Treaty can 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 81(1) of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(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[326].

(295) In *Limburgse Vinyl Maatschappij N.V. and Others v. Commission* (*PVC II*)[327], the Court of First Instance stated that "*it is well established in the case-law that for there*

---

325 The case-law of the Court of Justice and the Court of First Instance in relation to the interpretation of Article 81 of the Treaty applies equally to Article 53 of the EEA Agreement. See Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement. Reference will therefore be made only to Article 81, it being understood that the same considerations apply to Article 53 of the EEA Agreement.

326 Judgment of the Court of First Instance in case T-9/99, *HFB Holding für Fernwärmetechnik Beteilungsgesellschaft mbH & Co. KG and others v Commission*, [2002] ECR p.II-1487, paragraphs 206-207.

327 Judgment of the Court of First Instance of 20 April 1999 in joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV, Elf Atochem SA, BASF AG, Shell International Chemical Company Ltd, DSM NV*

to be an agreement within the meaning of Article [81(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".

(296) Although Article 81 of the Treaty draws a distinction between the concept of *"concerted practice*" and that of "*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[328].

(297) The criteria of co-ordination and co-operation laid down by the case law of the Court of Justice of the European Communities, 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 it 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 of which 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[329].

(298) Thus, conduct may fall under Article 81(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[330]. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice[331].

(299) Although in terms of Article 81(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 on the market will take account of the information exchanged with

---

and DSM Kunststoffen BV, Wacker-Chemie GmbH, Hoechst AG, Société artésienne de vinyle, Montedison SpA, Imperial Chemical Industries plc, Hüls AG and Enichem SpA v Commission of the European Communities (*PVC II*). [1999] European Court Reports (« ECR »), page II-0931, at paragraph 715.

328 Case 48/69 *Imperial Chemical Industries v Commission*, [1972] ECR, p.619, at paragraph 64.

329 Joined cases 40-48/73, etc. *Suiker Unie and others v Commission*, [1975] ECR, p.1663.

330 See also the judgment of the Court of First Instance in case T-7/89 *Hercules v Commission*, [1991] ECR, II-1711, at paragraph 256.

331 Judgments of the Court of First Instance in 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*, [1995] ECR, pp. II-1057, 1063 and 1191 respectively, at paragraph 82.

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 a concerted practice is caught by Article 81 (1) of the Treaty even in the absence of anti-competitive effects on the market[332].

(300) Moreover, it is established case law that the exchange, between undertakings, in pursuance of a cartel falling under Article 81 (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 adequate effectiveness of the agreement", constitutes a concerted practice within the meaning of that Article[333].

(301) 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 are fluid and 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 objective into several different forms of infringement.

(302) In *PVC II*[334], the Court of First Instance confirmed 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 [81] of the Treaty".

(303) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract at 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 subsequent 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, upholding the judgment of the Court of First Instance, has pointed out in *Commission v Anic Partecipazioni SpA*[335] it follows from the express terms of Article

---

332 See also the judgment of the European Court of Justice in case C-199/92 *P Hüls v Commission*, [1999] ECR, I-4287, at paragraphs 158-166.

333 Judgments of the Court of First Instance in 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*, quoted, at paragraph 72.

334 Judgment of the Court of First Instance *Limburgse Vinyl Maatschappij NV and others* (*PVC II*) quoted above in footnote 327, at paragraph 696.

335 Judgment of the European Court of Justice of 8 July 1999 in case C-49/92, *Commission v. Anic Partecipazioni*, [1999] ECR – p.I-4125, at paragraph 81.

81(1) of the Treaty that agreement may consist not only of an isolated act but also of a series of acts or a course of conduct.

6.2.1.2. Application to the case

(304) In section 4.6 it is described how, at least as from 31 January 1994, the producers of HP and PBS met on a regular basis to exchange market-sensitive information that was relevant to the assessment of their competitive position in the market. As regards HP the facts as described in section 4.6 show, more particularly, that at least as from 31 January 1994 competitors had discussions about production volumes, their possible reduction and/or the prevention of new capacity being brought onto the market, (see for instance sections 4.6.2.1, 4.6.2.2, 4.6.2.19, 4.6.2.27 and 4.6.2.34). As regards PBS initial talks occurred where market sensitive data was exchanged with the aim of achieving an anti-competitive agreement in view of an outright agreement that existed at least as of 15 May 1998. Competitors discussed the allocation of clients and market shares (see for instance sections 4.6.2.3, 4.6.2.11, 4.6.2.19, 4.6.2.27, 4.6.2.32 and 4.6.2.34) and discussed selling prices (see for instance sections 4.6.2.14, 4.6.2.19, 4.6.2.23, 4.6.2.27 and 4.6.2.34).

(305) The purpose of the contacts was to restrict competition as referred to, for example, by ***[name of the company]*** on the occasion of the meeting in Paris in May 1995 where a "***[deleted]***" was circulated and discussed (see section 4.6.2.2). Another example is that of the meeting of 27 November 1996 (referred to in section 4.6.2.9) where the companies exchanged information about the overall capacity in the market and the utilisation of that capacity, as evidenced by the handwritten notes taken by the ***[name of the company]*** representative during that meeting. It follows from the evidence shown in sections 4.6.2.1, 4.6.2.3, 4.6.2.14, 4.6.2.27 and 4.6.2.34 that the collusive contacts in the earlier period of the cartel, with a view to restricting competition, led to an outright agreement on prices and market allocation. The earlier period can equally be regarded as forming part of the collusive scheme. In *HFB* the Court of First Instance, after observing that at least at a certain moment, the undertakings concerned had expressed their common wish to conduct themselves on the market in a specific way, stated that *"it must therefore be found that, even if there was no agreement on all the elements forming the subject-matter of the negotiations, a common wish to restrict competition determined the course of the negotiations*" [336].

(306) As stated above in recital (294), and taking into account *PVC II*, where the Court of First Instance stated that for an agreement within the meaning of Article 81(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 (see recital (295)), this concept of *agreement* applies to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement. An example is the meeting of 31 October 1995 in Milan (see section 4.6.2.3) where the participants laid out how the extra market growth would be shared among the competitors.

---

[336] Judgment of the Court of First Instance in case T-9/99 *HFB Holding für Fernwärmetechnik Beteilungsgesellschaft mbH & Co. KG and others v Commission*, [2002] ECR p.II-1487, paragraph 206.

(307) Also, in *Suiker Unie*[337], the Court of Justice ruled that any direct or indirect contact between competitors the object or effect of which is to influence the conduct on the market of a competitor or to disclose the course of conduct which they have decided to adopt is strictly precluded.

(308) Furthermore, the content of the discussion between the competitors that took place at least as from 31 January 1994, as described in section 4.6, (exchanges of information on sales volumes, prices and customers) were of such a nature as to allow the producers in question to take account of this information when determining their own behaviour on the market. The Commission presumes therefore in the light of the cited case law (*Hüls* and *Suiker Unie*) that, having taken part in such concertation and being active on the market, those undertakings took account of the information exchanged with competitors in determining their own conduct on the market, all the more so because the concertation occurred on a regular basis and over a long period. According to the case law, such a concerted practice is caught by Article 81(1) of the Treaty even in the absence of anti-competitive effects on the market.

(309) On the basis of those considerations, the Commission considers that the competitors' behaviour, even if during the earlier period of the infringement it had not reached the stage where an agreement properly so called was concluded, can at least be characterised, in line with the above case law, as falling under the prohibition laid down in Article 81(1) of the Treaty. Indeed, the complex of collusive behaviour in its various forms, as described in section 4.6, presents all the characteristics of an agreement and/or a concerted practice for the purposes of Article 81(1) of the Treaty.

(310) Several parties (Solvay, Atofina, Solexis), in their reply to the Statement of Objections, raised arguments that the economic indicators in the period up to 1997/1998 showed conduct inconsistent with any collusive behaviour by the competitors. They pointed to the increases in production capacity and decreasing prices in the period until 1997 for HP and 1998 for PBS, from which it is apparent that any contacts could not be said to have had any influence on the conduct of the producers in the market and that therefore any contacts that had taken place between competitors were without any effect. At the oral hearing Solvay produced a study used to demonstrate that the economic indicators in the period up to 1997 were rather contrary to the existence of a collusive pattern and based on this analysis concluded that there was no behaviour that could be classed either as a concerted practice or as an agreement in breach of Article 81 of the Treaty.

(311) The Commission replies to these arguments as follows. Regarding the general argument that no agreement or concerted practice could have existed due to the fact that the market indicators (falling prices, increases in capacity) were inconsistent with the existence of an infringement, reference is made to recital (297) where it is explained that the prohibition contained in Article 81(1) of the Treaty strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential

337 Judgment of the European Court of Justice in case *Suiker Unie and others* quoted, paragraphs 174-175.

competitor, or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or are contemplating adopting on the market and that this is the case regardless of its actual effect on the market. Also, the issue of the collusion having had a particular impact on the market should be distinguished from the question whether the information exchange was capable of influencing the market behaviour of the individual operators. In the Commission's view, the answer to the latter question must in the circumstances of the case be positive. It is nonetheless clear from recitals (106)-(108), (115)-(117) and (133) that the collusion had, as from the beginning, the object of restricting competition.

(312) Solvay also raised the argument that the evidence as regards the start of the infringement is insufficient as it was based on evidence from a meeting between EKA and Kemira. According to Solvay, this evidence, provided by EKA, has been left unconfirmed by Kemira, it was second-hand hearsay, the references to 'discussions' and 'negotiations' are too vague, no understandings or agreements had been reached and the evidence related to a bilateral cartel between EKA and Kemira.

(313) Solvay also presented further specific arguments and notably that the contacts between January 1994 and April/May 1995 could not be classed as an agreement or concerted practice prohibited by Article 81 of the Treaty. For the period between April/May 1995 until August 1997, Solvay indicated that although during this period Solvay shared "some commercial information", no agreement had been reached and that there was in any case no effect on the market (Solvay did admit, however, that in the period after August 1997 behaviour in breach of Article 81 of the Treaty had taken place).

(314) Solexis used similar arguments as regards the period of its involvement, namely from April/May 1995 until mid-1997 and in particular stated that the 'playing rules' were not actually fixed until September 1997 following discussions held during the meeting in Seville in May 1997, which, however, did not lead to an outright agreement and therefore cannot be classified as an agreement and/or concerted practice[338].

(315) In reply to the arguments raised by Solvay and Solexis, the Commission firstly recalls with regard to the standard of proof in general, that "*since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum. Even if the Commission discovers evidence explicitly showing unlawful contact between traders, (…) it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which taken*

338 See in particular section III,(B),(ii) of Solexis' reply to the Statement of Objections.

together may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules"[339].

(316) In practice, the Commission is often obliged to prove the existence of an infringement under conditions which are hardly conducive to that task, when several years may have elapsed since the time of the events constituting the infringement. Indeed, in *JFE Engineering*, the Court of First Instance ruled that while sufficiently precise and consistent evidence must be produced to support a firm conviction that the alleged infringement took place, "*it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement*"[340].

(317) As regards the evidence of ***[name of the company]***'s participation in infringing behaviour as from 31 January 1994, the Commission considers, referring to recitals (315) and (316), that the information provided by ***[name of the company]***[341] is confirmed by an internal document, which also constitutes corroboration of the information provided by ***[name of the company]***. ***[Name of the company]***'s document should be placed in the context of ongoing exchanges of commercially sensitive information and therefore indeed corroborates the information provided by ***[name of the company]***. Furthermore, although ***[name of the company]***'s document also refers *passim* to discussions between other competitors where ***[name of the company]*** itself was not present, it constitutes a contemporaneous written account of a meeting between two competitors, including ***[name of the company]***, and of the discussions running at that time between the competitors. The Commission has no reason to doubt that the information in the document is a true reflection of what was discussed at that time, regardless of the fact that ***[name of the company]*** has not confirmed the existence of the meeting with ***[name of the company]*** and its contents. Lastly, as to the existence of bilateral collusive behaviour between ***[name of companies]*** during this time, it is considered that, although there may have been closer contacts between them as compared with contacts between other participants at this time, the references to other market players make clear that the collusion also extended to those other market participants. Therefore, the arguments presented by ***[name of the company]*** do not undermine the Commission's conviction that at this time exchanges of information were taking place between the competitors, and that, given the reference in the document provided by ***[name of the company]***, ***[name of the company]*** was at that time also party in those contacts. As regards the argument that these contacts had no effect, reference is made to recitals (297) and (304), where it is explained that the Commission considers that exchange of information of the type identified in this case has had the effect of putting the competitors in a position to adapt their market

---

339 Judgment of the European Court of Justice of 7 January 2004 *Aalborg Portland A/S et al. 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, [2004] ECR p.I-123, paragraphs 55-57.

340 Judgment of the Court of First Instance of 8 July 2004, *JFE Engineering Corp. et al. v Commission*. joined cases T-67/00, T-68/00, T-71/00 and T-78/00 (*Seamless Steel Tubes*), not yet reported, at paragraph 180.

341 ***[deleted]***.

behaviour in the light of the information exchanged and that the exchange took place with the object of restricting competition.

(318) ***[deleted]***.

(319) In relation to the arguments by Solvay and Solexis that during the period April/May 1995 – August 1997 no behaviour contrary to Article 81 of the Treaty took place, the Commission refers to recitals (304) and (311). In addition, the Commission, whilst referring to its reply in recital (317) to the arguments of Solvay as regards the January 1994 – April/May 1995 period, considers that firstly, the exchange of information of the type identified during that period has had the effect of putting the competitors in a position to adapt their market behaviour in the light of the information exchanged, and, secondly, that it served to prepare the ground for the price increases and market sharing practices that followed. More particularly, ***[deleted]***. As stated, it is not relevant in that respect whether any particular effect on the market was discernible or whether the company itself (Solvay) had decided that the information would not be used to alter its commercial decisions. That is all the more true in the particular instance where the parties were discussing the anticipated increase in capacity in the market, Solvay being one of the undertakings involved in the construction of a new plant. Solexis, in particular, although it contested the conclusions drawn by the Commission as regards the meetings held in 1995, did admit to these contacts having taken place in order to exchange market-related information[342].

(320) Solexis argued that the Commission should specify in the present case which allegedly unlawful conduct is to be classed as "agreements" and which as "concerted practices". However, the Commission considers that the consolidated case-law quoted in recitals (301) and (302) constitutes an exhaustive reply to that argument.

(321) The Commission has already clarified that in its view the collusive contacts until mid-1997 are to be seen as part of an overall scheme, as the contacts in the period 1994-1997 may be viewed as having served in preparation of outright agreements established then. However, as argued in section 6.2.1.1, even if the collusive behaviour in the period prior to 1997 were to be considered separately, the exchange of information of the type identified was of such a nature, and occurred on so many occasions, that it is considered to have had the effect of putting the competitors in a position to adapt their market behaviour in the light of the information exchanged, in contravention of Article 81 of the Treaty. That conclusion holds true also for Ausimont, for instance as regards the meetings on 11/12 May 1995 and November 1996 (see sections 4.6.2.2 and 4.6.2.9) in which it participated.

(322) FMC Foret denied having participated in *any* illegitimate meetings concerning either HP or PBS throughout the period of the infringement, although it did not deny in its replies to the Statement of Objections that certain producers engaged in anticompetitive activities. The Statement of Objections stated that Ausimont and FMC

342 See pages 9 and 10 of Solexis' reply to the Commission's Statement of Objections.

Foret were at least informed about the outcome of the discussions and in particular FMC Foret received telephone calls from competitors after a number of meetings between Degussa, Solvay and Kemira, during which an agreement was reached to increase HP prices. FMC Foret argued in reply to the Statement of Objections that the allegations made by its competitors were too vague to provide precise and consistent evidence that FMC Foret actually received such telephone calls and therefore took part in the infringement. In fact FMC Foret stated that it had not been invited to these meetings of which it had allegedly been informed because of the attitude it adopted in Seville, where it refused to accept the larger producers' requests (see recital (157)). FMC Foret pointed out that it is difficult to disprove the allegations, that is to say, to show that someone did not receive a telephone call.

(323) In reply to the arguments of FMC Foret, the Commission considers that it has been sufficiently established, from the various facts and indicia referred to in the factual part of this Decision, that FMC Foret did take part in the infringement regarding the products under investigation. Evidence has been provided that FMC Foret was either a participant in, or was informed of, contacts between competitors that were of an illicit nature. Reference is made in particular to the following sections that refer to FMC Foret's participation in meetings or to the exchange of information between competitors in connection with cartel meetings: sections 4.6.2.10, 4.6.2.11, 4.6.2.15, 4.6.2.17, 4.6.2.18, 4.6.2.19, 4.6.2.20, 4.6.2.27, 4.6.2.28, 4.6.2.29, 4.6.2.32, 4.6.2.33, 4.6.2.34, 4.6.2.35, 4.6.2.37, 4.6.2.39, 4.6.2.40 and 4.6.2.42. The participation of FMC Foret in the collusive behaviour, even though it often differed in manner from that of other undertakings, was referred to by various other parties in the proceedings and, in the case of particular contacts, corroborating information was provided.[343] The Commission therefore concludes, on the basis of an assessment of the available evidence as a whole, that FMC Foret was party to the agreements and concerted practices and that its denial is not credible.

6.2.2. Single and continuous infringement

6.2.2.1. Principles

(324) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a breach of Article 81(1) of the Treaty.

(325) Although a cartel is a joint enterprise, each participant in the agreement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not however

---

343 In this regard the Commission has also relied on the information submitted by other parties submitted in reply to the Statement of Objections, at the oral hearing and provided subsequently. The Commission submitted this information on 24 February 2006 to FMC Corp. and FMC Foret, from whom it received a reply by letters of 15 March 2006.

prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.

(326) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants in pursuance of the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of it and was prepared to take the risk[344].

(327) In fact, as the Court of Justice stated in *Commission v Anic Partecipazioni*[345], the agreements and concerted practices referred to in Article 81(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. It follows that infringement of that Article 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 an infringement of Article 81 of the Treaty[346].

6.2.2.2. Application to the case

(328) The manufacturers of HP and PBS adhered to a common scheme which laid down the lines of their action in the market and restricted their individual commercial conduct. The infringement consisted of a complex of behaviour having a single economic aim, namely to distort the normal movement of prices in the EEA-wide market for HP and PBS.

(329) In the Statement of Objections (paragraphs 294-301) the Commission concluded that, based on the available evidence, the competitors were involved in a complex of collusive arrangements with the aim of influencing prices for both HP and PBS. The Commission reached that conclusion with reference to the fact that a common scheme

344 Judgment of the European Court of Justice in case C-49/92, *Commission v. Anic Partecipazioni* mentioned above, at paragraph 83.

345 Judgment of the European Court of Justice in case C-49/92, *Commission v. Anic Partecipazioni* mentioned above.

346 Judgment of the European Court of Justice in Case C-49/92, *Commission v. Anic Partecipazioni* mentioned above, paragraphs 78-81, 83-85 and 203.

had existed covering both HP and PBS[347], that competitors were involved in collusive behaviour as regards both products, that the purpose of the arrangements for both products was a single one (to distort the normal movement of prices for both HP and PBS), that all participants were in a position to be informed of and take account of the information exchanged with the competitors, that the same mechanisms were being used, and that the splitting-up of the arrangements into different infringements was artificial. Also, the Commission noted that account would be taken of the fact that not every undertaking participated in all constituent elements of the overall cartel. This conclusion is also supported by the Commission decision in *Peroxygen products*[348], where HP and PBS were also part of a single infringement. Furthermore, in line with the judgment of the Court of First Instance in *Specialty Graphite*[349], the conclusion is based on a number of 'objective factors'.

(330) Several parties claimed that their actions as regards HP and PBS ought to be considered separately and that are insufficient grounds to consider them as part of a single infringement. The arguments raised can be summarised as follows: (a) the cartel concerned different products that belong to different product markets; (b) the collusion involved different companies; (c) the people involved in the businesses of HP and PBS were different within the companies; (d) the agreements for HP and PBS were concluded on different occasions and at unrelated meetings; (e) the collusive behaviour for HP and PBS had different durations. Additional arguments were raised by individual undertakings: (f) Caffaro referred to the fact that it was a customer for HP (it only manufactured PBS) and thus, according to it, could not be member of a cartel in HP, where it would have been a "victim" of the collusion itself; (g) Kemira stated in turn that as it did not produce PBS, it could not be considered to have been party to any agreement for PBS.

(331) Before answering the particular arguments of the parties, the Commission underlines that the undertakings' respective actions regarding HP and PBS constitute behaviour contrary to Article 81 of the Treaty also when looked upon separately for each of those products. However, as the Commission indicated in the Statement of Objections, to split the behaviour as regards HP and PBS into separate infringements, leading to a calculation of a separate fine for each, would be artificial, in view of the particular facts of the case and the various links that exist, as will also be demonstrated in the next recital. It is also noted that whilst the Commission remains of the view that what is at stake is a single infringement covering both HP and PBS, it will take into account for the setting of the fine the particular circumstances of this case, notably the fact that the collusion regarding PBS commenced later than that regarding HP and ceased earlier and that three undertakings were involved in collusive behaviour only as regards one of the two products.

---

347 PCS was also included among the products referred to in the Statement of Objections. However, as stated in recital (14), the investigation has not shown that the unlawful behaviour also extended to PCS.

348 Commission decision of 23 November 1984, *Peroxygen products*, quoted above in footnote 46. This decision was not appealed.

349 See the judgment of the Court of First Instance of 15 June 2005 in joined cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon Co. Ltd. and Others v Commission*, not yet reported (see OJ C 205 of 20.8.2005, p.18), paragraph 124.

(332) In answer to the particular points raised by the parties, the Commission replies as follows:

- (a) As regards the product(s): the existence of different products that may belong to different product markets (as economically defined) in no way means that these products cannot be part of a single collusive scheme. In this regard, reference may also be made to the fact that within CEFIC, until 1997, both products were dealt with within the same CEFIC working group, as described in section 4.6.2.20. In any case, it is settled case law that a market definition is not required in order to determine the scope of a cartel infringement[350]. Secondly, in this case there is a direct link between the products under investigation as a considerable part of the HP produced is used as a raw material for the production of its downstream product PBS. From that point of view, the two markets are closely related. Economically this means that a change in the quantities produced and/or a change in the price of HP would have a bearing on the price and/or quantities produced for PBS, and vice versa. Thirdly, the content of the meeting in Königswinter in July 1998 (see section 4.6.2.28) between Degussa, Solvay and FMC Foret demonstrates the connection between the products under investigation. As described in that section, Atofina was thinking of closing down its PBS production, but that would have left it with a large unused quantity of HP. At this meeting the three attendees agreed to present an offer to Atochem that Solvay would buy Atochem's PBS technology while Degussa would purchase Atochem's unused HP quantities. Solvay and FMC Foret would subsequently agree on compensation to Atochem[351]. Atofina eventually agreed to the proposal presented by Solvay and Degussa. This shows that the effects of the agreements regarding HP were intertwined with the arrangements regarding PBS. Lastly, and more generally, the simple fact that some participants in the cartel were not vertically integrated and were therefore not active in the production and sales of the cartelised products does not change the nature and the object of infringement which was to distort the normal movement of prices with regard to all the products. From the facts described in section 4.6 it appears that all participants in the anti-competitive arrangements adhered and contributed, to the extent they could (that is, to the extent they were active in one or more of the products concerned by the arrangements), to this anti-competitive plan.

- (b) As regards the participating undertakings: the competitors for both HP and PBS were essentially the same, and a core group of the same undertakings was involved in the anti-competitive arrangements for both products. Solvay, Arkema, Degussa, EKA (although it closed down PBS production in 1997), FMC Foret and Ausimont (which sold HP until May 2002) were all active in the production of HP and PBS, and together represented respectively ***[60-70%]*** and ***[90-100%]*** of turnover in these markets in 1998. Only three companies, Kemira, Chemoxal and Caffaro, were not vertically integrated and each produced either HP or PBS. More

---

350 Judgment of the Court of First Instance of 25 October 2005 in case T-38/02, *Groupe Danone v Commission*, not yet reported (see OJ C 330 of 24.12.2005, p.16), at paragraph 99; see also case T-62/98, *Volkswagen AG v Commission*, at paragraphs 230 and 231 and the case law mentioned therein.

351 When Solvay and Degussa met Atochem in Paris in October 1998 (see section 4.6.2.31), the latter acknowledged that its PBS production was not profitable and wanted to close down its plants: "***[deleted]***". See ***[deleted]***.

precisely, Kemira produced HP and PCS, Chemoxal shut down its PBS production plants in 1994 while Caffaro has never produced HP. In the Commission's view, the fact that only one or two different undertakings per product from the remainder of the group of six/seven are not vertically integrated, also weighs against a conclusion that separate collusive schemes existed.

- (c) As regards the involvement of individuals: firstly, in a number of instances, anti-competitive contacts concerning HP and PBS concerned representatives from the undertakings who had responsibility for both products within those undertakings and were therefore aware, or should have been aware, of the existence of anti-competitive arrangements covering both HP and PBS. Examples are ***[names of individuals and their functions]***. Secondly, certain individuals participated in illicit contacts that concerned both products: on 28 September 1998, ***[names of individuals and their functions]*** participated in a meeting which concerned both products (see section 4.6.2.30). Thirdly, as regards the meetings relating to HP and PBS that had been held separately, there were representatives who attended both the meetings related to HP and the meetings related to PBS[352].

- (d) As regards the cartel meetings: firstly, whilst it is true that most meetings identified between the cartel members concerned HP and PBS separately, at least two important meetings were held where the discussions for HP and PBS were directly connected: on 14 May 1998 a meeting was held in Evian. The session regarding HP took place in the morning, the session on PBS was held after lunch. The division of this meeting into two sessions was due to the fact that several representatives of the undertakings were responsible for both products (see section 4.6.2.27). On 28 September 1998 in Brussels, a trilateral high-level meeting was held between competitors regarding the implementation of price agreements for European HP sales, the possible freezing of HP market shares as well as the implementation of measures agreed for the improvement of the PBS sector (see section 4.6.2.30). Secondly, ***[name of the company]***[353] underlined that the idea for PBS was to repeat what had successfully been set up for HP[354]. ***[name of the company]*** stated: ***[deleted]***[355]. Lastly, the existence of a single and continuous infringement in this case is easily compatible with the existence of two or more arrangements which, taken singly, could constitute in themselves infringements of Article 81 of the Treaty.

- (e) As regards the difference in duration between the collusion on HP and PBS, the Commission notes that the fact that the collusion on PBS commenced later and ceased earlier does not mean that the two products could not have been the subject of the same infringement. That said, the fact that the infringement did not cover both products for the whole of its duration will be taken into account for the determination of the appropriate level of the fines.

---

352 Examples are ***[deleted]***. It merits to be noted ***[deleted]*** Solexis submitted ***[deleted]*** that the players active on the HP market were largely the same with regard to persalts. For some companies the representatives which took part in the Freiburg meeting (in 1999, concerning persalts) also participated in the Turku meeting (concerning HP, which took place in May 2000).

353 See its reply to the Statement of Objections, at §131.

354 This is a confirmation of what had already been stated ***[deleted]***.

355 ***[deleted]***.

- (f) and (g) Regarding the assertion by Caffaro and Kemira, that they could not have been involved in a cartel for a product they did not produce (HP and PBS respectively), the Commission notes that although these undertakings may not have participated in the entirety of the infringement, this does not mean that the infringement as such, covering the participants and the products as established in this Decision, could not have existed as a single collusive scheme. However, the fact that an undertaking did not participate directly in all the constituent elements of the overall infringement, in that it may have been unaware of some of them, may be taken into account when determining the amount of the fine to be imposed on it.

(333) On the basis of the foregoing arguments (notably the links between the collusive practices, the competitors concerned, the individuals involved, the commonality of contacts), and in line with the case-law cited [356], there are sufficient links to conclude that the different agreements and concerted practices for HP and PBS were connected in such a way that it would be artificial to separate them into different infringements. Therefore, the Commission considers that the complex of collusive arrangements constitutes a single and continuous infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

(334) Such a conclusion is not at odds with the principle that responsibility for such infringements 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. Also, the existence of a single and continuous infringement in this case is easily compatible with the existence of two or more arrangements which, taken singly, could constitute in themselves infringements of Article 81 of the Treaty. This is particularly the case where the common elements outweigh the differences among them, as demonstrated.

6.3. Restriction of competition

(335) Article 81(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which[357]:

- directly or indirectly fix selling prices or any other trading conditions;
- limit or control production, markets or technical development;
- share markets or sources of supply.

(336) These are the essential characteristics of the horizontal arrangements under consideration in the present case. The various collusive arrangements and mechanisms adopted by the producers were all ultimately aimed at inflating prices for their benefit. By limiting and/or controlling the production of HP and PBS and by fixing volume

356 Judgment of the European Court of Justice in case C-49/92, *Commission v. Anic Partecipazioni*, mentioned above.

357 The list is not exhaustive.

quotas, the producers refrained from putting more supplies on the market and from competing for market share with the aim of increasing the market price. Price fixing and control/allocation of volume quotas by their very nature restrict competition within the meaning of both Article 81 of the Treaty and Article 53 of the EEA Agreement.

(337) More particularly, in the present case, the principal aspects of the complex of agreements and concerted practices which can be characterised as restrictions of competition in breach of Article 81 of the Treaty and Article 53 of the EEA Agreement are:

(a) exchange of commercially important and confidential market- and/or company relevant information;

(b) limitation and/or control of production as well as of potential and actual capacities;

(c) allocating market shares and allocating customers;

(d) the fixing and monitoring of (target) prices.

(338) This complex of agreements and concerted practices has as its object the restriction of competition within the meaning of Article 81 of the Treaty and Article 53 of the EEA Agreement and has been described in detail in the factual part of this Decision.

(339) It is settled case-law that for the purposes of the application of Article 81 of the Treaty and Article 53 of the EEA Agreement there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[358].

(340) It follows that, in this case, breach of Article 81(1) of the Treaty and Article 53(1) of the EEA Agreement occurred even where the customer allocations or certain price increases agreed upon by the competitors may not have proved successful or were not even implemented. This applies, for instance, to the failed agreement regarding the HP prices to be applied as of 1 January 1996 (recital (136)) or the PBS price increase and the market shares of 13 December 1999 (recital (277)).

(341) In the present case, however, the Commission considers that, on the basis of the elements put forward in the factual part of this Decision, it has also proved that the anti-competitive arrangements were implemented and that therefore actual anti-competitive effects of the arrangements have taken place:

---

[358] Judgment of Court of First Instance in case T-62/98, *Volkswagen AG vs Commission* [2000] ECR II-2707, paragraph 178.

(a) the implementation of the cartel agreements was ensured by the monitoring scheme instituted by the conspirators whereby they regularly exchanged confidential market- and/or company relevant information, sales volumes and prices information. In the absence of proof to the contrary, it is presumed that the competitors in question took into account the information exchanged in determining their own pricing conduct in the market (see recitals (104), (106), (114), (135), (142), (143), (159), (170));

(b) the competitors engaged in reducing/mothballing capacity (see recitals (189), (194), (200), (203), (216), (229), (238), (256), (277), (282) and footnote 242);

(c) the regular review of the trend of market shares at the multilateral meetings made it possible to monitor the developments of each other's market shares (see recitals (133), (159) and (225));

(d) there is furthermore evidence of the implementation of price increases for both HP and PBS which were recognised and monitored at meetings between competitors (see recitals (176), (181), (224), (230), (248), (256), (268)).

6.4. Effect upon trade between Member States and between EEA Contracting Parties

(342) The continuing agreement between the HP and PBS producers had an appreciable effect on trade between Member States and between EEA Contracting Parties.

(343) Article 81(1) of the Treaty is aimed at agreements which might harm the attainment of a single market between the 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.

(344) As explained in recital (88), the markets for HP and PBS were characterised by a substantial volume of trade between Member States during the period of the infringement. There is also a considerable volume of trade between the Community and EFTA countries belonging to the EEA.

(345) The application of Article 81 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States[359].

(346) Cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between

[359] Judgment of the Court of First Instance in case T-13/89, *Imperial Chemical Industries v Commission* [1992] ECR II-1021, at paragraph 304.

Member States. Cross-border cartels harmonise the conditions of competition and affect the interpenetration of trade by cementing traditional patterns of trade[360]. In the present case, the cartel arrangements indeed covered all trade throughout the Community and EEA. The existence of a price-fixing mechanism and a quota allocation system must have resulted in the automatic diversion of trade patterns from the course they would otherwise have followed[361].

(347) ***[deleted]***.

6.5. Provisions of competition rules applicable to Austria, Finland, Iceland, Liechtenstein, Norway and Sweden

(348) In the period 31 January to 31 December 1994, the provisions of the EEA agreement applied to the EFTA Member States which had joined the EEA; the cartel thus constituted a violation of Article 53(1) of the EEA Agreement as well as of Article 81(1) of the Treaty, and the Commission is competent to apply both provisions. The restriction of competition in the EFTA states during this one year period falls under Article 53(1) of the EEA Agreement.

(349) After the accession of Austria, Finland and Sweden to the Community on 1 January 1995, Article 81(1) of the Treaty became applicable to the cartel insofar as it affected those markets. The operation of the cartel in Norway remained in breach of Article 53(1) of the EEA Agreement.

(350) In practice, it results from the foregoing that in so far as the cartel applied to Austria, Finland, Norway and Sweden, it constituted a violation of the EEA and/or Community competition rules as from 31 January 1994.

6.6. Duration of the unlawful behaviour

6.6.1. Beginning of the infringement

(351) The first (documentary) evidence that confirms the statements made by ***[name of the company]*** about illicit collusion, in particular as regards Degussa, EKA, Kemira and Solvay, dates from 31 January 1994 (see section 4.6.2.1). The evidence referring to the meeting of 31 January 1994 shows that EKA, Kemira, Degussa, and Solvay participated in collusive behaviour at least from the beginning of 1994, which later resulted in more developed agreements and concerted practices. Also on **31 January 1994** another (bilateral) meeting between Degussa and EKA took place during which market related information on the European HP market was exchanged. The Commission will thus take 31 January 1994 as the relevant date for the start of the

---

360 See also the Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ C 101 of 27.4.2004, p.81, paragraph 64.

361 Judgment of the European Court of Justice in joined cases 209 to 215 and 218/78, *Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 170.

infringement for **Degussa**, **EKA**, **Akzo Nobel Chemicals Holding** (formerly Nobel Industrier AB), **Kemira** and **Solvay**.

(352) On 25 February 1994 EKA became part of the Akzo Nobel group of companies. Hence, the Commission will take **25 February 1994** as the relevant beginning date for determining duration in the case of **Akzo**. As regards Chemoxal, Atofina and Ausimont, these companies participated in the meeting of 11-12 May 1995 in Dresden (see section 4.6.2.2), during which competition sensitive data like the HP price (and its expected decline) and the forthcoming additional capacity expected to become available on the market due to new plants built in the former GDR were discussed. Hence, the Commission will take **12 May 1995** as the relevant beginning date for determining duration for **Air Liquide**, **Chemoxal**, **Elf Aquitaine**, **Atofina**, **Ausimont** and **Edison**. As regards Caffaro and FMC Foret, the Commission has evidence that these companies participated in the cartel meeting of **29 May 1997**. Hence, the Commission will take this date as the relevant beginning date for determining duration for **Snia**, **Caffaro**, **FMC** and **FMC Foret**. Total acquired control of Elf Aquitaine in April 2000. Since then Total has controlled directly or indirectly the capital of all operating companies of the group. Hence, the Commission will take **30 April 2000** as the relevant beginning date for determining duration in the case of **Total**.

(353) ***[deleted]***, Solvay and Solexis stated that until mid-1997 no agreement was reached among the competitors, not even a general understanding. Solvay admitted to having participated in an infringement of Article 81(1) of the Treaty consisting of price fixing and market sharing between August 1997 and May 2000 and conceded that in the period between April/May 1995 and August 1997 exchanges of sensitive commercial information took place. It disputed however that the evidence contained in the factual part of the present Decision is sufficient to establish the existence of a longer infringement. Solexis used similar arguments, arguing in particular that the meetings between 1995 and mid-1997 in which it participated cannot be taken as evidence of the existence of concerted practices since no agreement on market sharing or pricing was reached nor a common course of conduct on the market established, in spite of what the Commission stated at paragraph 283 of its Statement of Objections.

(354) For the Commission's reply to these arguments put forward by Solvay and Solexis reference is made to recitals (315)-(319).

6.6.2. End of the infringement

(355) Concerning the end of the unlawful behaviour, it has been established that the participants discussed, during the meeting in Turku in May 2000, the prices for HP to be applied in 2001. Although it is likely that discussions continued in 2001, the available evidence does not support the conclusion that an agreement was reached for 2001. Nor does it clarify whether the effects on prices were actually prolonged until 2001, even though the issue of pricing for 2001 was raised at this meeting.

(356) In *Krupp Thyssen Stainless*[362] the Court of First Instance stated in relation to cartels which have formally ceased to be in force, that it is sufficient, in order for Article 85 [now 81] of the EC Treaty, and by analogy Article 65 of the ECSC Treaty, to be applicable, that those cartels continue to produce their effects. The same applies *a fortiori* where the effects of the agreement last until adoption of a decision to exit the cartel or the market, without the agreement having been formally brought to an end. Where companies do not cease applying the reference prices agreed at the cartel meetings they took part in, the Commission takes the view that the particular agreement in question lasts until the moment when new changes are agreed.

(357) ***[deleted]***. Since this is consistent with other evidence, it can be considered that the effect on prices lasted at least for the semester subsequent to the last meeting, given that price changes were usually discussed for the subsequent six months, in this case the 2nd semester of 2000 (see for example section 4.6.2.18, in particular recital (194), as well as recitals (224), (229) and (256)). ***[deleted]***. The Commission also has knowledge of bilateral contacts between Solvay and FMC Foret at the end of 2000 concerning PBS customers in Spain (see recital (282)). This shows that several competitors continued to behave unlawfully and to apply the cartel rules after the Turku meeting, at least until the end of 2000.

(358) Solvay stated, in reply to the Statement of Objections, that after the meeting in Turku, which took place on 18 May 2000, it withdrew from the cartel and ceased participating in any price fixing or market sharing arrangements. Solexis ***[deleted]*** pointed out that only ***[name of the company]*** had spoken about discussions on the prices to be applied as of 2001 and that nobody else had mentioned these discussions or confirmed ***[name of the company]***'s allegations; therefore no accusations could be upheld against Solexis as of this date. Kemira stated that it did not attend the Turku meeting in May 2000 and that the cartel did not last until either December 2000 or June 2001. According to Kemira, the documents on which the Commission based itself in the Statement of Objections contained no evidence (or only vague or ambiguous references) about anyone from Kemira participating in the discussions, or about which issues were actually discussed or what effects the discussions of May 2000 might have had on the market behaviour of Kemira and for how long.

(359) The Commission replies to the arguments of Solvay, Solexis and Kemira in the following manner. The addressees have neither provided evidence that they clearly distanced themselves from the cartel after the Turku meeting of May 2000 nor demonstrated that they behaved in a different manner afterwards. Kemira admits that "vague" elements against it are present. The Commission is, on the contrary, convinced that these elements, reflected in recital (282), are not vague as the pieces of evidence are submitted by different parties (Solvay and Atofina) and indicate the same participants, including Kemira.

---

362 Judgment of Court of First Instance of 13 December 2001 in joined cases T-45/98 and T-47/98, *Krupp Thyssen Stainless et al. v Commission*, at paragraphs 181-182.

(360) Therefore, in light of the reasoning set out in recital (355) et seq., the Commission takes **31 December 2000** as the relevant date for the end of the infringement in the case of Degussa, Edison, Kemira, Solvay, Solexis, Total, Elf Aquitaine and Arkema.

(361) Caffaro argued that the duration of the infringement in its case should be shortened as the company no longer participated in the cartel as of 1999 and that therefore the statute of limitations is applicable to it because the company was contacted by the Commission only in April 2004, thus more than five years after the end of its infringement.

(362) The Commission considers that Caffaro ***[deleted]*** engaged in illicit contacts for the period 29 May 1997 to 31 December 1998. The last evidence of the participation of Caffaro in illicit talks is related to the contacts in Brussels in November 1998 (see section 4.6.2.33). At this meeting the subject was the implementation of the PBS price increase agreed at the Evian meeting in May 1998 (see section 4.6.2.27). As stated in recitals (229)-(230) the prices agreed at Evian were applied until 31 December 1998. For the 1st semester 1999 new prices were agreed during the meeting of 16 September 1998 in Lyon (see section 4.6.2.29). Given that Caffaro adhered at least until 31 December 1998[363] to the collusive arrangements, the Commission will thus consider **31 December 1998** as the relevant ending date for determining duration in the case of Snia and Caffaro. Regarding the claim that the statute of limitations should apply to Caffaro, the Commission observes that the first action, as also recognised by Caffaro, took place on 25 March 2003 (the carrying out of the inspections). At that date, the five-year period laid down in Article 25 of Regulation (EC) No 1/2003 had not yet elapsed. The Commission therefore rejects Caffaro's claim.

(363) In the application for leniency and in its reply to the Statement of Objections EKA admitted having taken part in arrangements in Europe - mainly via bilateral contacts focused on the Nordic area - until late 1999. As of 2000 EKA decided to massively penetrate the continental marketplace regardless of the attempts by other competitors, like Solvay and Degussa, to dissuade it from doing so ***[deleted]***. EKA communicated to other competitors that it would no longer take part in meetings with anti-competitive content. The behaviour of EKA was highlighted during several cartel meetings among other competitors in 2000 (see recitals (280), (284) and (286)).

(364) The last evidence of participation by EKA in a cartel meeting dates from 25-26 November 1998. EKA itself admits to having engaged in illicit activities until its entry into the continental market. It appears reasonable from the available evidence that EKA withdrew from the anti-competitive arrangements as of the end of 1999. Therefore the Commission will take **31 December 1999** as the relevant end date for determining duration in the case of Akzo, Akzo Nobel Chemicals Holding and EKA.

---

363 See also reply of Caffaro to the Statement of Objections of 25 March 2005, at page 15. Caffaro was present at the meeting of May 1998 in Evian, where a price increase for the second half of 1998 was discussed. Given that the last documented presence of Caffaro dates from November 1998, and that it was not present at the meeting where prices for 1999 were discussed, the Commission will limit its participation to 31 December 1998, in spite of the fact that Caffaro stayed in the market until mid 1999.

(365) The last evidence of the participation of FMC Foret employees in a cartel meeting dates from 13 December 1999. On this date a meeting between the PBS producers was held in Freiburg (see section 4.6.2.40). Although FMC Foret denied that its representatives engaged in illicit discussions, at least two other companies present at this meeting have confirmed the presence of FMC Foret's representatives and their participation in the discussions. It is therefore the Commission's firm conviction that FMC Foret took part in the infringement until 13 December 1999. The Commission will therefore take **13 December 1999** as the relevant date for the end of the infringement in the case of FMC Corp and FMC Foret.

6.6.3. Application of the limitation period

(366) Pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing infringements, the limitation period only begins to run on the day the infringement ceases.[364] Any action taken by the Commission for the purpose of the preliminary investigation or proceedings in respect of an infringement shall interrupt the limitation period and each interruption shall start time running afresh.

(367) In this case, the Commission investigation started with the surprise inspections pursuant to Article 14 of Regulation No 17 on 25 March 2003. Hence, for infringements which ceased prior to 25 March 1998 no fines may be imposed.

(368) As regards Air Liquide/Chemoxal the last evidence of participation by its representatives in a cartel meeting dates from 18 September 1997 (see section 4.6.2.15). At this meeting, which was held in Paris in the apartment of ***[function]*** of Chemoxal, the discussions concerned the implementation at national level in France of the principles agreed at European level. A detailed table of French customers, the position of each producer with its customers and the [price] increase mechanisms to be implemented was also set up. The proposal of a common mechanism for the price increase was discussed as well. The overall principle discussed in the previous meeting, of which the Paris meeting was the local continuation, was to increase the price for HP as of 1 October 1997. The next increase was subsequently set up for 1 January 1998. It may therefore be presumed that Chemoxal implemented the agreement reached at the meeting of 18 September 1997 at least until 31 December 1997. In line with the finding by the Court of First Instance in *Krupp Thyssen Stainless*, cited in recital (356)[365], the Commission considers the date of **31 December 1997** as the relevant date for both Air Liquide and Chemoxal for determining the end of the infringement as well as for the calculation of the five-year limitation period.

---

364 Article 25(2) of Regulation No 1/2003.

365 Judgment of the Court of First Instance *Krupp Thyssen Stainless* quoted above, at recitals 181-182.

(369) In *Sumitomo*[366] the Court of First Instance stated that the fact that the Commission no longer has the power to impose fines on account of the expiry of the limitation period does not in itself preclude the adoption of a decision finding that past infringement has been committed. The Commission must however demonstrate the existence of a legitimate interest in doing so. Following the line taken by the Court of First Instance in *GVL* v *Commission*[367], there are strong reasons why the present case justifies the adoption of a Decision against Air Liquide. Firstly, there is a need to ensure that the undertaking behaves in accordance with the competition rules given that Air Liquide has already participated in the past in a cartel in the same sector. Air Liquide was found to have participated in a market sharing cartel which lasted approximately 20 years; the cartel consisted of a general agreement not to sell the products in question outside the "national" market, combined with agreements at the national level to share this market. This allowed the parties to keep a stable, anti-competitive market for almost two decades. The Commission denounced this behaviour in its decision of 23 November 1984[368] and therein also imposed fines on Air Liquide. Moreover, in Article 2 of the Decision, Air Liquide was requested to bring to an end the said infringements and to refrain from any agreement, concerted practice or measure which could have equivalent effect. It appears that the 1984 Commission decision, which concerned exactly the same products, did not produce a sufficient dissuasive effect on Air Liquide to stop its participation in cartel arrangements; consequently, there is an even greater interest and need to discourage any repetition of that infringement in the future. The fact that an undertaking, despite a previous finding of a similar infringement regarding the same product and despite the fine imposed on it, engaged again in unlawful conduct is a concrete sign that there is a risk of recidivism again in the future. By addressing this decision to Air Liquide the Commission seeks to ensure that any further infringement can be punished more severely as recidivist behaviour, which is considered to have a deterring effect of its own. Secondly, it is noted that there is ample evidence of Air Liquide's participation in the infringement for the period it took part, and that its role was similar to that of the other parties. For this reason too, it is considered that Air Liquide should be an addressee of the decision, like the other undertakings that participated in the infringement. Finally, there is an interest in enabling the injured parties to bring matters before the national civil courts against all cartel participants.

6.7. Addressees of the Decision

6.7.1. Principles

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

---

366 See the judgment of Court of First Instance of 6 October 2005 in joined Cases T-22/02 and T-23/02, *Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co. Ltd v. Commission*, not yet reported, at paragraph 131.

367 Judgment of the European Court of Justice of 2 March 1983 in case 7/82, *GVL* v *Commission*, [1983] ECR 483.

368 Commission decision of 23 November 1984, *Peroxygen products*, quoted above in footnote 46.

(371) The subject of Article 81 of the Treaty and Article 53 of the EEA Agreement is the "undertaking", a concept that is not identical with the notion of corporate legal personality in national commercial, company or fiscal law. In order to determine liability for an infringement of Article 81 of the Treaty, it is necessary to identify the undertaking which can be held liable. The term "undertaking" is defined neither in the Treaty nor in the EEA Agreement, but it may refer to any entity engaged in a commercial activity. A decision concerning an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement may therefore be addressed to one or several entities having their own legal personality and forming part of this undertaking, and thus to a group as a whole, or to sub-groups, or to subsidiaries[369].

(372) It is accordingly necessary to define the undertaking that is to be held accountable for the infringement of Article 81 by identifying one or more legal persons to represent the undertaking. According to the case law, "*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 and 82 of the Treaty if the companies concerned do not determine independently their own conduct on the market*"[370]. If a subsidiary does not determine its own conduct on the market independently, its parent forms a single economic entity with the subsidiary, and may be held liable for an infringement on the ground that it forms part of the same undertaking.

(373) It is established case-law that the fact that the subsidiary has separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company[371].

(374) A parent company can be held responsible for the unlawful conduct of a subsidiary if 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*"[372]. It is likewise established that "*the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power*"[373]. The parent company can reverse the presumption by producing evidence to the contrary.

---

369 The issue of who is the appropriate addressee of proceedings is entirely separate from the question of whether "agreements" between companies in the same group can fall under Article 81 EC or Article 53 EEA.

370 Judgment of the European Court of Justice in case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and Court of First Instance in Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 50, cited in Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071.

371 See the judgment of the European Court of Justice in case 48/69 *Imperial* quoted; judgment of the Court of First Instance *Limburgse Vinyl Maatschappij NV* and others mentioned above (*PVC II*).

372 Case 48/69 *Imperial* quoted above, paragraphs 132-133.

373 See the judgment of the Court of First Instance of 15 June 2005 in *Tokai*, quoted in footnote 349, paragraph 60; in the same sense see the Court of First Instance in case T-354/94, *Stora Kopparbergs Bergslags* v *Commission* [1998] ECR II-2111, paragraph 80, upheld by the European Court of Justice in case C-286/98P, *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 27-29; and the European Court of Justice in case 107/82, *AEG* v *Commission* [1983] ECR 3151, paragraph 50.

(375) The fact that it has been shown that a parent company is responsible for the conduct of its subsidiary does not in any way exonerate the subsidiary of its own responsibility. The subsidiary continues to be individually accountable for the anticompetitive practices in which it took part. Any responsibility on the part of the parent company, by reason of the influence and control it exercises over its subsidiary, is additional.

(376) Also, when an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it.

(377) If an undertaking commits an infringement of Article 81 of the Treaty and/or Article 53 of the EEA Agreement and later disposes of the assets that were the vehicle of the infringement and withdraws from the market concerned, the undertaking in question will still be held responsible for the infringement if it is still in existence[374].

(378) Liability for unlawful behaviour may pass to a successor where the corporate identity which committed the infringement has ceased to exist in law. The Court of Justice considers that, if the legal person initially answerable for the infringement ceases to exist and loses its legal personality, being purely and simply absorbed by another legal entity, that entity must be held answerable for the whole period of the infringement and thus liable for the activity of the entity that was absorbed[375]. The mere disappearance of the person responsible for the operation of the undertaking when the infringement was committed does not allow that undertaking to avoid liability[376].

(379) If the undertaking which has acquired the assets infringes Article 81 of the Treaty and/or Article 53 of the EEA Agreement, liability for the infringement should be apportioned between the seller and the acquirer of the infringing assets[377].

---

374 Judgment of the Court of First Instance in case T-6/89, *Enichem Anic SpA v. Commission (Polypropylene)*, [1991] ECR II-1623, paragraphs 237-8; case C-49/92 *Commission v. Anic Partecipazioni* quoted.

375 See the judgment of 16 November 2000 in case C-279/98P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 78 and 79: "It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it".

376 See the judgment of the Court of First Instance in case *PVC II*, cited in footnote 327, paragraph 953.

377 See Commission decision of 27 July 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/31.865, *PVC II*), OJ 1994, L 239 p.14, paragraph 41: "It is (…) irrelevant that an undertaking may have sold its PVC business to another: the purchaser does not thereby become liable for the participation of the seller in the cartel. If the undertaking which committed the infringement continues in existence it remains responsible in spite of the transfer. On the other hand, where the infringing undertaking itself is absorbed by another producer, its responsibility may follow it and attach to the new or merged entity. It is not necessary that the acquirer be shown to have carried on or adopted

6.7.2. Addressees of the present Decision

(380) In what follows the approach outlined in section 6.7.1 is applied in regard to each of the undertakings concerned. A distinction can be drawn between companies which directly participated in the infringement and those which are addressees of this Decision because they have also been identified as forming part of an economic entity responsible for the infringement.

6.7.3. Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and EKA Chemicals AB

(381) It is established by the facts as described in the factual part of this Decision that Eka Chemicals AB (the former Eka Nobel AB) participated in the overall arrangements from 31 January 1994 to 31 December 1999.

(382) The merger with Akzo NV on 25 February 1994 meant that Nobel Industrier AB, 100% holding company of Eka Nobel AB, became a wholly owned subsidiary of Akzo Nobel NV. In 1996, Eka Nobel AB changed its name to Eka Chemicals AB and Nobel Industrier AB changed its name to Akzo Nobel AB. In 2003, Akzo Nobel AB became Akzo Nobel Chemicals Holding AB, a 100% owned subsidiary of Akzo Nobel Chemicals International BV, which in turn is a wholly-owned subsidiary of Akzo Nobel NV.

(383) As from 1 January 2004, following a group restructuring, Akzo Nobel NV ("Akzo") has become the 100% parent company of EKA.

(384) EKA participated in the collusive behaviour from 31 January 1994 (see section 4.6.2.1). Nobel Industrier controlled EKA as 100% holding company between 31 January 1994 and 25 February 1994 and can therefore be presumed to be responsible for EKA's unlawful conduct during this period; its responsibility has now been absorbed by Akzo Nobel Chemicals Holding AB, due to the merger referred to above (recital (382)). Since 25 February 1994 EKA has been part of the Akzo Nobel group and has been 100% controlled by Akzo either directly or indirectly through several intermediate holding companies, as explained in section 2.2.1. Due to the 100% shareholding by Akzo the Commission considers that Akzo has exercised decisive influence on EKA since 25 February 1994 and no element was put forward to rebut this presumption.

(385) In addition, there are other elements which confirm that Nobel Industrier and Akzo can be held liable for the infringements committed, given that they exercised a decisive influence over the behaviour of their respective subsidiaries. As explained in section 2.2.1, the Akzo Nobel group is organised on the basis of a two-layer structure: a "corporate centre" and directly underneath approximately 20 Business Units ("BUs"). The corporate centre co-ordinates the most important tasks with regard to

---

the unlawful conduct as its own. The determining factor is whether there is a functional and economic continuity between the original infringer and the undertaking into which it was merged".

general strategy of the group, finance, legal affairs and human resources. The BUs each have their own General Manager, management team and supporting services though the BU management operates within the limits of the financial and strategic targets set out by the corporate centre and is bound by the "Business Principles" and "Corporate Directives" applicable to the entire Akzo Nobel group. ***[deleted]***.

(386) Taking into account the 100% shareholding chain that existed at the time of the infringement between Eka Chemicals AB, Akzo Nobel Chemicals Holding AB (the former Akzo Nobel AB and Nobel Industrier AB) and Akzo Nobel NV, the Commission holds Eka Chemicals AB liable for the infringement committed for the period from 31 January 1994 until 31 December 1999 and Akzo Nobel Chemicals Holding AB and Akzo Nobel NV jointly and severally liable for the infringement committed by Eka Chemicals AB for the period 31 January 1994-31 December 1999 and 25 February 1994-31 December 1999 respectively.

(387) Consequently, Eka Chemicals AB, Akzo Nobel Chemicals Holding AB and Akzo Nobel NV are addressees of the present Decision.

6.7.4. Degussa AG

(388) It is established by the facts as described in Section 4.6 that Degussa participated in the overall arrangements from 31 January 1994 to 31 December 2000. Consequently, Degussa is an addressee of the present Decision.

6.7.5. FMC Corporation and FMC Foret SA

(389) It is established by the facts as described in Section 4.6 that FMC Foret participated in the overall arrangements at the least from 29 May 1997 until 13 December 1999. For the determination of the start and end dates of the infringement see sections 4.6.2.11 and 4.6.2.40.

(390) As described in section 2.2.5, FMC Foret is wholly owned by FMC Chemical Holding B.V. (now FMC Chemicals Netherlands BV), which is in turn wholly owned by FMC. In the Statement of Objections the Commission concluded that both FMC Foret and FMC were to be held liable for the infringement committed by FMC Foret. That conclusion was based on the fact that FMC Foret is a (indirectly) wholly owned subsidiary of FMC.

(391) The Commission also referred to another element in relation to the decisive influence of FMC. Mr. ***[name of individual]***, who was party to several cartel contacts, was not only Managing Director and Chairman of FMC Foret from 1991 to April 2003, but also Vice President of FMC from 1994 to 2000. Furthermore, in referring to elements that showed the decisive influence of FMC on FMC Foret the Commission referred to the following facts: Mr. ***[name of individual]*** was a member of the Board at FMC Foret (from 1991 to June 1998), and of the Board at FMC Chemical Holding BV (from December 1992 to March 1999) as well as Vice President at FMC (from 1991 to

1998). In 1994 Mr. ***[name of individual]*** was also appointed as executive Vice President of FMC. Finally, Mr. ***[name of individual]*** was a member of the Board at both FMC Foret (between June 1996 and December 1999) and at FMC Chemical Holding BV (from August 1996 to March 1999). On these grounds, the Commission concluded that FMC exercised a decisive influence over FMC Foret. Furthermore, as stated by the Commission in the Statement of Objections, the role of Mr. ***[name of individual]*** as vice President of FMC is another element to support the view that FMC knew or should have known about the participation in cartel activities.

(392) As regards the issue of the liability of FMC, in its reply to the Statement of Objections the company argued that its subsidiary FMC Foret operated independently of any influence of FMC and that therefore FMC could not be held liable for any infringement committed by FMC Foret. FMC considers its shareholding in FMC Foret only as a financial investment and maintains that the autonomy of the subsidiary has not been affected. FMC stated that it "*acquired 20% of the shares in [FMC] Foret in April 1966. It raised its shareholding to 50% in 1971 and then in stages culminating in 1992 it purchased the remainder. Its attitude to Foret has not changed since it was a minority investor and Foret has continued to operate on an autonomous basis. (…) The acquisition was treated by FMC Corp as an investment and no attempt was made to take over any of the functions of management or to interfere with the commercial operation of the firm. FMC Foret appoints autonomously all its own managers and Foret's officers have never combined their roles at Foret with executive positions at FMC Corp*"[378]. According to FMC, if Mr ***[name of individual]*** was appointed as Vice President at FMC, it was a purely non-executive position (his functions within FMC and FMC Foret were purely administrative: he simply oversaw the business and corporate strategy, that is to say, he was not involved in the day to day operation).

(393) FMC furthermore stated that in the file there would not be other elements showing that Mr. ***[name of individual]*** was actively involved in the cartel activities. Finally, the fact that three members of FMC Foret were also members of the Board of FMC Chemical Holdings B.V. is not so significant as the only purpose of this latter entity is to hold shares and it does not conduct any commercial activity.

(394) The Commission cannot accept the arguments presented by FMC. Firstly the exercise of decisive influence by FMC over FMC Foret does not follow only from a 100% shareholding relationship. The Commission also pointed to other circumstances as referred to in recital (391). In any case the Commission considers, on the basis of the information available, that FMC either directly or indirectly through FMC Chemicals Holding BV, exercised decisive influence over FMC Foret. The element which FMC Foret brings forward, namely that FMC has a separate department for the manufacturing of HP to be shipped to the American market, is not sufficient to establish that FMC did not exercise any control over the European branch. The "independent status" of FMC Foret is otherwise only demonstrated through statements by FMC employees who stated that FMC Foret operated on a stand-alone basis. However, FMC itself presents FMC Foret as an integrated part of its business. Indeed, FMC Corp is equally involved in producing the HP and PBS. FMC Foret operates as

[378] See pages 24-25 of the FMC Corp's reply to the Statement of Objections.

its European subsidiary in this regard[379]. The Commission considers that this confirms the other elements that point towards an effective exercise of influence during the period of the infringement.

(395) Taking into account the foregoing considerations, the Commission maintains that FMC Corporation and FMC Foret SA are jointly and severally liable for the infringement committed.

(396) Consequently, FMC Corporation and FMC Foret SA are addressees of the present Decision.

6.7.6. Kemira OYJ

(397) It is established by the facts as described in Section 4.6 that Kemira participated in the overall arrangements from 31 January 1994 to 31 December 2000.

(398) As to the end of the infringement, despite the objections of Kemira, it has been explained in recital (359) that Kemira's participation has been ascertained until 31 December 2000. Consequently, Kemira is an addressee of the present Decision.

6.7.7. L'Air Liquide SA and Chemoxal SA

(399) It is established by the facts as described in Section 4.6 that Chemoxal participated in the overall arrangements from 12 May 1995 until 31 December 1997. As to the determination of the start and end date of the infringement, see sections 4.6.2.2 and 4.6.2.15 as well as recital (352).

(400) Although in 1990 Air Liquide created Chemoxal SA, a wholly owned[380] subsidiary[381], to which it transferred the entire HP and persalts business, that subsidiary was not able

---

379 See for a recent reflection of that the the FMC Corp annual report for 2004, available under {http://www.fmc.com}. On page 14 of the document it reads as follows: "Our European subsidiary, FMC Foret, S.A. ("Foret"), headquartered just outside of Barcelona, Spain, is a leader in providing chemical products to the detergent, paper, textile, tanning and chemical industries. Foret is a large and diverse operation with seven manufacturing locations in Europe. Foret has positions in phosphates, hydrogen peroxide, perborates, percarbonates, sulfur derivatives, silicates, zeolites and sodium sulfate. Foret's sales efforts are focused in Europe, Africa and the Middle East". In the FMC press release of 6 February 2006 on 2005 full-year results it reads as follows: "North American hydrogen peroxide and FMC Foret also benefited from higher selling prices. Segment earnings of $83.9 million increased 46 percent versus the prior year, driven by higher selling prices across the group and improved earnings from Astaris, offset in part by Granger soda ash plant startup expenses and higher raw material, energy and transportation costs", which suggests that FMC Foret is the entity within the group FMC which carries out the HP business outside North America, in particular in Europe, Africa and middle East.

380 It may be presumed that a wholly owned subsidiary, in principle, essentially follows the policy laid down by the parent company. See the judgment of the European Court of Justice in case 107/82, *AEG v Commission*, [1983] ECR p.3151, paragraph 50.

381 It is established case-law that the fact that the subsidiary has separate legal personality is not sufficient to exclude the possibility that its conduct may be attributed to the parent company. See the judgment of the European Court of Justice in case 48/69, *ICI v Commission* [1972] ECR 619.

to decide independently upon its own conduct in the market. In fact, although there were no directors of Air Liquide on the Board of Directors of Chemoxal SA, Air Liquide safeguarded its right to appoint the members of the Board of Chemoxal SA. Chemoxal succeeded Air Liquide in the activities it already carried out before the creation of Chemoxal SA.

(401) As explained in section 2.2.7, Chemoxal used to sell HP and persalts (mainly PBS) manufactured by Oxysynthèse SA, the subsidiary jointly (50/50) controlled by Air Liquide and Atochem.

(402) As to the duration of the infringement, Chemoxal has disputed that it took part in any infringement. However, it has been explained in recital (368) that Chemoxal's participation lasted until 31 December 1997. Currently Chemoxal still legally exists and operates a different business.

(403) Given the 100% shareholding that existed at the time of the infringement between Chemoxal and Air Liquide as well as the power that Air Liquide had to appoint the Directors at Chemoxal, the Commission has presumed the exercise of decisive influence by Air Liquide over the conduct of its subsidiary Chemoxal.

(404) Air Liquide disputed its joint and several liability for any infringement committed by Chemoxal SA. According to Air Liquide the power to appoint the members of the Board is not sufficient to prove absence of autonomy as it is the logical consequence of 100% ownership. The supply of HP by Oxysynthèse (which, as noted, was jointly run by Atofina and Chemoxal) does not establish the absence of autonomy either. Moreover, the companies did not have common managers. The mandate given to the Chemoxal's Executive Director gave him full powers to run the company. In order to implement its commercial policy, Chemoxal had all the necessary services (such as marketing and sales, human resources, informatics and accounting as well as a research centre[382]) of its own to do so. For the external services (such as legal, fiscal and insurance services[383]) not directly linked with the commercial policy, Chemoxal used the facilities of Air Liquide only against payment. Chemoxal's autonomy is also evidentfrom the fact that it had direct contacts with the clients and defined its commercial projects independently. Finally there is no evidence in the file to suggest that Air Liquide instructed Chemoxal concerning its commercial policy.

(405) The Commission does not agree with the opinion of Air Liquide. The 100% ownership leads in accordance with the case law to a presumption which can be rebutted by showing that, notwithstanding the full control by the parent company, the subsidiary benefits from a special autonomy. However, the elements presented by Air Liquide are insufficient to rebut that presumption. Firstly, the power to appoint the directors is indicative of the fact that Air Liquide carried out decisive influence on the day-to-day operations. Secondly, both customers and competitors were referring to the

382 See points 83-84 of the Air Liquide's reply to the Statement of Objections.

383 See point 85 of the Air Liquide's reply to the Statement of Objections.

undertaking "Air Liquide" in the HP business[384]; the external perception was clearly that Air Liquide was controlling the business of Chemoxal. Namely, Air Liquide ran the business and used its trade mark as well as its commercial power to exploit the peroxigen businesses, of which the subsidiary Chemoxal was the commercial part[385].

(406) The Commission therefore maintains that L'Air Liquide SA and Chemoxal SA are part of the same undertaking that took part in the infringement, are therefore to be held jointly and severally liable for it and, consequently, are addressees of the present Decision.

6.7.8. Snia SpA and Caffaro Srl

(407) It is established by the facts as described in Section 4.6 that Caffaro participated in the arrangements regarding PBS from 29 May 1997 until 31 December 1998. As to the determination of the duration of the infringement for this company reference is made to sections 4.6.2.11 and 4.6.2.33 as well as section 6.6.

(408) Snia wholly controlled the subsidiary Caffaro during the infringement and, through Caffaro, also the company Industrie Chimiche Caffaro SpA at the time the PBS business was taken over by this latter company. Furthermore Mr. ***[name of individual]*** was, from 1991 to 1999, a member of the Board both at Snia and at Caffaro; Mr. ***[name of individual]*** was a member of the Board at both Caffaro and Industrie Chimiche Caffaro SpA between 1994 and 1997; Mr. ***[name of individual]*** was a member of the Board at both Caffaro and Industrie Chimiche Caffaro SpA between 1997 and 1999. Finally, all the members of the Board at Caffaro between 1991 and 1999 were appointed by Snia, which was the majority shareholder (with 53%-59%). The members of the Board at Industrie Chimiche Caffaro Spa were appointed between 1994, the year in which the PBS business was transferred to this company, and 1999 by the sole shareholder Caffaro.

(409) Caffaro (ex Industrie Chimiche Caffaro SpA, also referred to as "ICC") participated in the infringement regarding PBS at least until it closed down its PBS production in summer 1999. Thus, the duration of the infringement in Snia's case is limited to the period from 29 May 1997 to 30 June 1999, when Snia decided to shut down its PBS production plant. As explained in section 2.2.8, in 2000 Caffaro merged into Snia and ICC became Caffaro.

---

384 See notably the contemporaneous documents by Mr. ***[name of individual]*** of Atofina where the name "Air Liquide" is constantly referred to indicate the competitor.

385 See notably the judgment of the Court of First Instance in case T-66/99, *Minoan Lines V. Commission*, of 11 December 2003 [2003] ECR 5515, at paragraph 129 where the Court stated that "the criteria used in earlier cases to establish whether or not an agent and its principal form a single economic unit are satisfied in the present case because ETA did business on the market only in the name of and for the account of Minoan, it took on no financial risk in connection with that business and, lastly, the two companies were perceived by third parties and on the market as forming one and the same economic entity, namely Minoan" (emphasis added).

(410) Caffaro and Snia disputed the liability of the parent company Snia for the infringement. Snia stated in its reply to the Statement of Objections that during the period of the infringement the activity linked to the detergents (including PBS production) was directly carried out by ICC (today's Caffaro Srl); the strategic and pricing policy was determined inside ICC in the framework of the division "Ausiliari per l'industria", whose Director was Mr. ***[name of individual]***, and of the division "Chimica fine e specialità", whose Director was Mr. ***[name of individual]***. These Directors reported directly to the general manager of ICC, namely Mr. ***[name of individual]***. Mr ***[name of the individual]*** never sat on the Board of Caffaro nor Snia. Also, the competitors in the PBS market always referred to ICC, or to Caffaro, but never referred to Snia. According to Snia and Caffaro, the current case-law requires the production of elements other than 100% ownership in order for a legal entity to be held liable for behaviour in which a subsidiary was involved. According to the companies, the Commission has failed to produce that additional evidence. Snia finally noted that the control by Snia over Caffaro at the time of the infringement was not 100%, but only 53-59%.

(411) The Commission cannot share the opinion of Snia and Caffaro. As regards the last point raised by Snia, that the 53%-59% control of Caffaro would not suffice to establish a presumption of decisive influence, it should first be recalled that, contrary to Snia's claim, its liability does not derive from its 53%-59% ownership of Caffaro in the period of infringement, but from the fact that Snia merged with the former Caffaro, which was the 100% parent company of ICC, the entity that was directly involved in the infringement. Thus, the question of the control between Snia and the *former* Caffaro is not the issue in this regard. What is to be analysed is the control relationship between the Snia /Caffaro entity (renamed Snia after the merger) and the subsidiary ICC (which was later renamed Caffaro Srl.). Caffaro stated that the decision to quit the PBS market was taken by the parent company Snia BPD during the directors' meeting of 19 January 1999 and annexed the minutes of this meeting. The document submitted by Caffaro does not state anything contrary to the interpretation given to the facts by the Commission. On the contrary it shows the involvement of the parent company Snia BPD in the decision-taking process of Caffaro and ICC up to the point of deciding on the actual presence of Caffaro on the market. Given the 100% shareholding that existed at the time of the infringement between Caffaro (today merged with Snia) and ICC, as well as the proven dependence in the decision-taking process of Caffaro and Snia, and as the links in terms of managing personnel between the entities, the Commission takes the view that Caffaro exercised decisive influence over the conduct of its subsidiary and that the elements presented by Snia and Caffaro cannot rebut the presumption expressed in the Statement of Objections.

(412) For these reasons Snia are therefore to be held jointly and severally liable for the infringement committed by Caffaro for this period. Consequently, both Snia SpA and Caffaro Srl are addressees of the present Decision.

6.7.9. Solvay SA/NV

(413) It is established by the facts as described in Section 4.6 that Solvay SA/NV participated in the overall arrangements from 31 January 1994 to 31 December 2000.

As to the start and end date of its infringement, see recitals (125) and (359). Consequently, it is an addressee of the present Decision.

6.7.10. Solvay Solexis SpA

(414) It is established by the facts as described in Section 4.6 that Ausimont SpA (now Solvay Solexis SpA) participated in the overall arrangements from 12 May 1995 until 31 December 2000. As to the determination of the start date of the infringement for Solexis see section 4.6.2.2.

(415) Solvay, currently the parent company of Solexis, urged the Commission that the fine for Ausimont's infringement should be addressed only to the former owner of Ausimont, namely (Mont)Edison, because the infringement was entirely committed under the ownership of (Mont)Edison. The Commission rejects this claim as it has been established that Ausimont, which existed as a separate legal entity at the time of its ownership by (Mont)Edison, participated in the infringement. It is therefore to be held liable for the infringement and is an addressee of the present Decision.

6.7.11. [deleted]

(416) ***[deleted]***.

(417) ***[deleted]***[386][387].

(418) ***[deleted]***[388]. ***[deleted]***[389].

(419) ***[deleted]***.

(420) ***[deleted]***[390]. ***[deleted]***[391].

(421) ***[deleted]***[392], ***[deleted]***.

(422) ***[deleted]***.

(423) ***[deleted]***.

---

386 Judgment of the European Court of Justice *Stora Kopparbergs Bergslags v. Commission* quoted, in particular the conclusion of the AG Mischo.

387 Point 40 of the opinion quoted above.

388 Point 28 of the judgment of the European Court of Justice *Stora* quoted in footnote 386.

389 See Court of First Instance in case *Tokai*, quoted in footnote 349, paragraph 60.

390 ***[deleted]***.

391 ***[deleted]***.

392 ***[deleted]***.

(424) ***[deleted]***.

6.7.12. Total SA, Elf Aquitaine SA and Arkema SA

(425) It is established by the facts as described in Section 4.6 that Atochem/Atofina, now Arkema, participated in the overall arrangements from 12 May 1995 until 31 December 2000. As to the determination of the starting date of the infringement see section 4.6.2.2.

(426) As described in section 2.2.10, Atochem was created in 1983 from the merger of Cloè Chimie, Atochimie and the biggest part of the chemical activity of the group PCUK, under the name Atochem SA. In 1992 its name changed to Elf Atochem SA and in April 2000 to Atofina SA, after a takeover of Atochem's parent company Elf Aquitaine SA by the TotalFina group. On 4 October 2004 Atofina was renamed Arkema. It is however the same legal person as directly participated in the infringement throughout its duration. Atofina SA is therefore an addressee of the present Decision.

(427) The members of the board of Atofina were and are appointed by Elf Aquitaine. Taking into account this fact as well as the 98% shareholding that existed at the time of the infringement between Atofina and Elf Aquitaine SA, the Commission presumes that Elf Aquitaine SA exercises decisive influence over the conduct of its subsidiary Atofina SA. The Commission therefore holds Elf Aquitaine SA jointly and severally liable for the infringement committed by Atofina/Arkema.

(428) In April 2000 TotalFina SA acquired control of the company Elf Aquitaine SA by means of a public offering, becoming TotalFinaElf SA. TotalFinaElf SA subsequently changed its name to Total SA. Since that date Arkema has been controlled (96.48%) by Elf Aquitaine, which is in turn almost wholly owned (99.43%) by Total SA.

(429) In the exercise of its activity, Total SA controls directly or indirectly the capital of all operating companies of the group, including the companies that played a direct role in the behaviour described in Section 4.6. Given these facts, the Commission presumes that Total SA exercises decisive influence over the conduct of its subsidiaries Elf Aquitaine SA and Atofina SA.

(430) Responses to the Statement of Objections were sent separately by Atofina on the one hand and by the other two companies involved in the investigation on the other hand. Total and Elf Aquitaine firstly observed that for the sake of good administration the Commission should wait for the judgment of the Court of First Instance in *MCAA*[393] where the issue of the liability of a parent company in cartel cases was raised by Elf Aquitaine. According to Total and Elf Aquitaine, the *MCAA* Decision marks an audacious change in the Commission assessment of the liability of parent companies.

[393] Commission Decision of 19 January 2005, *MCAA*, case COMP/37.773, not yet published.

For example, the Commission decision concerning *Organic peroxides*[394] was addressed to Atofina alone.

(431) Subsequently Atofina, Total and Elf Aquitaine made several remarks arguing that the Decision should be addressed solely to Atofina on the following main grounds:

- fining a company other than that which committed the infringement would undermine the principle of the autonomy of a legal entity, and in particular its economic autonomy;
- the Statement of Objections did not contain any element which could justify Total and Elf Aquitaine being punished due to anti-competitive practices, whereas for other groups of companies these elements were indicated (e.g. Akzo);
- the attribution of liability to Total and Elf Aquitaine would be contrary to several principles at the basis of European law (personal liability, personality of sanctions, presumption of innocence, principle of equality of arms)[395];
- although Elf Aquitaine and Total nominate members of the Board of Atofina this does not prove the exercise of decisive influence. Atofina enjoys complete autonomy in its commercial policy and conduct on the market, which is not subordinated to instructions originating from Total and/or Elf Aquitaine (the reporting duty being limited to general information given within the framework of a normal functioning in a group of companies, focussed mainly on accounting, financing and auditing matters);
- Atofina also pointed out that Total and Elf Aquitaine were not involved in the Commission's investigatory procedure, received no requests for information from the Commission, were not subject to on the spot investigations and were not contacted by the Commission prior to receiving the Statement of Objections;
- the Commission's power to calculate the fine is clearly circumscribed by the 1998 guidelines on fines and any fine imposed should be set at an equitable level; therefore it should not take the global turnover of the Total group as an indicator to establish the level of the fine.

(432) Finally Total and Elf Aquitaine pointed out that they are equally entitled to enjoy a possible reduction of any fines in the framework of the leniency programme, for which their subsidiary Atofina applied on 3 April 2003.

(433) In reply to these arguments the Commission responds, on the preliminary point, that the fact that a case is currently pending before the Court of First Instance does not prevent the Commission from taking other Decisions on similar matters.

---

394 Commission Decision of 10 December 2003, *Organic peroxides*, case COMP/37.857, not yet published.

395 See pages 37-49 of the reply of Total and Elf Aquitaine to the Statement of Objections. In the original French text such principles read as follows: « responsabilité du fait personnel, principe de la personnalité des peines, principe de la présomption d'innocence, principe de l'égalité des armes ».

(434) Furthermore, the fact that in a previous case the Commission addressed its decision to Atofina alone does not prevent the Commission in this case from addressing its decision to both Atofina and Total/Elf Aquitaine. The Commission has discretion to impute liability to a parent company in such circumstances and the fact that it has not done so in a previous decision does not prevent it from doing so in this case[396].

(435) The Commission does not accept the argument that this Decision runs contrary to the principles of law referred to by the companies. For instance, neither the principle of the autonomy of a legal entity nor the principle of personality of the penalties are undermined by the fact that more than one company is held liable for an infringement.

(436) As regards the principle of personal liability according to which punishment should be applied only to the offender, the Commission would like to point out the following: the case-law of the Court of Justice recognises the principle of personal liability[397]. In line with the principles of parental liability laid down in section 6.7.1, Total/Elf Aquitaine participated in the infringement by virtue of the fact that they formed a single undertaking with their subsidiary Atofina, which was directly involved in the infringement. In the present case the Commission is not imposing a fine on any company other than those answerable for the infringement. The principle of the autonomy of a legal entity and economic autonomy are company law principles that are not relevant once a group of companies is held to form a single undertaking for the purposes of applying Article 81 of the Treaty.

(437) As regards the principles of presumption of innocence and equality of arms, Atofina, Total and Elf Aquitaine are confusing the notions of liability and imputation. Atofina, which belongs to a single undertaking with Total/Elf Aquitaine, has explicitly admitted to participating in the infringement in its application for immunity and alternatively for a reduction of fines under the Leniency Notice. Therefore, the presumption of innocence has not been breached. The imputation of responsibility to Total/Elf Aquitaine follows from a presumption of decisive influence established by settled case-law and which has not been rebutted in the present case. Therefore, no separate set of evidence needs to be submitted to establish Total's and Elf Aquitaine's responsibility other than that used to demonstrate Atofina's responsibility for the same infringement. Consequently the principle of equality of arms has not been breached.

(438) The fact that Total and Elf Aquitaine were not subject to on-site inspections and did not receive any requests for information has no bearing on the issue of the liability of parent companies for the acts of their subsidiaries. Inspections and requests for information are purely investigatory steps which the Commission is not obliged to address to undertakings before issuing a Statement of Objections.

---

396 See case T-203/01, *Michelin v Commission*, [2003] ECR, II-4071, par. 290.

397 Judgment of the European Court of Justice in *Anic Partecipazioni v Commission*, quoted in footnote 335, at paragraph 78.

(439) The argument that any fine imposed should be set at an equitable level and not discriminatory is assessed by the Commission in recital (465).

(440) The Commission, finally, will take account of the reduction accorded to Atofina in the framework of the leniency programme for determining the fine to be attributed to Total and Elf Aquitaine.

(441) The Commission confirms therefore its findings in order to address this Decision to Arkema SA, Elf Aquitaine SA and Total SA. Together those entities form part of the undertaking that is responsible for the sale of HP and PBS on the relevant market and they are jointly and severally liable for the participation in the cartel. Total SA can be held responsible for the infringement committed by Elf Aquitaine SA and Atofina SA (now Arkema SA) from the date of acquisition of the control over Elf Aquitaine SA (30 April 2000) until 31 December 2000.

6.8. Conclusions

(442) On the basis of the foregoing considerations, the Commission considers that the following companies should be addressees of the present Decision:

- Akzo Nobel NV
- Akzo Nobel Chemicals Holding AB
- EKA Chemicals AB
- Degussa AG
- ***[deleted]***
- FMC Corporation
- FMC Foret S.A.
- Kemira OYJ
- L'Air Liquide SA
- Chemoxal SA
- Snia SpA
- Caffaro Srl
- Solvay SA/NV
- Solvay Solexis SpA
- Total SA

- Elf Aquitaine SA
- Arkema SA

7. REMEDIES

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

(443) Where the Commission finds that there is an infringement of Article 81 of the Treaty or Article 53 of the EEA Agreement it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003.

(444) While it appears from the facts that in all likelihood the infringement effectively ended in December 2000, it is necessary to ensure with absolute certainty that the infringement has ceased and, accordingly, necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from entering into any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

(445) The prohibition applies not only to secret meetings and multilateral or bilateral contacts between competitors aimed at restricting competition between them or enabling them to concert their market behaviour, but also to the activities of the undertakings in so far as they involve, in particular, collecting and distributing individualised sales statistics.

7.2. Article 23(2) of Regulation (EC) No 1/2003

(446) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose fines on undertakings where, either intentionally or negligently, they infringe Article 81(1) of the Treaty and/or Article 53(1) of the EEA Agreement. Under Article 15(2) of Regulation No 17[398] which was applicable at the time of the infringement, the fine for each undertaking participating in the infringement could not exceed 10% of its total turnover in the preceding business year. The same limitation results from Article 23(2) of Regulation (EC) No 1/2003.

(447) However, pursuant to Article 25(1)(b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for such infringements is subject to a limitation period of five years. Pursuant to Article 25(2) of Regulation (EC) No 1/2003, for continuing infringements, the limitation period begins to run on the day on which the infringement ceases. Any action taken by the Commission for the purpose

[398] Under 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 81 and 82] of the EC Treaty […] shall apply *mutatis mutandis*". (OJ L 305, 30.11.1994, p.6)

of the preliminary investigation or proceedings in respect of an infringement interrupts the limitation period.

(448) As related in recital (368), Chemoxal ended its participation in the infringement on 31 December 1997. The first action taken by the Commission to investigate the infringement was the carrying out of unannounced inspections on 25 and 26 March 2003, as described in recital (65). As this action took place more than five years after Chemoxal had ended its participation in the infringement, no fines can be imposed on Chemoxal or on its parent company, Air Liquide.

(449) Pursuant to both Article 15(2) of Regulation No 17 and Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to both the gravity and the duration of the infringement. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the Commission will, having regard to all relevant circumstances, assess the role played by each undertaking party in the infringement on an individual basis. In particular, the Commission will ensure that the fines imposed reflect any aggravating or mitigating circumstances pertaining to each undertaking[399].

(450) In the present Decision, the Commission applies the Leniency Notice[400]. It also evaluates the position of each undertaking which filed an application for a reduction of a fine.

(451) In assessing the fine to be imposed on each individual undertaking, the Commission also takes account of, *inter alia*:

– the role played by each undertaking, in particular the leading role played by some companies, as described in the factual part of the present Decision;

– the respective duration of their participation in each infringement;

– the importance of each of the undertakings in the HP and PBS industry and the impact of the offending conduct of each undertaking on competition.

8. THE BASIC AMOUNT OF THE FINES

(452) The basic amount of each fine is determined according to the gravity and the duration of the infringement.

8.1. Gravity

399 See the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, published in the Official Journal: OJ C 9, 14.1.1998.

400 Commission Notice on the immunity from fines and reduction of fines in cartel cases, OJ C 45 of 19.02.2002, p. 3-5.

(453) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

8.1.1. Nature of the infringement

(454) The infringement in this case consisted mainly of competitors exchanging commercially important and confidential market- and/or company relevant information, limiting and/or controlling production as well as potential and actual capacities, allocating market shares and customers, and fixing and monitoring (target) prices. These kinds of horizontal restrictions are, by their very nature, among the worst kinds of infringements of Article 81 of the Treaty and Article 53 of the EEA Agreement. With full knowledge of the illegality of their actions, the participants colluded to set up a secret and institutionalised scheme designed to restrict competition in this industrial sector.

8.1.2. The actual impact of the infringement

(455) In this proceeding, it is not possible to measure the actual impact on the EEA market of the complex of arrangements of which the infringement consists and therefore the Commission does not rely specifically on a particular impact, in line with the guidelines currently applicable according to which the actual impact should be taken into account when it can be measured. The Court of First Instance has found that the Commission is not required precisely to demonstrate the actual impact of the cartel on the market and to quantify it, but may confine itself to estimates of the probability of such an effect. What can be said, in the present case, is that with regard to the EEA, the cartel arrangements were implemented by the European producers and that such implementation did have an impact on the market, even if its actual effect is *ex hypothesi* difficult to measure[401].

8.1.3. The size of the relevant geographic market

(456) The infringement covered the whole of the EEA. It is important to note that fact for the purposes of assessing gravity.

8.1.4. Conclusion on the gravity of the infringement

(457) Taking into account the nature of the infringement committed, the fact that it must have had an impact and the fact that it covered the whole of the EEA, where the HP/PBS market had a total value of around EUR 470 million[402] in 1999, the last full year of the infringement, the Commission considers that the undertakings to which this Decision is addressed have committed a very serious infringement of Article 81 of the Treaty and Article 53 of the EEA Agreement.

---

401 See judgments of the Court of First instance of 18 July 2005 in case T-241/01 *SAS v Commission*, at paragraph 122 and of 25 October 2005 in case T-38/02 *Danone v Commission*, at paragraph 148.

402 This takes together both the HP and the PBS market.

8.1.5. Differential treatment

(458) Within the category of very serious infringements, the scale of likely fines makes it possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders, respectively, to cause significant damage to competition. This is appropriate where, as in this case, there are considerable disparities between the respective market shares of the undertakings participating in the infringement.

(459) In the circumstances of this case, which involves several undertakings, it is necessary, when setting the basic amount of the fines, to take account of the specific weight, and therefore the real impact on competition, of each undertaking's offending conduct. For this purpose the undertakings concerned can be divided into different categories according to their relative importance in the market concerned.

(460) In order to determine the individual weight of participants in the infringement, the global market shares in 1999, the last full year of the infringement for both products, as indicated in section 2.3.1, will be used. By assessing the turnover in the respective products for each undertaking and setting them off against the total turnover for HP and PBS for the purposes of determining the individual weight, the Commission has taken account of the fact that certain undertakings were only active on the market for one of the two products concerned. In doing so the Commission has taken account of the real impact of the unlawful conduct of each undertaking on competition, particularly as there is a considerable disparity between the sizes of the undertakings that committed the unlawful behaviour. Because of the different varieties in which HP and PBS can be sold, sales based on the total value amount appear a more reliable indicator of operators' capacities. These figures show that Solvay was the largest market operator in the EEA, with a share of the combined sales of around ***[20-30%]***. It is therefore placed in a first category. Degussa, with a market share of ***[12-20%]***, is placed in a second category. FMC Foret, EKA, Atofina, Kemira and Ausimont with shares of ***[8-12%]*** respectively, are placed in a third category. Finally, Caffaro, with a market share in PBS of around ***[5-10%]***% in its last full year, 1998, and a share of sales with regard to the combined HP and PBS market of ***[1-5%]*** is placed in a fourth category.

(461) In the case of Caffaro, the Commission takes into account, in the light of the facts as established, and despite the several links existing between the two products, that it has not been established that Caffaro was aware or could necessarily have had knowledge of the overall scheme of the anti-competitive arrangements. Consequently, given the circumstances of the case, a reduction of 25% is applied to the starting amount of the fine calculated for Caffaro.

(462) On this basis, the appropriate starting amounts for those undertakings that will receive a fine are as follows:

First Category (Solvay)	EUR 50 million

Second Category (Degussa)	EUR	30 million
Third category (FMC Corporation/FMC Foret, Akzo Nobel/Akzo Nobel Chemicals Holding/EKA Chemicals, Total/ Elf Aquitaine/Atofina, Kemira and ***[Deleted]***Ausimont (now Solvay Solexis)	EUR	20 million
Fourth category (Snia/Caffaro)	EUR	1.875 million

8.1.6. Sufficient deterrence

(463) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking. In this respect, the Commission notes that in 2005, the most recent financial year preceding this Decision, the world-wide turnover of Total was EUR 143 billion, that of Elf Aquitaine EUR 120 billion, that of Akzo EUR 13,000 million, that of Degussa EUR 11,750 million, that of Solvay EUR 8,560 million ***[deleted]***. Accordingly, the Commission considers it appropriate to multiply the fine for Total by a factor of 3, that is based on the size of the parent companies, Elf Aquitaine and Total, which each have a turnover well above EUR 100 billion. Akzo and Degussa, with a turnover each of around 10% of that of Total are still very large undertakings, with a turnover well exceeding EUR 10,000 million. It is therefore considered it appropriate to multiply the fine for these undertakings by a factor of 1.75. In view of the fact that Solvay had a turnover of EUR 8,560 million, the Commission considers it appropriate to multiply the fine for Solvay by a factor of 1.5. ***[deleted]***. Given that Ausimont was transferred to a different undertaking, in the circumstances of the case, the multiplier applies to the fine to be attributed to ***[deleted]*** only.

(464) Total/Elf Aquitaine submitted that it is not appropriate and, according to Arkema would be discriminatory[403], to take the world-wide turnover of Total and/or Elf Aquitaine for the purpose of increasing the fine for Atofina to be made provision in order to ensure sufficient deterrence, unless the direct involvement of the parent companies in the anti-competitive agreements is demonstrated. They argued that the Court of First Instance (*rectius* the Court of Justice) has reduced a fine where it was the result of a simple calculation based on global turnover, particularly where the goods concerned only represented a small proportion of global turnover[404]. Atofina further supported this approach by reference to the Commission decisions *Pre-insulated Pipes*[405] and *Carbonless Paper*[406] which, they allege, demonstrate that where the responsibility for the infringement lies with the subsidiary alone and not with the group, no multiplier is justified.

---

403 See section 3.2.3. of Arkema's reply to the Statement of Objections.

404 See judgment of the European Court of Justice of 7 June 1983 in joined cases 100 to 103/80: *SA Musique Diffusion Francaise and others v Commission*, ECR 1983, page 1825, paragraph 121.

405 Commission Decision of 21 October 1998, case IV/35.691: *Preinsulated Pipes*, OJ L 24 of 30.1.1999, page 1 f., paragraphs 155-156 and 169.

406 Commission Decision of 20 December 2001, case COMP/36.212: *Carbonless Paper*, OJ L 115 of 21.4.2004, page 1 f., paragraphs 364 and 411.

(465) The Commission disagrees. If the Commission were to decide, on the basis of this argument, that a lower fine should be imposed on Atofina than is justified by the size of the undertaking of which it is part, a very large undertaking involved in one or several cartels could escape from high fines by creating small subsidiaries with little turnover to engage them in illegal behaviour. Imposing a sufficiently high fine on very large undertakings for each infringement committed by any entity of such undertaking deters such behaviour. Regarding the claim concerning the principle of non-discrimination between multinational companies and others, it suffices to refer to the fact that the rules laid down in Article 81 of the Treaty apply equally to all companies, regardless of their size

(466) As a result, the starting amounts of the fines to be imposed on each undertaking become as follows:

- Total/Elf Aquitaine/Atofina	EUR	60 million;
- Solvay	EUR	75 million;
- Degussa	EUR	52.5 million;
- Akzo Nobel/Akzo Nobel Chemicals Holding/EKA Chemicals	EUR	35 million;
- ***[deleted]***	EUR	25 million;
[deleted] Ausimont (now Solvay Solexis) is liable for	EUR	20 million
- FMC Corporation/FMC Foret	EUR	20 million;
- Kemira	EUR	20 million;
- Snia/Caffaro	EUR	1.875 million.

8.2. Duration of the infringement

(467) As related in section 6.6, Degussa, Solvay and Kemira participated in the infringement at least from 31 January 1994 to 31 December 2000, a period of six years and eleven months. All these undertakings committed an infringement of long duration. The starting amounts of the fines should consequently be increased by 10 % for each full year of infringement. They should be further increased by 5 % for any remaining period of 6 months or more but less than a year. This leads to a percentage increase of the starting amount for each undertaking of 65 %. EKA participated in the infringement at least from 31 January 1994 until 31 December 1999, a period of five years and eleven months, while Atofina and Ausimont participated in the infringement at least from 12 May 1995 until 31 December 2000, a period of five years and seven months. According to the criterion set out above, this leads to a percentage increase of the starting amount for each undertaking of 55%. FMC Foret participated in the infringement at least from 29 May 1997 until 13 December 1999, a period of two

years and seven months. According to the criterion set out above, this leads to a percentage increase of the starting amount of 25 %. Caffaro participated in the infringement at least from 29 May 1997 until 31 December 1998, a period of one year and seven months. According to the criterion set out above, this leads to a percentage increase of the starting amount of 15 %.

8.3. Conclusion on the basic amounts

(468) The basic amounts of the fines for each undertaking are therefore as follows:

- Atofina (Arkema)/Elf Aquitaine	EUR	93 million;
Of this amount Total is liable for	EUR	60 million
- Solvay	EUR	123.75 million;
- Degussa	EUR	86.625 million;
- Akzo Nobel / Akzo Nobel Chemicals Holding / EKA Chemicals[407]	EUR	42 million;
- ***[deleted]***	EUR	38.75 million;
[deleted] Ausimont (now Solvay Solexis) is liable for	EUR	31 million
- FMC Corporation/FMC Foret	EUR	25 million;
- Kemira	EUR	33 million;
- Snia/Caffaro	EUR	2.156 million.

9. AGGRAVATING AND ATTENUATING CIRCUMSTANCES

9.1. Aggravating circumstances

9.1.1. Recidivism

(469) At the time the infringement took place, Atofina, Degussa, ***[deleted]*** and Solvay had already been the addressees of previous Commission decisions concerning cartel activities[408]. The fact that the undertakings have repeated the same type of conduct

---

407 As ***[deleted]*** enabled the Commission to trace back the cartel to 31 January 1994, in accordance with point 23 of the Leniency Notice, these elements will not be taken into account when setting the fine, resulting in an increase for duration of 20% instead of 55% for this undertaking.

408 Such decisions include:
As regards Degussa: Commission decision of 23 November 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.907 – *Peroxygen products*, OJ L 35 of 7.2.1985, p.1), Commission decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 – *Polypropylene*, OJ L 230 of 18.8.1986, p.1).
[deleted].

either in the same industry or in different sectors from that in which they had previously incurred penalties, shows that the first penalties did not prompt these undertakings to change their conduct. This constitutes for the Commission an aggravating circumstance. This aggravating circumstance justifies an increase of 50 % in the basic amount of the fine to be imposed on the undertakings mentioned above[409]. A 50% rate is the normal rate employed by the Commission in cases involving recidivism.

(470) In its reply to the Statement of Objections, Solvay submitted that the fact that it may have been the addressee of previous decisions finding a similar infringement should not permit an increase of the fine, mainly because the deterrence would be already guaranteed by the increase of the fine on the basis of the size of the undertaking. Furthermore Solvay argued that an increase on the ground of recidivism would amount to looking backwards and punishing an undertaking for a repetition of its past conduct, that effectively the decision would assume a criminal nature, which is prohibited by Regulation (EC) No 1/2003. Finally the time that has elapsed between the previous Commission decisions in cartel cases, firstly the decision of 1984 for the same products, but also another three decisions fining Solvay for anti-competitive behaviour contrary to Article 85 (now 81) of the Treaty, is too long to constitute the basis of recidivism. Atofina, in turn, stated that the Commission should not be entitled to increase the starting amount of the fine on account of recidivism because, according to it, the kind of infringement as well as the features established by the "peroxigen" decision of 1984 are of a different nature; the other two prohibition decisions quoted by the Commission in the Statement of Objections were addressed to legal persons other than Atofina; finally, applying the notion of recidivism would be excessive considering that the previous decisions were adopted in 1984 and 1988 and concerned facts dating back to more than 20 years before the adoption of the present decision.

(471) The Commission does not share Solvay's and Atofina's opinion. The fact that Solvay repeated the same type of conduct not only in the same sector in which it had previously incurred penalties, but also in different sectors, shows that the first penalties did not prompt Solvay to change its conduct. This constitutes for the Commission an aggravating circumstance. This aggravating circumstance justifies an increase of 50% in the basic amount of the fine to be imposed on Solvay. As regards the remarks by Atofina, the infringement established and punished by the Commission decision of 1984 was contrary to Article 85 (now 81) of the Treaty, that is to say, the same as is established by the present Decision. Therefore, no difference is shown between the two allegedly different kinds of infringement. The same can be said for

---

As regards Solvay: Commission decision of 23 November 1984 quoted (*Peroxygen products*), Commission decision of 23 April 1986 quoted (*Polypropylene*), Commission decision of 27 July 1994 quoted (*PVC II*).
As regards Atochem/Arkema: Commission decision of 23 November 1984 quoted (*Peroxygen products*), Commission decision of 27 July 1994 quoted (*PVC II*).

409 The increase for recidivism applies only to Atofina and not to its parent companies, Elf Aquitaine and Total, as the latter were not in control of Atofina at the time of the previous infringement. The multiplying factor applied to Total, namely 3 is not included in the calculation. Instead a multiplying factor of 1.25, which would have been applied had Atofina been the sole addressee of the Decision (given its worldwide turnover of 5.7 billion EUR in 2005), will be used for the purposes of calculating recidivism. A separate fine will accordingly be addressed to Arkema alone for this amount.

the other decision. As to the addressees of previous decisions, the Commission considers that the legal entities which were addressees of such decisions were and still are part of the Total group, therefore belonging to the same undertaking to which the present decision is addressed. Finally, the two decisions quoted by the Commission as precedents were adopted in 1984 and 1994, respectively. Only one year after the latter decision Atofina again started negotiating anti-competitive arrangements. Thus, the time that elapsed between the previous prohibition decision and the start of new anti-competitive negotiations is not long at all. The arguments of the parties on those points are therefore rejected.

9.2. Attenuating circumstances

9.2.1. Early termination of the infringement

(472) EKA, Solvay, Solexis and Arkema claim that the fact that the infringement was voluntarily terminated before the Commission initiated an investigation should be taken into account as an attenuating circumstance.

(473) Cartel infringements are by their very nature hard-core anti-trust violations. Participants in these infringements normally realise very well that they are engaged in unlawful activities. In the Commission's view, in such cases of deliberate unlawful behaviour, the fact that a company terminates this behaviour before any intervention of the Commission does not merit any particular reward. It means only that the period of infringement of the company concerned will be shorter than it would otherwise have been. In *Graphite Electrodes*, the Court of First Instance confirmed that the fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance[410].

9.2.2. Minor and/or passive role

(474) Kemira, Atofina, Solexis and Caffaro have invoked attenuating circumstances for their minor and/or passive role in the cartel. Chemoxal stated that it did not attend most of the meetings and this shows its minor role.

(475) In general, an exclusively passive or "follow-my-leader" role played by an undertaking in the infringement may, if established, constitute an attenuating circumstance. A passive role implies that the undertaking has adopted a `low profile', that is to say, it did not actively participate in the creation of any anti-competitive agreements.[411] The factors capable of revealing such a role within a cartel include the significantly more sporadic nature of the undertaking's participation in the meetings by comparison with

---

410 See the judgment of Court of First Instance of 29 April 2004 in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, [2004] ECR, p II-1202, at paragraph 341.

411 Judgment of the Court of First Instance in case T-220/00 Cheil Jedang v. Commission, [2003] ECR, p II-2473, paragraph 167.

the ordinary members of the cartel,[412] and also the existence of express declarations to that effect made by representatives of other undertakings which participated in the infringement.[413] In any event, it is necessary to take account of all the relevant circumstances in each particular case.

(476) It is clear from the facts described in the factual part of the present Decision that Caffaro's involvement in the cartel was not comparable with that of the other active members. It is equally apparent that Caffaro's participation in the collusive contacts was significantly more sporadic by comparison with the other members of the cartel and limited to only two meetings relating to PBS. The number of Caffaro's proven anticompetitive contacts is indeed very small and shows a limited involvement in the overall arrangements.

(477) Thus, in the case of Caffaro the Commission will, because of its passive and minor role, reduce the otherwise appropriate figure by 50%.

(478) The same cannot be said for the other competitors that claim to have been small players or to have behaved as followers. The attempts by Kemira, Atofina, Solexis and Chemoxal to portray themselves as minor players and/or mere followers of Degussa and Solvay in the cartel are not convincing. Rather, the evidence in the Commission's file points to their having consistently been ordinary, regular and active participants in the arrangements described in the factual part of the present Decision.

(479) Indeed, Kemira's participation in the collusive contacts with the other producers cannot be considered significantly more sporadic than that of the other members of the cartel. The frequency of Kemira's contacts with the other producers (the company itself admits that Kemira's representatives were present at 31 out of 73 meetings referred to by the Commission in the Statement of Objections) throughout the entire infringement period is incompatible with any notion of a passive or minor role. See, for example, Kemira's presence at fundamental meetings as set out in recitals (106), (134), (141), (143), (156), (171), (180), (187), (199), (211), (215), (222), (239), (247), (255), (264), (273) and (281), where the various topics of the cartel were discussed. Kemira was involved in all collusive price increases reported in section 4.6, including the stages of their preparation, implementation and follow-up. Moreover, the active contribution of the Kemira executives to the overall scheme and the strategy of the cartel, as implemented in the EEA, is fully demonstrated. With regard to Kemira's argument that it was a minor player in Europe, compared with Solvay, Degussa and EKA, the Commission notes that Kemira was the third largest HP producer as well as the third largest PCS producer in the EEA.

(480) Kemira's claim for mitigating factors due to its alleged passive and/or minor role must therefore be rejected.

---

412 Judgment of the Court of First Instance in case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 343.

413 Judgment of the Court of First Instance in case T-317/94 *Weig* v *Commission* [1998] ECR II-1235, paragraph 264.

(481) The same applies to Atofina's argument that it was only a follower as Degussa and Solvay were the real leaders of the cartels. On the contrary, Atofina participated in almost all the multilateral contacts, it organised (and hosted) some of them and fully took part in all the discussions, also formulating several proposals for a market sharing agreement as well as for price fixing arrangements. Therefore Atofina's argument must also be rejected.

(482) Finally, Solexis and Chemoxal claim that they were among the smallest players[414] compared with other producers in the industry. As to Solexis, its aim was to increase its weight on the market by building new capacity. This project was at odds with the market strategy of the larger producers like Degussa. Solexis further claims that it was only present at 13 out of 48 meetings in the period mid-1997 – December 1999 and only at those meetings where it was requested to agree upon proposals already elaborated elsewhere by the largest producers. Chemoxal states that it was absent from a great number of the meetings described in the present Decision.

(483) The Commission observes, however, that Ausimont was represented at at least 29 bilateral or multilateral contacts during the operation of the cartel described in the factual part of the present Decision and, when absent, it was often informed of the outcomes of the main discussions which had taken place in its absence (see for example recital (172)). The same is valid for Chemoxal which, despite the earlier termination of its infringement, was nevertheless present at at least nine of the meetings described in the factual part of the present Decision between 1995 and 1997.

9.2.3. Non-implementation

(484) Caffaro claims that the infringement, or elements thereof, was not effectively implemented, or not implemented at all. First of all, Caffaro claims that no agreement on PBS was reached in Seville and when an agreement was actually reached, in Evian, Caffaro's own increase in PBS price was over two thirds smaller than that of its competitors. On the basis of this reasoning and of the sales figures annexed to the reply to the Statement of Objections, which show that prices went up only slightly, Caffaro concludes that it behaved in a disruptive manner and its transaction prices differed significantly from those of the other participants in the infringement, which is the criterion that, according to the Court of First Instance, justifies a reduction of the fine.

(485) The Commission's conclusion on this point is set out in recital (340), where it is stated that the arrangements, in so far as they pertained to the EEA market, were implemented. They were implemented in particular in respect of the key elements of prices and the control of conversions, even if such implementation may have been less than fully successful in achieving an actual impact on the market.

---

414 The Commission defined for instance Ausimont "one of the smallest producers of HP in Europe" at paragraph 148 of the Statement of Objections.

(486) In the Commission's view, the fact that an undertaking which participated in an infringement or elements thereof with its competitors did not always behave on the market in the manner agreed between them is not a matter which must be taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit[415].

(487) Such an undertaking would have to demonstrate that it systematically and explicitly refrained from applying the restrictive agreements[416]. In this case such proof has not been adduced by Caffaro.

9.2.4. Crisis situation

(488) Atofina, Solvay, Solexis and Caffaro argue that a reduction should be granted in view of the (alleged) fact that the HP and PBS industry was in a crisis situation and companies were in a poor financial condition. They state that during the period of the infringement the European producers often made losses on sales of HP and PBS[417].

(489) The Commission observes that in a free market economy, entrepreneurial risk includes the risk of occasional losses or even bankruptcy. The fact that an undertaking may not happen to make profits on a certain commercial activity is no licence for it to enter into secret collusion with competitors to cheat customers and other competitors.

(490) As a general rule, cartels risk coming into play not when undertakings make large profits but precisely when a sector encounters problems. Therefore, if the reasoning of

---

415 See judgement of the Court of First Instance in *Cascades SA* v *Commission*, cited above, paragraph 230; See also the judgement of the Court of First Instance in *Tokai Carbon Co. Ltd and others* v *Commission*, cited above, paragraph 297, and Judgement of the Court of First Instance in case T-44/00 *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-729 paragraphs 277-278.

416 See judgement of the Court of First Instance in *Mannesmannröhren-Werke AG* v *Commission*, cited above, paragraph 278.

417 See Arkema's written reply to the Statement of Objections, page 48. In the French original: « le secteur du peroxyde d'hydrogène a connu une grave crise de surcapacités au milieu des années 90 entraînant une chute des prix en dessous des coûts variables en 1997 ». See also Solexis reply, in the original Italian, on pages 10 and 85: "nel periodo 1995-1997 (…) i prezzi hanno subito una riduzione vertiginosa fino ad arrivare, per alcuni clienti, al di sotto dei costi variabili", "nel periodo immediatamente precedente l'adesione di Ausimont all'accordo sui prezzi prima nel perossido d'idrogeno, poi nei persali [i.e. according to the company, from 1994 to 1997], il settore era caratterizzato da un significativo eccesso di capacità produttiva rispetto alla domanda (…). Il prezzo del perossido d'idrogeno è passato da 2000 DM/t nel 1994 a 325 DM/t nell'estate del 1997 (450 DM/t il prezzo medio del 1997). Ad essere danneggiate in misura maggiore erano proprio quelle imprese che, come Ausimont, avevano investito in nuova capacità produttiva e dovevano pertanto recuperare tali investimenti in un momento in cui per alcuni clienti i prezzi offerti non consentivano neppure il recupero dei costi variabili". ***[name of company]***'s reply at pages 139-40 reads as follows: "the Commission [should take] into account as a mitigating circumstance the crisis situation of the European HP industry at the time of the infringement". (…) "the substantial excess capacity led to a crisis in the HP industry, with prices dropping below average total costs for most of 1995 and 1996, and some producers were even selling at prices below variable costs by the third quarter of 1997". Finally Caffaro stated in the original Italian: "il segmento del PBS è in profonda crisi".

Atofina, Solvay and Solexis were followed, fines on cartels would have to be reduced in virtually all cases. In *Graphite Electrodes*, the Court of First Instance confirmed that the Commission is not required to regard as an attenuating circumstance the poor financial state of the sector in question[418].

9.2.5. Absence of benefit

(491) To the extent that Caffaro submits that its fine should be reduced because it did not gain any benefit from the arrangements, it suffices to note that for an undertaking to be classified as a perpetrator of an infringement it is not necessary for it to have derived any economic advantage from its participation in the cartel in question[419]. The Court of First Instance has recently stated that "*[t]he 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*"[420]. Therefore, the gravity of Caffaro's anti-competitive behaviour is in no way attenuated by the fact that the profits derived may have been negligible.

(492) The Commission thus rejects Caffaro's claim regarding absence of benefit as a mitigating factor.

9.2.6. Cooperation outside the 2002 Leniency Notice

(493) Certain undertakings (Solexis, Kemira, Chemoxal and Caffaro) requested that in so far as their co-operation was not taken into account under the Leniency Notice, their co-operation be considered outside the Leniency Notice. According to the Guidelines on the method of setting fines in antitrust cases, the Commission may reduce the basic amount of the fines on the basis of attenuating circumstances, such as effective cooperation of the undertakings outside the scope of the Leniency Notice.

(494) In this case the Commission has assessed, in line with the case-law, whether the co-operation of any of the undertakings concerned enabled the Commission to establish the infringement more easily. Indeed, an assessment of co-operation in a case where the Leniency Notice applies is in principle to be carried out under that Notice[421]. That assessment has in fact been carried out in application of the Leniency Notice (see sections 10.5 and 10.6).

---

418 Judgment of Court of First Instance in joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon and Others v Commission*, quoted in footnote 410, at paragraph 345.

419 Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, at paragraph 141, confirmed by the Court of First Instance with judgment in case T-71/03 et al. *Tokai Carbon and others*, quoted in footnote 349, at paragraph 81.

420 Judgment of 25 October 2005 of Court of First Instance in case T-38/02, *Danone v Commission*, quoted in footnote350, at paragraph 148. The official French text reads as follows : « La mise en œuvre, fût-elle partielle, d'un accord dont l'objet est anticoncurrentiel suffit à écarter la possibilité de conclure à une absence d'impact dudit accord sur le marché ».

421 See judgment of the Court of First Instance of 15 March 2006 in case T-15/02 *BASF AG v Commission*, (not yet reported), at paragraph 586. See also judgment of the Court of First Instance of 6 December 2005 in case T-48/02 *Brouwerij Haacht v Commission*, not yet reported (see OJ C 36 of 11.02.2006, p.60), at paragraph 104 and the case law cited therein.

(495) The Commission considers, taking into account the arguments of the parties, the very limited scope and value of their cooperation and the contestation of facts they have made beyond this limited cooperation, that no other circumstances are present that would lead to a reduction of fines outside the Leniency Notice, which, in secret cartel cases, could in any event only be of an exceptional nature (see the Commission's decision in the *Raw Tobacco Italy* case[422]).

9.3. Conclusion on aggravating and attenuating circumstances

(496) As a result of aggravating circumstances, the basic amount of the fine to be imposed on Arkema, Degussa, ***[deleted]*** and Solvay should be increased in each case by 50 % to EUR 112.38 million, EUR 129.938 million, EUR 58.125 million and EUR 185.625 million, respectively, and, as a result of attenuating circumstances, the basic amount of the fine to be imposed on Caffaro should be reduced by 50% to EUR 1.078 million.

9.4. Application of the 10% turnover limit

(497) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking is not to exceed 10% of its turnover. As regards the 10% ceiling, if "*several addressees constitute the "undertaking", that is the economic entity responsible for the infringement penalised, […] at the date when the decision is adopted, […] the ceiling can be calculated on the basis of the overall turnover of that undertaking, that is to say, of all its constituent parts taken together. By contrast, if that economic unit has subsequently broken up, each addressee of the decision is entitled to have the ceiling in question applied individually to it*"[423].

(498) The world-wide annual turnover achieved by Solexis in 2005 was EUR 256,190,307[424]. The fine imposed on Solexis must therefore not exceed EUR 25.619 million.

10. APPLICATION OF THE 2002 LENIENCY NOTICE

(499) Degussa, EKA, Arkema, Solvay, Solexis and Kemira submitted applications under the Leniency Notice. They co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment provided for in the Leniency Notice.

(500) As concerns EKA and Arkema, it is noted that the leniency applications submitted by entities from those respective groups are considered in the circumstances of this case also to cover the other addressees of the same undertaking, given that indeed they belong to the economic entity held liable for the infringement and that there are no grounds for refusing to extend the beneficial treatment to them.

---

422 Commission decision of 20 October 2005, available on the Commission's website.

423 See judgment *Tokai Carbon and Co* v *Commission*, cited in footnote 349, paragraph 390.

424 See Solexis' response of 10 March 2006 to request for information letter.

10.1. Degussa

(501) Degussa was the first European producer of HP and persalts to inform the Commission of the existence of a cartel in the HP market as well as in the HP-linked PBS market. By letter dated 13 December 2002, Degussa produced the evidence for both products and on 27 January 2003 the Commission granted Degussa conditional immunity from fines in accordance with point 15 of the Leniency Notice on the basis of the information provided on 13 December 2002.

(502) Following the application under the Leniency Notice on 13 December 2002 the Commission was able to carry out inspections under Article 14(3) of Regulation Nr. 17 on 25 and 26 March 2003. Degussa has co-operated fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provided the Commission with all evidence available to it relating to the suspected infringement, giving details of meetings between competitors as concerns both products and enabling the Commission to prove the existence of a cartel for both products. Degussa ended its involvement in the suspected infringement no later than the time at which it submitted evidence under point 8(a) of the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement. Hence, Degussa qualifies for a full immunity from the fine that would otherwise have been imposed on it.

10.2. EKA

(503) EKA was the second undertaking to approach the Commission under the Leniency Notice, on 29 March 2003, and the first undertaking to meet the requirements of point 21 thereof, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission.

(504) EKA terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. The Commission therefore will apply a reduction of fines in the band of 30-50%.

(505) In the assessment of the level of reduction within the band of 30-50%, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission. The timing of EKA's leniency application on 29 March 2003 was early after the inspections. EKA voluntarily submitted evidence of the infringement in the week following the Commission's inspections without itself undergoing such inspections.

(506) ***[deleted]***.

(507) On the basis of the foregoing, the Commission grants EKA a 40% reduction of the fine that would otherwise have been imposed on it for the period from 14 October 1997 until 31 December 1999.

(508) As noted, EKA's evidence enabled the Commission to trace the existence of the cartel back to 31 January 1994. EKA's evidence for the period of the infringement before 14 October 1997 related to facts previously unknown to the Commission which had a direct bearing on the duration of the suspected cartel. In accordance with point 23 of the Leniency Notice, the Commission will not take these elements into account for the purposes of setting the amount of the fine to be imposed on EKA.

10.3. Atofina (Arkema)

(509) Atofina, (now Arkema), was the second undertaking to meet the requirements of point 21 of the Leniency Notice, as it provided the Commission with evidence which represents significant added value with respect to the evidence already in the Commission's possession at the time of its submission and, to the Commission's knowledge, Atofina terminated its involvement in the infringement no later than the time at which it submitted the evidence. It qualifies, therefore, under the second indent of point 23 (b) of the Leniency Notice, for a reduction of 20-30% of the fine. In the assessment of the level of reduction within the band of 20-30%, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value.

(510) On 3 April 2003, shortly after its premises had been inspected under Article 14 of Regulation No 17, Atofina submitted its application under the Leniency Notice. ***[deleted]*** Atofina supplemented its initial submission only on 26 May 2003 ***[deleted]***.

(511) In its reply to the Statement of Objections Arkema does not contest that it was the third undertaking to cooperate with the Commission (after Degussa and EKA) but claims that the evidence it submitted to the Commission was of a higher added value than the one produced by EKA, in terms of both quantity and quality, justifying a reduction of fine by 50%.

(512) The Commission rejects Arkema's claim. Pursuant to the Leniency Notice (points 21 and 22), in order to get a reduction in fines an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession. It is clear from point 23 of the Leniency Notice that the time of the submission of any submission that meets the threshold of significant added value is determinant for the band of reduction. The evidence submitted is compared with the evidence already in Commission's possession at the time such evidence is provided. Therefore, in order to establish whether this submission represents significant added value, only the elements already in the Commission's file and the evidence provided by the applicant are taken into account. The Commission has already explained that it considers that the submission of EKA of 29 March 2003, together with the corporate statement of 31 March 2003, met the threshold of significant added value with respect to the evidence

already in the Commission's possession, as set out in point 21 of the Leniency Notice. This results in EKA being placed in the first band pursuant to point 23 of the Leniency Notice. This means that the value of Atofina's submissions can only be relevant for establishing a possible level of reduction within the subsequent band.

(513) In the assessment of the level of reduction within the band of 20-30%, the Commission takes into account the time at which the evidence of significant added value was submitted and the extent to which it represents such value. It may also take into account the extent and continuity of any cooperation after the submission. As to the timing of Atofina's submissions, the first submission by Atofina containing significant added value occurred on 3 April 2003, only one week after the inspections had taken place. However, additional explanations and new documents were not provided until 26 May 2003. The documents ***[deleted]*** enabled the Commission to corroborate the information already provided by Degussa and are used exhaustively in the Decision.

(514) Based on the foregoing the Commission grants Arkema a 30% reduction of the fine that would otherwise have been imposed on it.

10.4. Solvay

(515) Solvay was the third undertaking to meet the requirements of point 21 of the Leniency Notice. On 4 April 2003, also soon after its premises had been inspected under Article 14 of Regulation No 17, on 25 March 2003, Solvay submitted an application under the Leniency Notice ***[deleted]*** which was completed during a meeting on 9 April 2003, ***[deleted]***. On 17 May 2004 Solvay provided the Commission with an additional statement. The meeting of 4 April 2003 took place upon Solvay's request for a meeting dated 3 April 2003. The submission on 4 April 2003 met the requirements of point 21 of the Leniency Notice, as Solvay provided the Commission with evidence representing significant added value with respect to the evidence already in the Commission's possession. To the Commission's knowledge, Solvay terminated its involvement in the infringement no later than the time at which it submitted the evidence.

(516) Solvay submits that it contacted the Commission by telephone on the morning of 3 April 2003 to inform it that Solvay wished to make an application under the Leniency Notice. Its external legal advisers confirmed this in writing the same day and requested a meeting the same day or 4 April 2003 at the latest. Solvay stated that it was only offered a meeting for 4 April 2003. At this meeting, Solvay provided the information constituting its leniency application. The application by Atofina, made on 3 April 2003 at 15:50hrs enclosed thirteen documents which, according to Solvay, were illegible and/or unintelligible without a transcript or other form of explanation, so that the Commission was unable to make use of any of these documents until a full explanation was provided, on 26 May 2003, that is to say, after Solvay's leniency application was made.

(517) Solvay submits that, according to the wording of the Leniency Notice (points 21 and 22) and the case law of the Court of Justice (as well as decisions by the Commission such as in *Austrian Banks*[425]), a decisive factor in determining whether an application for leniency qualifies for a reduction under Section B of the Leniency Notice is the objective quality of the information submitted in terms of the extent to which it is useful to the Commission[426], to be assessed as at the date it is submitted against the background of the information already in the Commission's possession at that time.

(518) Solvay concludes that its application for leniency was properly made on the morning of 3 April 2003 and provided significant added value in relation to both HP and PBS (while Degussa would only have provided information on HP but few useful elements on PBS). Solvay also stated that EKA did not provide significant added value in relation to either HP or PBS. Furthermore, Solvay was ready to meet with the Commission on 3 April 2003, but was only offered an appointment for the following day and Atofina did not provide significant added value before 26 May 2003. Therefore the Commission was wrong in finding that Solvay ranks only fourth in the 'leniency ranking', since it actually was the first undertaking to provide significant added value in relation to the cartel concerning HP and PBS. It therefore qualifies, under Section B of the Leniency Notice, for the maximum reduction (50%) of any fine imposed in relation to the two products.

(519) The Commission refers to recital (512), concerning Atofina, which applies *mutatis mutandis* to the arguments submitted by Solvay.

(520) The Commission has already explained that it considers that EKA's submission of 29 March 2003, together with the corporate statement of 31 March 2003 represented significant added value with respect to the evidence in the Commission's possession, according to point 21 of the Leniency Notice. The submission of Atofina of 3 April 2003 also represented significant added value in accordance with point 21 of the Leniency Notice. The first submission by Solvay only occurred on 4 April 2003, when it submitted evidence constituting significant added value concerning an infringement in the HP and PBS industry. For factual details, see recitals (68)-(70). In particular, in relation to the claim that Solvay's application preceded that of Atofina, it is noted that neither the telephone call of the morning of 3 April 2003 nor the fax sent at midday contained any information about the infringement.

(521) The meeting of 4 April 2003 was scheduled in agreement with Solvay. In any case, as set out in recital (69), on 3 April 2003 at 15.50hrs (that is before Solvay's request of 17.24hrs) Atofina had already sent its leniency application by fax to the Commission.

---

425 The party quoted from the paragraph 550 of the Commission decision *Austrian Banks – 'Lombard Club'* of 11 June 2002, in OJ (2004) L 56/1, which reads as follows: "The added value is easy to determine: it is the sum of, first, any facts that were not ascertained from the inspections, or from the documents that were provided or ought to have been provided in accordance with the duty to supply information (new facts), and, second, any explanations that facilitated the Commission's understanding of the case. Only new facts and explanations that assist better comprehension will make it easier for the Commission to establish the infringement".

426 See judgment *Tokai* v *Commission*, cited in footnote 349, paragraph 390.

(522) Therefore the Commission rejects Solvay's argument.

(523) As already stated in recital (513), the time, scope and value of the submissions have to be taken into account when establishing the level of the reduction within the band assigned. The Commission considers that, as to the timing, the first submission by Solvay containing significant added value occurred on 4 April 2003. An additional statement was submitted on 17 May 2004. As regards the scope, the documents concern the Europe-wide cartel for both products. As regards the value, basically Solvay submitted evidence which enabled the Commission to corroborate certain of the information already provided by Degussa and Atofina and which is used widely in the present Decision.

(524) Based on the foregoing, the Commission grants Solvay a 10% reduction of the fine that would otherwise have been imposed on it.

10.5. Solexis

(525) On 7 July 2003 Solexis submitted an application under the Leniency Notice including a statement by the company regarding both HP and PBS.

(526) The Commission has examined Solexis' submission, applying its practice of examining each submission of evidence in the chronological order in which submissions are made and evaluating for each submission whether it, together with the value accorded to any previous submissions by the same applicant, constitutes significant added value within the meaning of point 21 of the Leniency Notice. Based on these criteria the Commission has concluded that the evidence submitted by Solexis does not represent significant added value within the meaning of the Leniency Notice. This is because Solexis' submission of 7 July 2003 merely included for the time period 1997 until 1999 information ***[deleted]*** already known to the Commission prior to Solexis' leniency application.

10.6. Kemira

(527) On 18 September 2003 Kemira submitted an application under the Leniency Notice for HP regarding sales in Northern Europe including a corporate statement with 11 annexes.

(528) The Commission has examined Kemira's submission, applying its practice of examining each submission of evidence in the chronological order in which submissions have been made and evaluating for each submission whether it, together with the value accorded to any previous submissions by the same applicant, constitutes significant added value within the meaning of point 21 of the Leniency Notice. Based on these criteria the Commission has concluded that the evidence submitted by Kemira did not represent significant added value within the meaning of the Leniency Notice. The information from Kemira only relates to a small part of the market whilst the investigation of the Commission covers the EEA-market. Furthermore the facts

provided by Kemira were already known to the Commission prior to Kemira's leniency application.

10.7. Conclusion on the application of the 2002 Leniency Notice

(529) In conclusion, Degussa, EKA, Arkema and Solvay should be granted the following reductions of the fines that would otherwise have been imposed on them:

- Degussa	immunity
- Akzo Nobel / Akzo Nobel Chemicals Holding / EKA Chemicals	40 %
- Total / Elf Aquitaine / Atofina (now Arkema)	30 %
- Solvay	10 %

11. THE AMOUNTS OF THE FINES IMPOSED IN THIS PROCEEDING

(530) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

(a) Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and EKA Chemicals AB, jointly and severally: EUR 25.2 million;

(b) Degussa AG: EUR 0;

(c) ***[deleted]***: EUR 58.125 million, of which EUR 25.619 million jointly and severally with Solvay Solexis SpA;

(d) FMC Corporation and FMC Foret S.A., jointly and severally: EUR 25 million;

(e) Kemira OYJ: EUR 33 million;

(f) L'Air Liquide SA and Chemoxal SA: EUR 0;

(g) Snia SpA and Caffaro Srl, jointly and severally: EUR 1.078 million;

(h) Solvay SA/NV: EUR 167.062 million;

(i) Arkema SA: EUR 78.663 million, of which EUR 42 million jointly and severally with Total SA and EUR 65.1 million jointly and severally with Elf Aquitaine SA.

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings have infringed Article 81(1) of the Treaty and Article 53 of the EEA Agreement by participating, for the periods indicated, in a single and continuous infringement regarding hydrogen peroxide and sodium perborate, covering the whole EEA territory, which consisted mainly of exchanges between competitors of information on prices and sales volumes, agreements on prices, agreements on reduction of production capacity in the EEA and monitoring of the anti-competitive arrangements:

(a) Akzo Nobel NV, from 25 February 1994 until 31 December 1999;

(b) Akzo Nobel Chemicals Holding AB, from 31 January 1994 until 31 December 1999;

(c) EKA Chemicals AB, from 31 January 1994 until 31 December 1999;

(d) Degussa AG, from 31 January 1994 until 31 December 2000;

(e) ***[deleted]***;

(f) FMC Corporation, from 29 May 1997 until 13 December 1999;

(g) FMC Foret S.A., from 29 May 1997 until 13 December 1999;

(h) Kemira OYJ, from 31 January 1994 until 31 December 2000;

(i) L'Air Liquide SA, from 12 May 1995 until 31 December 1997;

(j) Chemoxal SA, from 12 May 1995 until 31 December 1997;

(k) Snia SpA, from 29 May 1997 until 31 December 1998;

(l) Caffaro Srl, from 29 May 1997 until 31 December 1998;

(m) Solvay SA/NV, from 31 January 1994 until 31 December 2000;

(n) Solvay Solexis SpA, from 12 May 1995 until 31 December 2000;

(o) Total SA, from 30 April 2000 until 31 December 2000;

(p) Elf Aquitaine SA, from 12 May 1995 until 31 December 2000;

(q) Arkema SA, from 12 May 1995 until 31 December 2000.

Article 2

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

(a) Akzo Nobel NV, Akzo Nobel Chemicals Holding AB and EKA Chemicals AB, jointly and severally: EUR 25.2 million;

(b) Degussa AG: EUR 0;

(c) ***[deleted]***: EUR 58.125 million, of which EUR 25.619 million jointly and severally with Solvay Solexis SpA;

(d) FMC Corporation and FMC Foret S.A., jointly and severally: EUR 25 million;

(e) Kemira OYJ: EUR 33 million;

(f) L'Air Liquide SA and Chemoxal SA: EUR 0;

(g) Snia SpA and Caffaro Srl, jointly and severally: EUR 1.078 million;

(h) Solvay SA/NV: EUR 167.062 million;

(i) Arkema SA: EUR 78.663 million, of which EUR 42 million jointly and severally with Total SA and EUR 65.1 million jointly and severally with Elf Aquitaine SA.

The fines shall be paid in Euros, within three months of the date of the notification of this Decision, to the following account:

Account N°

375-1017300-43 of the European Commission with:

ING - Agence Bruxelles-Européenne, Rond-Point Schuman, 5 B-1040 Brussels

(Code SWIFT BBRUBEBB – Code IBAN BE66 3751 0173 0043)

After 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.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, in so far 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:

AKZO NOBEL NV
Velperweg 76
NL - 6824 BM ARNHEM

AKZO NOBEL CHEMICALS HOLDING AB
P.O. BOX 11500
SE – 10061 STOCKHOLM

ARKEMA SA
4-8, cours Michelet
F – 92800 PUTEAUX

CAFFARO Srl
Via Borgonuovo, 14
I – 20121 MILANO

CHEMOXAL SA
75, Quai d'Orsay
F – 75007 PARIS

DEGUSSA AG
Bennigsenplatz, 1
D - 40474 DÜSSELDORF

[deleted]

EKA CHEMICALS AB
SE – 44580 BOHUS

ELF AQUITAINE SA
2, place de la Coupole
La Défense 6
F – 92078 Paris La Défense Cedex

FMC Corporation
1735 Market Street
US – PHILADELPHIA, PA 19103

FMC Foret SA
Plaza Xavier Cugat, 2 - Edificio C, planta 3
Parque de Oficinas Sant Cugat Nord
E - 08174 SANT CUGAT DEL VALLÉS (BARCELONA)

KEMIRA OYJ
Porkkalankatu, 3 - P.O. Box 330
FIN - 00101 HELSINKI

L'AIR LIQUIDE S.A.
75, Quai d'Orsay
F – 75321 PARIS

SNIA SpA
Via Borgonuovo, 14

I – 20121 MILANO

SOLVAY SA/NV
Rue du Prince Albert, 33
B – 1050 BRUXELLES/BRUSSEL

SOLVAY SOLEXIS SpA
Via Turati, 12
I – 20121 MILANO

TOTAL S.A.
2 Place de la Coupole
La Défense 6
F - 92078 Paris La Défense Cedex

This Decision shall be enforceable pursuant to Article 256 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 03.05.2006

For the Commission

Neelie Kroes
Member of the Commission