



COMMISSION OF THE EUROPEAN COMMUNITIES

CONFIDENTIAL

COMMISSION DECISION

Relating to a proceeding under Article 81 of the Treaty establishing the European Community and of Article 53 of the Agreement on the European Economic Area

Case No COMP/F/38.638 – Butadiene Rubber/Emulsion Styrene Butadiene Rubber (BR/ESBR)

(only the English, German, Italian and Polish versions are authentic)

(Communication of Ms. N. Kroes)

I – SUMMARY OF THE INFRINGEMENT

- (1) The addressees of this draft Decision participated in a single and continuous infringement of Article 81 of the EC Treaty and Article 53 of the EEA Agreement in the synthetic rubber industry involving two products:
 - Butadiene Rubber (BR); and
 - Emulsion Styrene Butadiene Rubber (ESBR).
- (2) The infringement's main features included: agreeing on price targets for the products, sharing customers by non-aggression agreements and exchanging sensitive commercial information relating to prices, competitors and customers.

ADDRESSEES AND DURATION OF THE INFRINGEMENT

- (3) The Decision is addressed to 13 legal entities (belonging to 6 undertakings), which have participated in the infringement (some entities are held liable as parent companies):
 - (a) Bayer AG from 20 May 1996 to 28 November 2002;

- (b) The Dow Chemical Company from 1 July 1996 to 28 November 2002. Dow Deutschland Inc. from 1 July 1996 to 27 November 2001. Dow Deutschland Anlagengesellschaft mbH (formerly Dow Deutschland GmbH & Co. OHG) from 22 February 2001 to 28 February 2002. Dow Europe GmbH from 26 November 2001 to 28 November 2002;
- (c) Eni S.p.A. and Polimeri Europa S.p.A. from 20 May 1996 to 28 November 2002;
- (d) Shell Petroleum N.V., Shell Nederland B.V. and Shell Nederland Chemie B.V. from 20 May 1996 to 31 May 1999;
- (e) Unipetrol as and Kaucuk as from 16 November 1999 to 28 November 2002;
- (f) Trade-Stomil Ltd from 16 November 1999 to 22 February 2000.

THE BR/ESBR INDUSTRY

- (4) Both BR and ESBR are synthetic rubbers primarily used in the tyre production. Other applications include golf balls and soles for shoes.
- (5) The investigation showed that the cartel covered the whole or the large majority of the EEA. The 2001 combined EEA market value for BR and ESBR was at least € 550 million.

PROCEDURE

- (6) [...], the German company Bayer informed the Commission of the existence of cartels for BR and ESBR and expressed the wish to cooperate with the Commission under the 2002 Leniency Notice. Bayer provided the Commission with written statements and certain material evidence that enabled the carrying out of an inspection in March 2003 at the premises of Dow.
- (7) About [...] months after the inspection Dow submitted a successful application for reduction of fines between 30 % and 50 %.
- (8) On 7 June 2005 the Commission initiated proceedings in this case, and adopted a first Statement of Objections which was notified to the addressees of the present preliminary draft Decision (with the exception of Unipetrol as) as well as Chemical Company Dwory S.A., Tavorex s.r.o and Syndial. The Statement of Objections was never notified to Tavorex, following the liquidation of that company. The procedure against Tavorex has since been closed.
- (9) [...] a second Statement of Objections was adopted on 6 April 2006.
- (10) An Oral Hearing was held on 22 June 2006.

FUNCTIONING OF THE CARTEL

- (11) The Commission sets the starting date with the meeting of 20 May 1996, as this is the first anti-competitive meeting for which the Commission has documentary evidence and confirmation from more than one of the participants. The end of the cartel is set at 28 November 2002, which is the date of the discussions where it was decided to end the cartel.
- (12) The anti-competitive arrangements took place in the margin of the meetings of the European Synthetic Rubber Association (ESRA). At the surroundings of some but not all of the ESRA meetings, typically during dinner, at the bar, on the way to the dinner, at the hotel room of one of the participants or at a specifically hired conference room, the companies concluded price targets for the products in the form of target prices or roll-over prices for the following quarter, shared customers by non-aggression agreements and exchanging sensitive commercial information relating to prices, competitors and customers.

II – FINES

BASIC AMOUNT

Gravity

- (13) Regarding the gravity of the infringement, impact on the market and its geographic scope, the infringement must be qualified as very serious.

Differential treatment

- (14) To reflect the different turnovers of the 6 undertakings in BR and ESBR in 2001 (year before the termination of the cartel), they have been divided into 5 groups.
- (15) Eni and Bayer with EEA turnover in 2001 of € 164.9 and 148.8 million respectively for BR/ESBR products are placed in the first category. Dow with BR/ESBR EEA turnover in 2001 of € 126.9 million has been placed in the second category. Shell with BR/ESBR turnover in 1998 (Shell sold its BR/ESBR assets in 1999) of € 86.7 million has been placed in the third category. Unipetrol with an ESBR turnover in 2001 of € 40.8 million is placed in a fourth category, while Stomil with an ESBR turnover in 1999 (Stomil stopped participating in the cartel in 2000) of € 16.4 million is placed in a fifth category.

Sufficient deterrence

- (16) In order to set the amount of the fine at a level which ensures that it has sufficient deterrent effect the Commission considers it appropriate to apply a multiplication factor to the fines imposed. The Commission notes that in 2005, the most recent financial year preceding this Decision, the total turnovers of the undertakings were as follows: Shell: € 246.5 billion; Eni: € 73.7 billion; Dow € 37.2 billion; Bayer € 27.4 billions; Unipetrol € 2.7 billion and Stomil € 38 million. Accordingly, the Commission considers it appropriate to apply a multiplication factor for Bayer, Dow, Eni and Shell. For Unipetrol and Stomil the Commission proposes not to apply a multiplication factor.

Duration

- (17) Individual multiplying factors will be applied according to the duration of the infringement by each company as set out at paragraph (3) (a) – (f) above.

AGGRAVATING CIRCUMSTANCES

Repeated infringements

- (18) At the time the infringement took place, Bayer, Eni and Shell had already been subject to previous Commission prohibition decisions for cartel activities.¹ This justifies an increase in the basic amount of the fine to be imposed on these undertakings.

ATTENUATING CIRCUMSTANCES

- (19) Several undertakings claimed some or all of the following attenuating circumstances: a minor/passive role, the absence of an effective implementation of the practices, the implementation of compliance programs, and absence of benefit. These claims are all rejected as being unfounded.
- (20) Claims for an attenuating circumstance based on cooperation outside the 2002 Leniency Notice have been rejected, since no particular circumstances have occurred which would justify such a measure.
- (21) Although Shell did not formally apply for leniency, its cooperation was evaluated according to the provisions of the 2002 Leniency Notice.

APPLICATION OF THE 10% TURNOVER LIMIT

¹

Such decisions include:

As regards Shell and Eni: Commission decision 86/398/EEC of 23 April 1986 (*Polypropylene*), OJ L 230 of 18.8.1986, p.1, Commission decision 94/599/EC of 27 July 1994 (*PVC II*). OJ L 239 of 14.9.1994, p.14.

As regards Bayer: Commission decision of 5 December 2001 (*Citric Acid*) OJ L 239 of 6.9.2002 p. 18.

- (22) Where appropriate, the 10% worldwide turnover limit of Article 23 (2) of Regulation No. 1/2003 will be applied to the fines calculated. This results in a reduction of the fine for Stomil.

APPLICATION OF THE 2002 LENIENCY NOTICE

Immunity

- (23) Bayer was the first to inform the Commission of the existence of cartels for BR and ESBR on [...]. On [...] the Commission granted Bayer conditional immunity from fines in accordance with point 8(a) of the Leniency Notice. Bayer 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. Bayer ended its involvement in the suspected infringement no later than the time at which it submitted evidence under the Leniency Notice and did not take steps to coerce other undertakings to participate in the infringement. Hence, Bayer qualifies for a full immunity from fines.

Point 23 (b), first indent (reduction of 30-50 %)

- (24) Dow was the first 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, Dow terminated its involvement in the infringement no later than the time at which it submitted the evidence and its involvement has remained terminated. It qualifies, therefore, under point 23 (b), first indent, for a reduction of 30% - 50% of the fine that would otherwise have been imposed.
- (25) In deciding the percentage reduction, the Commission will take into account that, at the time of Dow's leniency application on [...], the Commission was already in possession of certain key documents obtained in the inspection at their premises [...] months before. [...].

Point 23 (b), second indent (reduction of 20-30 %)

- (26) [...] Although no formal application for leniency has been made, the Commission proposes to consider the cooperation of Shell under the terms of the 2002 Leniency notice.
- (27) The Commission observes that at the time of Shell's cooperation, the information provided did not constitute significant added value with respect to the evidence already in the Commission's possession, as the Commission was already able to prove the infringement in all of its main elements.
- (28) Based on the foregoing, the Commission does not consider that Shell is entitled to a reduction for its cooperation.

III - CLOSURE OF THE PROCEEDINGS

(29) [...].

(30) [....].

IV - CONCLUSION

It is therefore proposed that the Commission by oral procedure:

-takes note of the enclosed opinions of the Advisory Committee on Restrictive practices and monopolies;

-takes note of the enclosed approval of the Legal Service and the positive opinions of DG Enterprise and DG Budget;

-takes note of the report of the Hearing Officer in this case

-adopts the draft Decision attached herewith in the four authentic languages i.e. English, German, Italian and Polish; and

-decides to publish in all official languages a summary of the Decision, from which business secrets has been removed, in the Official Journal of the European Communities.