

LIMITED

COMMISSION DECISION

Relating to proceedings under Article 81 of the EC Treaty and Article 53 of the EEA Agreement

Against Akzo Nobel Chemicals International B.V., Akzo Nobel Polymer Chemicals B.V., Akzo Nobel N.V., Atofina S.A., Degussa UK Holdings Ltd., Peroxid Chemie GmbH & Co. KG, Peroxidos Organicos S.A. and AC Treuhand AG.

Case no COMP/E/-2C.37.857 – Organic Peroxides

(only the English, Spanish and German versions are authentic)

(Communication of Mr. Monti)

INTRODUCTION

- (1) This communication concerns a proposed Decision addressed to five undertakings and/or association of undertakings (8 addressees) for infringement of Article 81(1) of the Treaty and Article 53(1) EEA Agreement. The case concerns a hard-core cartel between the producers of Organic Peroxides (hereafter 'OP'). The Commission has gathered evidence that from January 1971 to December 1999, the cartel participants agreed on market shares, on price targets, implemented price increases, allocated customers and exchanged information on sales volumes and market shares and monitored and enforced their agreement. Some participants participated for shorter periods. The cartel covered the EEA. The Decision deals with the infringement in the Community, as well as in the EEA since 1 January 1994.

1. SUMMARY OF THE CASE

1.1. Origin and procedural steps taken

- (2) The case arose in [REDACTED] when Akzo Nobel Chemicals International B.V., Akzo Nobel Polymer Chemicals B.V., Akzo Nobel N.V. (hereafter Akzo) approached the Commission announcing a statement in which it admitted participating in a cartel to fix prices and allocate quotas in OP and claimed the benefit of the (old 1996) Leniency Notice. A few days later Akzo submitted a first written company statement, which was followed by supplementary information [REDACTED]

- (3) In [REDACTED], shortly after Akzo's initial contact, Atofina (hereafter Atochem) submitted a company statement on the same infringement. Atochem is part of TotalFinaElf and confirmed the essential parts of Akzo's statement.
- (4) After requests for information were sent out in [REDACTED] to Degussa UK Ltd. (hereafter Laporte), the third main participant in the cartel (Laporte plc.'s subsidiary Peroxid Chemie Munich, hereafter 'PC') submitted a company statement and asked as well for the application of the Leniency notice. More requests were sent out to smaller participants of the cartel, which took part during a limited period of time or concerning specific geographical areas. These smaller participants are [REDACTED] Peroxidos Organicos (Perorsa) S.A. of Spain [REDACTED] and AC Treuhand, a Swiss consultancy which helped organising the cartel.
- (5) While replying to the requests for information, [REDACTED]
- (6) On 27 March 2003, the Commission initiated proceedings in the present case and adopted a statement of objections against Akzo, Atochem, Laporte and its subsidiary PC, Perorsa [REDACTED] and AC Treuhand.
- (7) All parties submitted written observations in response to the Commission's objections and attended the oral hearing held on 26 June 2003.
- (8) During the hearing, the parties confirmed most of the essential facts. However, a number of conclusions, especially concerning the duration of the infringement and the responsibility of parent companies for their subsidiaries were contested.
- (9) During that hearing, a new document evidencing an important meeting was distributed by one party. This meeting concerns a period which could be considered as an interruption of meetings and hence as the beginning of a new, shorter, cartel. The hearing officer invited the parties to comment on this, which the parties did after the hearing.
- (10) Initial suspicion against [REDACTED] was not confirmed and the investigation as regards [REDACTED] was not continued. [REDACTED] received a Statement of Objections, but as its involvement is time barred [REDACTED] received a Statement of Objections, but it could not be shown that it was responsible for the behaviour of its 50% joint venture Perorsa. Therefore, neither [REDACTED] nor [REDACTED] will be addressee of the proposed decision.
- (11) The present decision is also addressed to AC Treuhand, a Swiss company offering association management to other companies. AC Treuhand was an active organiser of the cartel.
- (12) A second important aspect of the cartel is its long duration. The cartel started in 1971 and lasted until 1999. A period of tension in the early nineties was not considered to mark the end of an old cartel and the beginning of a new cartel.
- (13) A third important point in the decision is the question to which extent parent companies are responsible for their subsidiaries, which have actively participated in

the 'cartel. This concerns Laporte plc (now renamed Degussa UK), parent company of PC Munich.

1.2. Product, companies involved and nature of the infringement.

- (14) OP are used, amongst others, in the production of rubber and plastic. There is a substantial number of sub-products and applications, such as high-polymer-, cross-linking- and thermoset-organic peroxides. The product is highly explosive, and accidents in factories are frequent.
- (15) The Commission estimates that the annual average Organic Peroxide market value (EEA) during the 1990ies was around € 250 million.
- (16) The Decision is addressed to the following undertakings and/or association of undertakings: Akzo Nobel Chemicals International B.V., Akzo Nobel Polymer Chemicals B.V., Akzo Nobel N.V., Atofina S.A., Degussa UK Holdings Ltd. (formerly Laporte), Peroxid Chemie GmbH & Co. KG, Peroxidos Organicos S.A. (Perorsa) and AC Treuhand AG.
- (17) The infringement consists of the participation of the above-mentioned addressees in a continuing agreement contrary to Article 81(1) EC and (from 1 January 1994) Article 53(1) EEA and covering the whole of the EU and EEA, by which they agreed on market shares, fixed the prices of the product, agreed on and implemented price increases, allocated customers and set up a scheme to monitor and enforce their agreements.
- (18) The duration of the involvement varies: Akzo Nobel Chemicals International B.V., Akzo Nobel Polymer Chemicals B.V. and Akzo Nobel N.V., Atofina S.A., Peroxid Chemie GmbH & Co. KG from 1 January 1971 to 31 December 1999, Degussa UK Holdings from 1 September 1992 to 31 December 1999, Peroxidos Organicos S.A. from 31 December 1975 to 31 December 1999, AC Treuhand from 28 December 1993 to 31 December 1999.
- (19) A main agreement started in 1971, with initially three participating members (Akzo, PC and Atochem (at that time Luperox)). It consisted of sub-arrangements for High Polymer and Thermoset-OP, and was also split up by regional criteria. Regional sub-arrangements concerned France (until 1992), UK (until 1992), Spain (since the end of 1975) and the rest of Europe, following the main principles and rules of the overall agreement. For Cross-linking OP, another sub-arrangement was made in 1983, covering as well most European countries. These sub-arrangements had a substantial overlap with the overall agreement, e.g. the period under question, the mechanisms of mutual control and compensation, the parties, the products, the clients or the acting persons concerned can be found in each of the sub-arrangements.
- (20) The main agreement aimed at preserving market shares and co-ordinating price increases and is based on a written 'contract' from 1971. In order to achieve this objective, detailed sales data of the participating companies were closely monitored by an independent body (AC Treuhand), clients were allocated and, in case of deviations from the intended market share, compensations were applied or

clients were reallocated. Regular meetings took place in order to fine-tune the working of the agreement. The agreement contained numerous sub-arrangements on specific products or sub-products, or concerning regions. These sub-arrangements have in part only lasted for a limited period of time or have been integrated in other sub-arrangements. Two other companies (Perorsa [REDACTED]) have been involved concerning some sub-arrangements. Perorsa was involved in the Spanish sub arrangement, [REDACTED] was involved in some OP product until November 1996.

- (21) The cartel underwent frictions in 1992 after Akzo announced it would withdraw from the agreement. Two parties consider that these frictions marked the end of one cartel and the beginning of a new one. However, it could be shown that cartel meetings continued during that period, although at lower frequency.
- (22) The cartel ended at the end of 1999, after the parties' attempts to agree on quotas failed. Some sub arrangements ended earlier.

2. FINES

2.1. Basic amount

- (23) In fixing the amount of any fine the Commission must have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in Article 15(2) of Regulation 17.

2.1.1. Gravity

- (24) According to the Guidelines, the Commission must take account of i) the nature of the infringement, ii) its actual impact on the market and iii) the size of the relevant geographic market.
- (25) The present infringement consisted mainly of price-fixing practices and the exchange of sales information which are by their very nature very serious violations of Articles 81(1) of the Treaty and 53(1) of the EEA-agreement
- (26) The cartel agreement was carefully implemented by producers which for the relevant period covered the vast majority of the European market for organic peroxides. It must therefore have had an actual impact on the organic peroxide market in the EEA.
- (27) The cartel covered the whole of the common market and, following its creation the whole of the EEA. Every part of the Common market, and later of the territory covered by the EEA, was under its influence. For a certain duration, some regions and some sub-products were covered by sub arrangements to the main cartel agreement. This concerns France, the UK and Spain as well as high polymer OP, thermoset OP, cross-linking OP.
- (28) Taking into account the nature of the behaviour under scrutiny, its actual impact on the organic peroxide market and the fact that it covered the whole of the Common market and, following its creation, the whole EEA, the Commission

considers that the addressees of the present Decision committed a very serious infringement of Article 81(1) of the Treaty and 53(1) EEA.

- (29) Within the category of very serious infringements, the proposed 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 to cause significant damage to competition and to set the fine at a level which ensures it has sufficient deterrent effect. This is particularly necessary where, like in the present case, there is considerable disparity in the size of the undertakings participating in the infringement.
- (30) In the circumstances of this case, which involves several undertakings, it will be necessary in setting the basic amount of the fines to take account of the specific weight and therefore the real impact of the offending conduct of each undertaking on competition.
- (31) It is proposed to divide the companies into three groups on the basis of their European market share for the product concerned. The first group will include Akzo. The second group will include PC, Laporte and Atochem. The third group will include Perorsa. AC Treuhand will be considered apart.
- (32) In order to ensure that the fines imposed have a sufficient deterrent effect, and in view of their extremely large size, it is proposed in addition to apply a multiplying factor to the starting amount of the fine set for Akzo and Atochem. This multiplying factor will be related to the overall world-wide turnover of each undertaking.

2.1.2. Duration

- (33) The Commission has established that, Akzo, Atochem, and PC infringed Article 81(1) of the Treaty from 1 January 1971 until 31 December 1999, Perorsa from at least 31 December 1975 until 31 December 1999, Laporte from 1 September 1992 until 31 December 1999, AC Treuhand from 28 December 1993 until 31 December 1999.

2.2. Aggravating circumstances

- (34) Atochem has been fined previously for its involvement in four cartels, and PC/Laporte have been fined for their involvement in one cartel. Therefore repeat offence will be considered as aggravating circumstance.
- (35) No other aggravating circumstances are applicable in this case.

2.3. Attenuating circumstances

- (36) Atochem co-operated and provided information on a period of frictions of the cartel. This supported the Commission's arguments of a particularly long single and continuous infringement which lasted 29 years. Without that information, the duration of the infringement and hence Atochem's involvement would probably

have been substantially shorter than it is in the present decision. Such a case is not covered by the leniency notice. In order to avoid that Atochem is sanctioned for its co-operation, the Commission will consider effective co-operation outside the leniency notice as an attenuating circumstance for Atochem.

- (37) The Commission has not found other attenuating circumstances.

3. APPLICATION OF THE LENIENCY NOTICE

- (38) Certain of the addressees of this Decision have co-operated with the Commission, at different stages of the investigation and in conjunction with the different periods of the infringement under examination, in order to enjoy the favourable treatment referred to in the Leniency Notice. To meet the relevant undertakings' legitimate expectations as to immunity from fines or a reduction of fines in return for their co-operation, it is necessary to consider whether those parties meet the conditions set out in the Leniency Notice. In the present case, the Leniency Notice of 1996 applies, as Akzo approached the Commission before the 2002-Leniency Notice entered into force.

3.1. Non-imposition of a fine or a very substantial reduction of its amount ("Section B": reduction from of 75% to 100%)

- (39) [REDACTED]

- (40) The Commission accordingly considers Akzo does meet the conditions of point B of the Leniency Notice and it is therefore eligible for a very substantial reduction of the fine or its non-imposition. [REDACTED]

3.2. Substantial reduction in a fine ("Section C": reduction from 50% to 75%)

- (41) Neither of the other parties were the first to provide the Commission with decisive information on the cartel, as required under point (b) of Section B of the Leniency Notice. Consequently none of the above undertakings meet the conditions as set out in Section C of the leniency Notice.

3.3. Significant reduction of a fine ("Section D": reduction from 10% to 50%)

- (42) The Commission finds that Atochem materially contributed to establishing the existence of the infringement. [REDACTED]

[REDACTED]

(43) [REDACTED]

(44) [REDACTED]

(45) [REDACTED]

(46) [REDACTED]

- (47) In the above circumstances, it is concluded that it is appropriate to grant a reduction in the amount of the fines for Laporte (Degussa UK Ltd.), Peroxid Chemie, Atochem and Perorsa

4. CONCLUSION

It is therefore proposed that the Commission by oral procedure:

- take note of the enclosed opinions of the Advisory Committee on Restrictive Practices and Monopolies;
- take note of the enclosed note of the Legal Service and the positive opinions of DGs Enterprise and Budget;
- take note of the report of the Hearing Officer in this case;
- adopt the draft Decision attached herewith in the three authentic languages, i.e. English, Spanish and German; and
- decide to publish in all official languages the Decision, from which business secrets have been removed, in the Official Journal of the European Communities:

Enclosure