EUROPEAN COMMISSION
Competition

CASE AT.39864 – BASF

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 19/06/2015

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AGRIA Polska Sp.z.o.o.
ul. Rynek Glowny 13
43-600 Jaworzno
Poland

AGRIA Chemicals Poland Sp. z.o.o.
Rynek Glowny 13
43-600 Jaworzno
Poland

Star Agro Analyse und Handels GmbH
Europapark 1,
8412 Allerheiligen bei Wildon
Austria

AGRIA Beteiligungsgesellschaft mbH
Europapark 1,
8412 Allerheiligen bei Wildon
Austria

Via:

The law firm T. Studnicki, K. Pleszka, Z. Ćwiąkalski, J. Górski Spółka komandytowa (limited partnership) ("SPCG")
ul. Jabłonowskich 8
31-114 Kraków
Poland

Subject: Case AT.39864 – BASF (formerly AGRIA e.a./BASF e.a.)
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Commission européenne, DG COMP GREFFE ANTITRUST, B-1049 Bruxelles, Belgique
Europese Commissie, DG COMP GREFFE ANTITRUST, B-1049 Brussel, België

Tel: (32-2) 299 11 11, Fax: (32-2) 295 01 28, e-mail: COMP-GREFFE-ANTITRUST@ec.europa.eu.

Dear Madam/Sir,

(1) Thank you for your letter of 8 January 2015, in which you submitted observations on the Commission's preliminary assessment of your complaint against eighteen entities who are principally manufacturers and distributors of plant protection products ("PPPs").

(2) Your written submissions, however, did not lead to a different assessment of the complaint. The Commission accordingly rejects your complaint pursuant to Article 7(2) of Commission Regulation (EC) 773/2004[1] for the reasons set out below.

1. INTRODUCTION

1.1. The Complaint

(3) By letter dated 30 November 2010, you requested the Commission to launch an investigation into alleged infringements of Article 101 and/or Article 102 TFEU on the European market for the distribution and trade of PPPs. You asserted that a number of manufacturers and distributors of PPPs, their industry associations and a law firm had sought to eliminate you from the market by bringing vexatious administrative and criminal law proceedings against you. Since your initial submission of 30 November 2010, you have submitted supplementary information and summaries on several occasions, the most recent being a summary of the complaint dated 30 July 2013[2]. By its letter of 8 December 2014 pursuant to Article 7(1) of Regulation 773/2004 (the "Article 7(1) letter"), the Commission informed you (and the other complainants initially involved) of its intention to reject the complaint and set a deadline of four weeks to submit observations. You replied to this letter by way of written observations dated 8 January 2015.

1.2. The parties

(4) The initial complaint of 30 November 2010 was lodged on behalf of four companies belonging to the Agria group[3] and a company belonging to the […][4]. By submission of

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1 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, Official Journal L 123, 27.04.2004, pages 18-24.

2 The initial submission of 30 November 2010 was supplemented by submissions dated 15 December 2010 and 27 April 2011. On 30 June 2011, the Commission requested a summary of the complaint and its various supplements, which was provided on 29 July 2011. The complaint was further supplemented on 21 September 2011. In light of these separate submissions, the Commission requested a consolidated version of the complaint with its various supplements, which was sent on 7 February 2012 (the "consolidated complaint"). Further information was submitted by letters of 13 and 22 June 2012, 3 August 2012 and 19 June 2013. On 30 July 2013, another summary of the complaint was submitted to the Commission. In the remainder of this letter, the Commission will refer to all of these documents collectively as "the complaint". Where a specific page of the complaint is cited, this should be understood as a reference to the consolidated complaint.

3 AGRIA Polska Sp. z o.o. ("AGRIA Polska"), AGRIA Chemicals Poland Sp. z o.o. ("AGRIA Chemicals Poland"), both based in Poland, and Star Agro Analyse und Handels GmbH ("Star Agro") and AGRIA Beteiligungsgesellschaft mbH ("AGRIA Beteiligungsgesellschaft"), both based in Austria. These four companies are the addressees of this decision.

4 […].

15 December 2010, two other companies belonging to the […][5] joined as complainants. These seven companies[6] are based in Poland, Austria, Germany and Luxembourg and are active in the distribution and trade (including parallel imports and re-imports) of PPPs, in the EEA. Following the Commission's Article 7(1) letter and as explained in point (13) below, some of the complainants[7] are no longer involved in the procedure and are therefore not addressees of this Decision.

(5) The complaint was brought against eighteen entities[8], which will collectively be referred to as "the implicated parties". Each time the specific allegations in the complaint refer to only some of these entities, the term "implicated parties" will be considered to encompass only those entities mentioned in the corresponding allegations in the complaint. The eighteen entities are the following:

- **Twelve manufacturers and/or distributors of PPPs** belonging to the following company groups: the BASF group ("BASF"), the RWA Raiffeisen Ware group ("RWA"), the Syngenta group ("Syngenta"), the DuPont de Nemours group ("DuPont"), the Bayer group ("Bayer"), the Sumi Agro group ("Sumi Agro"), Monsanto Agrar Deutschland GmbH ("Monsanto"), the Nufarm group ("Nufarm"), Rokita Agro S.A. Grupa Rokita ("Rokita"), the Arysta group ("Arysta"), the Dow group ("Dow") and the Makhteshim group ("Makhteshim")[9].

- **Five industry associations**: Industrieverband Agrar e.V. ("IVA"), Fachverband der chemischen Industrie Österreichs – Industriegruppe Pflanzenschutz (Wirtschaftskammer) ("FCIO"), Polskie Stowarzyszenie Ochrony Roślin (Polish Plant Health Association) ("PSOR"), Deutscher Raiffeisenverband e.V. ("DRV") and European Crop Protection Association ("ECPA"); and

- **A law firm**: Noerr LLP ("Noerr").

1.3. Summary of the allegations

(6) The complaint alleges that in the period from at least February 2005 until at least April 2012, the implicated parties engaged in behaviour allegedly constituting "vexatious litigation"[10] as defined in the *ITT Promedia*[11] and *AstraZeneca*[12] judgments of the EU Courts. According to the complaint, the implicated parties carried out a concerted campaign of filing false notices to Polish and Austrian authorities and engaging in unlawful lobbying of government officials aimed at eliminating you and the former complainants from the market. The complaint alleges the following:

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5 […].

6 The complaint also includes detailed presentations of facts with regards to other market participants which are not official complainants, namely, […].

7 […]. These entities will be referred to as the "former complainants".

8 The complaint also includes information about and accusations against other entities, such as, Avia Law Group, Law Office Fellner Wratzfeld Partner, the Regional and General Inspectorates of Plant Health and Seed Inspection Service in Poland, the Polish Ministry of Agriculture, the Embassy of the German Federal Republic in Poland and the Federal Office for Food Safety in Austria although none of these are listed in the complaint as entities which should be investigated.

9 The individual entities belonging to each group of companies are named in the complaint on pp. 7-13.

10 Complaint, pp. 88, 94-95, 98, 101-106, 114, 118-119, 133.

11 Case T-111/96, *ITT Promedia v. Commission* (ECLI:EU:T:1998:183).

12 Case T-321/05, *AstraZeneca v Commission* (ECLI:EU:T:2010:266).

(i) *Notices to Polish and Austrian authorities*: Two law firms, acting in the name of an undisclosed client, filed notices in 2005 and 2006 with public authorities and agencies in Poland and Austria, alleging that some of the complainants had infringed, inter alia, national tax laws and regulations relating to PPPs. The complaint alleges that the undisclosed client was RWA. The complaint also alleges that the two law firms were cooperating in these cases as allegedly there was a large similarity between some of the pleadings and aspects of proceedings. In two of the resulting decisions of the public authorities in Poland and Austria, the complainants concerned were fined. On appeal, the decision of the Polish General Inspector of the Plant Health and Seed Inspection Service in 2006 against AGRIA Polska was annulled, but in 2007 a new decision was adopted, imposing a (lower) fine on the company for essentially the same facts. The fine imposed by the tax office in Austria in 2007 was annulled on appeal.

(ii) *Lobbying Polish and Austrian officials in 2005 and 2006*: On two occasions some of the implicated parties allegedly engaged in unlawful lobbying activities towards public officials in Poland and Austria, explicitly addressing the activities of some of the complainants. Allegedly as a result of this, a fine was imposed on AGRIA Polska and repeated inspections of the "company AGRIA"[13] were conducted. This lobbying supposedly took place: (i) at a meeting in June 2005 between representatives of the German embassy in Poland, the IVA, the PSOR, the Polish Ministry of Agriculture and the Polish General Inspectorate of Plant Health and Seed Inspection Service; and (ii) at a meeting in February 2006 between the General Inspectorate of Plant Health and Seed Inspection Service and the Federal Office for Food Safety in Austria, where Polish officials met with representatives of the Austrian plant protection industry.

(iii) *Inspections in Poland*: In March 2008 and May 2010, warehouses in Poland operated or used by AGRIA Chemicals Poland (in March 2008) and some of the former complainants (in May 2010) were inspected by Polish government agencies. On both occasions PPPs belonging to the complainants concerned were seized. In May 2010, some of the implicated manufacturers received samples of the seized products and subsequently filed claims alleging breaches of, *inter alia*, industrial property law. According to the complaint, all or most of the criminal proceedings initiated by the District Prosecutor following the May 2010 inspection were eventually dismissed[14].

(iv) *Inspections in Austria*: In April 2012, the Austrian Federal Office for Food Safety initiated inspections at the premises of a purchasing group which distributes PPPs for you in Austria, and thereafter complained to the relevant municipal authorities that there were no proper security measures in place.

(7) According to the complaint, all of the events referred to above took place in the first half of the year, which is the most important part of the year given that the PPPs are a seasonal commodity and are mainly sold in spring and summer. Moreover, the complaint states that none of the implicated parties have made civil claims against you or the

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[13] Complaint, p.21.

[14] The information in the complaint on p. 31 regarding the discontinuation of various proceedings appears to be contradictory.

former complainants to protect their rights. According to the complaint, the implicated parties opted for administrative and criminal proceedings because these would be more damaging to you and the former complainants than any civil action, in that they would disrupt the business activities and harm the reputation and confidence in the AGRIA group of companies.

(8) The complaint alleges that by engaging in vexatious litigation, the implicated parties breached Articles 101 and/or 102 TFEU through practices which might be qualified as follows[15]:

a) Anticompetitive agreements or concerted practices

(i) Horizontal agreements or a concerted practice among manufacturers of PPPs;

(ii) Horizontal agreements or a concerted practice among distributors[16] of PPPs;

(iii) Vertical agreements or a concerted practice among manufacturers and distributors of PPPs;

b) Abuse of dominance

(i) Abuse of a collective dominant position by manufacturers of PPPs and the industry associations;

(ii) Abuse of a collective dominant position by distributors of PPPs and the industry associations; and

(iii) Abuse of a dominant position by RWA in Austria.

(9) The complaint alleges that the aim of this behaviour was to eliminate competing distributors of PPPs, you and the former complainants included, from the markets in Austria, Germany, Luxembourg, Poland and possibly other EU Member States[17].

(10) The Commission notes that the complaint does not always explain how the allegations are linked to each of the Member States mentioned or each of the implicated parties. In particular, for some of the implicated parties (e.g., Makhteshim, Sumi Agro, Rokita, Arysta, Dow and Nufarm) the complaint only assumes that their membership in a certain industry association implies their involvement in the alleged anticompetitive behaviour. Similarly, the complaint claims that ECPA was involved in the alleged infringements without presenting any evidence to support that allegation.

1.4. Responses of the implicated parties

(11) In March 2012, with the consent of all the complainants, the Commission sent a non-confidential version of the complaint to the implicated parties for comments[18]. These parties submitted their comments between 30 April 2012 and 20 June 2012[19].

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15 Complaint, pp. 130-131.

16 According to the complaint, DRV and RWA were involved at the distribution level (see complaint, pp. 132-133).

17 Complaint, pp. 106, 129, 136 and 138.

18 Since all but one of the implicated parties provided a single submission in response to the complaint, the Commission will in the remainder of this letter, for ease of reference, refer to the responses simply by the name of the party which provided it. The exception is RWA, which supplemented its initial submission of 16 May

(12) In response to the complaint, the implicated parties denied the allegations and submitted that: (i) some allegations were based on an inaccurate presentation of the facts[20]; (ii) the notices, to the extent they actually were filed, were justified[21] and the implicated parties had a legitimate interest in taking such action in order to prevent possible reputational damage caused by illegal trade in their products and in counterfeit products marked with their brand names[22]; (iii) all contacts between the manufacturers of PPPs and/or plant protection authorities, and/or industry associations were appropriate[23], as was the manufacturers' involvement in inspections[24]; (iv) there were logical explanations for the similarity of the timing of various notices in May 2010 and the differences in the content of the notices filed[25]; and (v) the reliance on the *AstraZeneca* and *ITT Promedia* case-law was unfounded[26], as no misleading information was provided to the public authorities[27].

1.5. The observations to the Article 7(1) letter

(13) […] did not submit any written observations in response to the Commission's Article 7(1) letter. As a result, they are deemed, pursuant to Article 7(3) of Regulation No. 773/2004, to have withdrawn the complaint insofar as it had been submitted on their behalf, and are therefore, not addressees of this Decision[28].

(14) You (the addressees of this Decision) submitted written observations (the "Observations") to the Article 7(1) letter on 8 January 2015, and therefore, within the time limit specified in the Article 7(1) letter. These Observations can be summarised as follows:

(i) Parallel imports of PPPs are an activity within the internal market worthy of protection through competition law enforcement (point 4);

(ii) The Commission has not made any effort to gather additional information in order to verify the allegations made in the complaint and should have used its procedural powers of investigation (point 5);

2012 on 8 April 2014. References to RWA shall be construed as references to its initial submission, except in footnote 57, where it refers to the supplement.

19 The precise list of submissions of each of the parties together with the dates on which these were submitted is attached as Annex 1.

20 DuPont, section II; BASF, para 24-26; Bayer, para 174; Noerr, p. 5; PSOR, paras 3.15.-3.20; IVA, footnote 29.

21 Nufarm, para 45.

22 BASF, paras 11-13; Bayer, executive summary para 3, main text paras 12, 82-83; DuPont, introduction; Syngenta, para 13, 31.

23 BASF, paras 10, 28, 77-79; Bayer, Executive summary paras 5, 147-154, 245; DRV, p.2; DuPont, section II-IV; ECPA, para 3.13; IVA, paras 4, 38, 58-65, 69, 73-75; FCIO, p.3; Makhteshim, section 3.; Nufarm, paras 47-50; PSOR, section 1.9, 6.6-6.7; Syngenta, paras 47-48, 56-58, 65.

24 BASF, paras 9, 33-34; Bayer, para 196; ECPA 3.29; Monsanto, section 3.2; Syngenta, paras 32-34.

25 BASF, para 46; Bayer, para 201; ECPA, para 3.22; Syngenta, para 51.

26 BASF, paras 65-76; Bayer, paras 230-243; DuPont, p. 4; IVA, paras 66-67; Nufarm, paras 53-55; Syngenta, paras 60-63.

27 BASF, para 75; Bayer, paras 237-241; DuPont, section II; Noerr, pp. 7-8; IVA, para 76; Noerr, pp. 7-8; RWA, paras 24-25, 73-89; Syngenta, para 62.

28 Your written observations submitted on 8 January 2015 confirm that […] did not wish to submit any observations.

(iii) The fact that an investigation of a wide scope would be required is not a legitimate basis on which the Commission may decide not to investigate a complaint (point 7);

(iv) The Commission merely referred to information provided by the implicated parties (point 6), did not take proper note of a number of quotations contained in the complaint (points 8-10) and was influenced by certain statements by the implicated parties that are misleading (point 10).

(v) The Commission failed to explain properly why the criteria of the vexatious litigation doctrine are not applicable in the case at hand (point 11) and has interpreted the rulings of the EU courts in a way that is "utterly literal"; and

(vi) Even though private enforcement means could be pursued, the Commission's refusal to act on the complaint diminishes the chances of receiving compensation for breaches of EU competition law, due to the nature of proceedings before Polish civil courts (point 12).

2. ASSESSMENT OF THE COMPLAINT

2.1. The need for the Commission to set priorities

(15) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. It has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Commission Notice on the handling of complaints[29].

(16) Unlike civil courts, whose task is to safeguard the individual rights of private individuals, the Commission is an administrative authority that must act in the public interest. It is an inherent feature of the Commission's task as public enforcer that it has a margin of discretion to set priorities in its enforcement activity[30].

(17) When deciding which cases to pursue as a matter of priority, the Commission takes various factors into account. There is no fixed set of criteria, but it may take into consideration whether, on the basis of the information available, it seems likely that further investigation will ultimately result in the finding of an infringement. The Commission may also consider the scope of the investigation required. If it appears that an in-depth investigation would be complex and time-consuming and the likelihood of establishing an infringement seems limited, this will weigh against the Commission taking further action.

(18) In this context, the Commission may also take into account whether a national court or national competition authority is well-placed to examine the allegations made or has done so already.

(19) Based on its priority-setting, the assessment of your complaint and your subsequent observations, the Commission has decided not to conduct an in-depth investigation.

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[29] OJ C 101, 27.04.2004, p. 65. See also the Commission's Report on Competition Policy 2005, p. 25-27.
[30] Notice on Complaints, point 27.

2.2. The likelihood of establishing the existence of an infringement

(20) The likelihood of establishing the existence of an infringement of Article 101 and/or 102 TFEU in this case appears limited.

2.2.1. Anticompetitive agreements and/or concerted practices within the meaning of Article 101(1) TFEU

(21) The Commission considers that there is an insufficient basis upon which to conclude that the initiation of or lobbying for legal or administrative actions described in the complaint are the result of an agreement or concerted practice between any of the implicated parties with a view to excluding you from the market.

(22) The only indications of possible contacts between the implicated parties, which can be deduced from the complaint, are contacts that might have taken place in the context of the activities of various industry associations[31]. However, there is no evidence that any such contacts were of an anticompetitive nature or that they did not take place in the context of the normal business activities of the associations in question. Generally, one of the roles of industry associations is to facilitate legitimate contacts within an industry; thus, the mere fact that contacts took place cannot be taken as evidence that the associations served as platforms for reaching an anticompetitive agreement and/or coordinating practices in contravention of Article 101 TFEU.

(23) The Commission has carefully examined all the evidence provided with the complaint and notes that in the Observations, you do not present any new facts or evidence to support your allegations.

(24) In the absence of any evidence of any anti-competitive contacts between the implicated parties, the Commission has considered whether the existence of a concerted practice and/or agreement could be inferred from circumstantial evidence such as the behaviour of the parties. However, even assuming that the actions of the companies were to constitute "parallel conduct", this cannot be regarded as proof of a concerted practice, unless it is the only plausible explanation for that behaviour[32]. This does not appear to be the case here. The implicated parties have advanced alternative reasons, other than an agreement or a concerted practice, which could explain the number and timing of the actions filed against you and the inspections carried out by public authorities in the period from 2005 to 2012. Therefore, it appears there are alternative plausible explanations for the alleged conduct.

(25) For example, the implicated parties submitted that given that illegal trade in PPPs in Europe has generally grown in the last years, it is not unreasonable that some of them might have taken action against you because they had suspicions that their commercial interests, and in particular their reputation, might be harmed if the products in question turned out to be illegally traded or counterfeit. Moreover, the implicated parties contend that one possible explanation for the similarity of the timing of some notices is that these

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[31] See point (6)(ii) of the present letter.

[32] See Case C-48/69, *Imperial Chemical Industries Ltd. v Commission (Dyestuffs)* (ECLI:EU:C:1972:70), paras 65-68; and joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *A. Ahlström Osakeyhtiö and others v Commission (Woodpulp II)* (ECLI:EU:C:1990:128), para 71.

followed inspections by public authorities and were based on evidence and information supplied by the latter to them. The implicated parties claim that it may have taken them a similar amount of time to inspect the materials and prepare their notices. Another reason they advance is that the products in question are seasonal and, therefore, potential irregularities concerning their trade would naturally become apparent in a certain time of the year.

(26) In the Observations (point 6), you state that "the existence of parallel conduct implies the necessity to examine all facts/plausible explanations of the behaviour very precisely". However, it is established case-law that, *"since the Commission is under no obligation to rule on the existence or non-existence of an infringement, it cannot be compelled to carry out an investigation, because such an investigation could have no purpose other than to seek evidence of the existence or non-existence of an infringement which it is not required to establish"*[33]. For the same reason, your argument that the Commission was required to use its investigative powers in the circumstances of the present case must be rejected.

(27) In the Observations you further criticise the Commission for allegedly only referring to alternative reasons provided by the implicated parties (point 6) which could explain any alleged parallelism in conduct. However, the Commission assessed the evidence adduced in your complaint and your written observations as well as the reasons advanced by the implicated parties to explain the behaviour complained of. As in order to establish an infringement, it would be necessary to establish that the only plausible explanation of the alleged parallelism is an anticompetitive agreement or concerted practice[34], all of these elements are relevant to the assessment of the likelihood of establishing an infringement of the EU competition rules.

(28) The allegation in the Observations (point 10) that the implicated parties submitted "misleading representations and explanations" is not sufficiently substantiated[35] and you only give two examples. Even if it were correct that these statements were inaccurate, this would not constitute a sufficient basis to conclude that the totality of the observations submitted by the implicated parties should be disregarded.

(29) In light of the above, the Commission confirms its preliminary conclusion that there is a low likelihood of establishing that the decision of each company to initiate legal or administrative actions against you, to the extent that this actually happened, was the result of an anti-competitive agreement or concerted practice. The Commission takes the view that it is unlikely that an in-depth investigation would allow it to establish the existence of agreements or concerted practices aimed at eliminating you from the market in breach of Article 101 TFEU.

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[33] See Case T-320/07, *Jones v Commission* (ECLI:EU:T:2011:686), para. 115 and the case-law cited. See also Case T-204/03 *Haladjian Frères* v *Commission* (ECLI:EU:T:2006:273), para. 28.

[34] See joined Cases T-108/07 and T-354/08, *Spira v Commission* (ECLI:EU:T:2013:367), para. 347.

[35] The Commission understands the first example of misleading information given in point 10 of the Observations to refer to the submission by Syngenta, as this implicated party is mentioned in your attachment no. 2 to the Observations, even though it is identified only as "implicated party no. 11". You claim that Syngenta omitted to mention that an injunction, which had been granted in December 2011 in its favour, had been overruled in January 2012. However, Syngenta clearly mentioned this fact in point 38 of its letter of 4 June 2012.

2.2.2. Abuse of dominance within the meaning of Article 102 TFEU

(30) The information you have provided does not provide sufficient basis to enable the Commission to infer that the initiation or prompting of the legal or administrative actions described in the complaint could constitute an abuse of dominance by RWA or an abuse of collective dominance by (the members of) IVA, FCIO or DRV[36] in the markets referred to in the complaint.

(31) In order for the Commission to establish an infringement of Article 102 TFEU, it would be necessary to show: (i) dominance or collective dominance in one market on the part of the undertakings concerned in the complaint; and (ii) an abuse of that dominance through the alleged conduct. Therefore, in the present case, it would be necessary to establish either that RWA was dominant or that the members of IVA, FCIO and DRV held a collective dominant position on a relevant market. For the reasons set out in greater detail below, the Commission would need to undertake an in-depth investigation in order to establish whether this is the case.

(32) The remainder of this analysis will proceed on the assumption that dominance could be established. However, when considering the overall likelihood of establishing an infringement of Article 102 TFEU, it should be taken into account that this assessment is based on the assumption of dominance and is made without prejudice to the Commission's view that establishing dominance is likely to prove complex in this instance.

(33) According to the available case-law of the EU courts, namely the *ITT Promedia*[37] and the *AstraZeneca*[38] judgments, bringing legal proceedings against a competitor and/or providing misleading information about a competitor to a public authority may, in certain circumstances, constitute an abuse within the meaning of Article 102 TFEU.

(34) The *ITT Promedia* case concerned the use by a dominant undertaking of civil legal proceedings to assert its copyrights. In that case, the General Court confirmed that two cumulative criteria must be fulfilled in order to establish that bringing legal proceedings against a competitor constitutes an abuse pursuant to Article 102 TFEU: (i) the action cannot be reasonably regarded as an attempt to assert the dominant undertaking's rights and can therefore only serve to harass the opposite party; and (ii) it is conceived in the framework of a plan whose goal is to eliminate competition[39].

(35) The Court expressly held that *"it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article [102 TFEU]"* [40]. The Court also held that *"since*

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[36] In your complaint, you do not clearly specify which industry associations you are referring to in this context. You limit yourself to pointing to the collective market shares of the members of the following industry associations: the DRV (Allgemeine Warenwirtschaft), whose members represent a share of 50–60% of the market for PPP distribution in Germany; the IVA, whose members represent a share of 100% in the German PPP manufacturing market; and the FCIO, whose members represent a share of 100% in the Austrian PPP manufacturing market. Therefore, it is assumed that you are alleging that these associations, or at least their members, were collectively dominant.

[37] See footnote 11.

[38] See footnote 12.

[39] *ITT Promedia v. Commission*, para 55.

[40] *Ibid.*, para 60.

the two cumulative criteria constitute an exception to the general principle of access to the courts, which ensures the rule of law, they must be construed and applied strictly […]"[41].

(36) The *AstraZeneca* case concerned a pharmaceutical undertaking which made misleading representations before national patent offices in order to obtain patent extensions for its products. In that case, the General Court held that providing misleading information to public authorities which leads them into error and therefore makes it possible for the company to wrongly obtain or prolong an exclusive right, can constitute an abuse within the meaning of Article 102 TFEU[42].

(37) The Court held that *"the question whether representations made to public authorities for the purposes of improperly obtaining exclusive rights are misleading must be assessed* in concreto *and that assessment may vary according to the specific circumstances of each case. […] the limited discretion of public authorities or the absence of any obligation on their part to verify the accuracy or veracity of the information provided may be relevant factors to be taken into consideration for the purposes of determining whether the practice in question is liable to raise regulatory obstacles to competition"*[43].

(38) In support of your allegations, you argue that the principles established in *ITT Promedia* should be applied *mutatis mutandis* in the present case, as the Court did not limit the concept of vexatious litigation to a specific type of legal proceedings, and that this concept should therefore be applicable to the administrative and criminal proceedings of the type described in your complaint[44]. You further argue that your complaint is consistent with the Commission's interpretation of abuse in *AstraZeneca* since the implicated parties allegedly provided misleading information to the Polish public authorities, and these authorities had limited discretion and were obliged under their national rules to verify the allegations made by the implicated parties[45].

(39) In the Observations (point 11), you repeat your argument regarding the alleged applicability of the *ITT Promedia* case law but add no further evidence or reasoning to sustain this position. Instead you criticise the Commission for interpreting the case law in a manner that is too "literal" and submit that the Commission gave inadequate reasons to support its analysis of the legal principles at issue.

(40) The Commission maintains its view[46] that the concept of vexatious litigation elaborated in *ITT Promedia* and/or in *AstraZeneca* does not apply to the present case.

(41) Firstly, the fact that the Court did not explicitly limit the concept of vexatious litigation to civil proceedings does not mean that it can be extended *mutatis mutandis* to any other type of proceedings. The *ITT Promedia* case established a limit to the right of access to civil courts. The criteria for such a limit, as formulated by the Commission and endorsed by the Court, are very specific to such proceedings.

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41 *ITT Promedia v. Commission*, para 61.
42 *AstraZeneca v Commission*, para 355.
43 *Ibid,* para 357.
44 Complaint, pp. 102-103.
45 *Ibid*, p. 103.
46 See points 31-40 of the Article 7(1) letter.

(42) In the present case, neither of the two cumulative criteria established by the *ITT Promedia* case law and set out in paragraph (34) above seem to be fulfilled.

(43) Firstly, by your own admission[47], the parties have neither asserted any rights nor exercised their right of access to civil courts by denouncing your activities to the Polish authorities.

(44) Secondly, it is not clear that the notices can be qualified as abusive. Exceptions to the right of access to courts (and, as you argue, public authorities) must be construed and applied strictly. The Commission considers that it is not clear whether, and to what extent, a limitation on a party's right to inform the proper authorities of perceived infractions of public order rules could be justified on the basis of EU competition rules in this instance.

(45) Thirdly, as described in points (21)-(29), there is insufficient evidence that these actions were *"conceived in the framework of a plan whose goal is to eliminate competition"*.

(46) However, even if it were assumed that the principles established in *ITT Promedia* are applicable by analogy in the present case, you have not advanced any evidence showing that the notices filed by the implicated parties went beyond what could legitimately be considered as an attempt to protect their commercial interests and that they instead served only to harass you. You have also not submitted any evidence indicating that these actions were part of a plan to eliminate competition. The Commission has carefully assessed all the evidence that you have provided, including the quotations in the Observations (point 9), which were already contained in the complaint.

(47) Moreover, undertakings may have a legitimate interest to turn to public authorities for perceived breaches of administrative or legal requirements by their competitors. Therefore, the Commission takes the view that there are insufficient indications that the initiation of legal proceedings by the implicated parties was abusive within the meaning of Article 102 TFEU.

(48) Equally, it appears unlikely that the Commission would be able to establish that the submission of notices/information by the implicated parties to the public authorities constituted an abuse within the meaning of Article 102 TFEU on the basis of the *AstraZeneca* case-law.

(49) Even if it were assumed that the principles established in the *AstraZeneca* judgment may apply more widely to any misleading information provided by a dominant company to public authorities of any kind, leading these public authorities to erroneously investigate possible wrongdoings, you have not provided evidence indicating that the information submitted was, in fact, misleading to the degree required to constitute an abuse.

(50) The fact that some, or even all, of the proceedings against you were eventually discontinued does not in itself demonstrate that the information which initially led to the inspections was misleading[48]. Rather, it would appear that the relevant authorities at least

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[47] Complaint, pp. 103-104.

[48] According to the implicated parties, the proceedings were discontinued for two reasons. Firstly, because there was not enough evidence that the PPPs were intended for sale in Poland and therefore the question whether they or their labels had been forged became irrelevant for the Polish authorities (Bayer, paras 218 – 222, 224 –

initially considered that the claims made by the implicated parties had some merit. In cases where, following inspections, the authorities opened proceedings against you and particularly where they imposed fines[49], it seems particularly unlikely that the information allegedly provided by the implicated parties could be found to have been misleading to such a degree that it was abusive.

(51) Further and in any event, from the evidence available, it appears that some of the inspections mentioned in the complaint were not carried out as a result of information provided by any of the implicated parties. For instance, in respect of the inspections conducted in March 2008[50], none of the implicated parties acknowledges having provided information leading to these inspections[51], and you have not provided any evidence demonstrating the contrary.

(52) As regards your claim that the Polish authorities had, as in the *AstraZeneca* case, limited discretion to act (or to choose not to act) on information provided by the implicated parties, this appears unconvincing and is not supported by any evidence[52]. Without further substantiation on your part, the Commission has no reason to believe that the public authorities of any Member State, charged with verifying and ensuring compliance by market participants with public order regulations, would – under circumstances such as those described in the complaint – have limited or no discretion in deciding whether or not to conduct inspections, to initiate proceedings or to impose fines.

(53) The considerations above apply also to the allegedly unlawful lobbying activities of the implicated industry associations and industry representatives.

(54) Where lobbying activities exceed *"the normal lobbying activity carried out by any association that brings together the undertakings of an industry in order to protect and promote the interests of its members"*[53], this may constitute an abuse of Article 102 TFEU. However, on the basis of the limited information provided in the complaint regarding the content of the alleged discussions with public officials, it cannot be presumed that any information exchanged was misleading and that the public officials involved lacked any discretion as to whether to act on any information allegedly provided. Therefore, it is unlikely that the lobbying activities described in the complaint could be qualified as an abuse within the meaning of Article 102 TFEU.

(55) Given these considerations, the Commission confirms its preliminary conclusion and takes the view that there is a limited likelihood that further investigation could enable the Commission to establish an infringement of Article 102 TFEU.

225; Syngenta, para 54). Secondly, the Polish authorities decided that there was not sufficient evidence to prove forging and illegal substances without investing substantial additional time and resources (BASF, para 42 - 44; Bayer, 223).

49 See point (6)(i) of the present letter.

50 See point (6)(iii) of the present letter.

51 BASF, para 32; Bayer, para 188; Monsanto, Section 3.2.; Syngenta, para 29.

52 The Commission assumes that point 11 of the Observations erroneously refers to the *ITT Promedia* case as a case involving patent extension and that in fact it is meant to refer to the *AstraZeneca* case.

53 Case T-432/05, *EMC Development v Commission* (ECLI:EU:T:2010:189), para 81.

2.3. The scope of the investigation required

(56) An in-depth investigation into the allegations in your complaint would require considerable resources and would probably be disproportionate in view of the limited likelihood of establishing the existence of an infringement.

(57) In particular, such an investigation would require the Commission to investigate eighteen entities situated in four countries for conduct allegedly lasting seven years.

(58) With regard to the allegations concerning a possible infringement of Article 101 TFEU, it is not excluded that the Commission would have to, among other things, conduct inspections at the premises of these entities in order to verify the allegations of a concerted practice or agreement. With regard to the allegations concerning a possible infringement of Article 102 TFEU, the Commission would be required to conduct a comprehensive analysis of the relevant product and geographic market(s) in order to conclude on the relevant market definition.

(59) The Commission would also have to conduct an in-depth and complex analysis of the alleged dominance of RWA or the probability of a collective dominance of (the members of) IVA, FCIO and DRV. This would entail among other things, determining the market shares of the companies active on the relevant product and geographic market(s), verifying the existence of any barriers to entry, or of significant countervailing buyer power, etc. In order to demonstrate collective dominance in particular, the Commission would also need to determine whether the undertakings in question were united by economic links and/or economic factors, whether they present themselves or act as a collective entity on (each of) the relevant market(s), etc.

(60) Moreover, in order to establish whether the events and proceedings listed in the complaint could be considered to be an abuse within the meaning of Art. 102 TFEU, the Commission would be required to assess the details of each of these proceedings, including whether the parties had a legitimate interest in initiating the proceedings, whether the specific information submitted to the public authorities was misleading, whether these authorities indeed possess no discretion whatsoever in whether or not to act on the information provided to them, whether there was a plan to eliminate competition, etc.

(61) This would likely involve an extensive investigation with a very broad scope and complexity, necessitating, among other things, numerous requests for documents and information from the relevant national authorities and courts. Therefore, the Commission takes the view that given the low likelihood of finding an infringement, a further investigation into your allegations would be disproportionally burdensome. Contrary to the assertion in the Observations, this is a factor which the Commission may legitimately take in to account when setting priorities.

2.4. National courts and authorities appear to be well-placed to handle the matters raised

(62) The Commission confirms its preliminary view that national courts and authorities could be particularly well-placed to deal with the issues raised in the complaint.

(63) The Commission understands that the Polish national competition authority (UOKIK) has declined to investigate your allegations of anti-competitive conduct because it is time-barred from doing so under the national law relating to competition matters[54].

(64) However, competition law means, other than enforcement by competition authorities, may still be available, such as enforcement by national courts. Since the introduction of Regulation 1/2003, national courts have been fully competent to apply the EU competition rules to any dispute that comes before them. In the absence of evidence to the contrary, the Commission assumes that, in particular, Polish and Austrian national courts may be well placed to investigate the issues raised.

(65) Moreover, as you confirm in point 12 of the Observations, other means than competition enforcement are also available to address your concerns. Your allegations concern notices to national authorities in Poland and Austria entrusted with specific responsibilities for investigating compliance with tax laws, food safety and plant health regulations. The decisions of these authorities are normally subject to scrutiny by higher-instance national authorities and/or national courts. These authorities and courts could be given access to the information held by the authorities whose actions are being questioned, and would have a comprehensive knowledge of the legal framework within which these authorities operate. They may also have the power to annul administrative decisions and/or court judgments, insofar as such actions are not yet prescribed under national procedural laws.

(66) From the complaint, it appears that you have already appealed some of the relevant decisions to the competent authorities and courts in Austria and Poland[55] and were able to have decisions either fully or partially overturned[56]. You seem to have also initiated court proceedings against some of the implicated parties and other parties allegedly involved in the events described in your complaint. Some of these proceedings seem to be on-going[57]. Therefore, contrary to your claims in point 12 of the Observations, it appears that you have already had (even successful in some cases) access to judicial remedies concerning the facts described in the complaint.

(67) The Commission, therefore, takes the view that national courts and authorities might be particularly well-placed to deal with the issues raised in the complaint, and this further weighs against the Commission investigating this matter further.

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54 Complaint, p. 141.

55 Complaint, pp. 26, 42-43.

56 Complaint, pp. 27, 43-44.

57 You have filed several reports of criminal or other offences to the Public Prosecutor's office in Vienna, the bar association of Vienna, the Public Prosecutor's Office in Katowice, the District Court in Katowice (Complaint, pp. 23, 51, 93, 134) and the Public Prosecutor's Office in Jaworzno (Complaint, p. 51) against lawyers employed by Noerr, a partner of the Avia Law Group and a number of private investigators, accusing them of forming a criminal organisation, forging evidence, libel, breach of professional responsibility and the provision of detective services on the sovereign territory of Poland without the relevant permits. You have also initiated a number of law suits, including claims for damages, before the Commercial Court of Vienna and the District Court in Warsaw against a partner of the Avia Law Group (Supplement to the complaint and the annex thereto of 21 September 2011; Complaint, p. 20), RWA (Complaint, p. 70), Noerr and the Republic of Poland. See also the supplement to RWA's reply of 16 May 2012.

3. CONCLUSION

(68) In view of the above considerations, the Commission, in its discretion to set priorities and on the basis of the assessment of your complaint and subsequent submission, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringements and consequently rejects the complaint pursuant to Article 7(2) of Regulation No. 773/2004.

4. PROCEDURE

4.1. Possibility to challenge this Decision

(69) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

4.2. Confidentiality

(70) The Commission reserves the right to send a copy of this Decision to the implicated parties. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website[58]. If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform […]. Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information, and that it can therefore be published on the Commission's website or sent to the implicated parties.

(71) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Věrá JOUROVÁ
Member of the Commission

[…]

Annex:

1. List of the documents on which the Commission bases its assessment

[58] See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.