



EUROPEAN COMMISSION

Brussels, 13.4.2011
C(2011) 2528 final

COMMISSION DECISION

of 13.4.2011

**relating to a proceeding under Article 101 of the Treaty on the Functioning of
the European Union and Article 53 of the EEA Agreement**

(COMP/39579 – Consumer Detergents)

(Only the English text is authentic)

(Text with EEA relevance)

*Parts of this text have been edited to ensure that confidential information is not
disclosed; those parts are enclosed in square brackets.*

TABLE OF CONTENTS

1. INTRODUCTION.....	5
2. PROCEDURE.....	5
3. THE INDUSTRY SUBJECT TO THE PROCEEDINGS	7
3.1. The product concerned by the cartel	7
3.2. The undertakings subject to the proceedings	7
3.2.1. Henkel	7
3.2.2. P&G.....	7
3.2.3. Unilever.....	8
3.3. Inter-state trade.....	8
4. DESCRIPTION OF THE EVENTS.....	8
4.1. Overview of the cartel	8
4.2. Geographic scope of the infringement	10
4.3. Duration of the infringement.....	10
5. APPLICATION OF ARTICLE 101 OF THE TFEU AND ARTICLE 53 OF THE EEA AGREEMENT.....	10
5.1. The nature of the infringement.....	11
5.1.1. Agreements and concerted practices	11
(a) Principles.....	11
(b) Application to this case	11
5.1.2. Single and continuous infringement.....	12
(a) Principles.....	12
(b) Application to this case	13
5.1.3. Restriction of competition.....	13
(a) Principles.....	13
(b) Application to this case	14
5.1.4. Effect upon trade between Member States and between Contracting Parties to the EEA Agreement.....	14
(a) Principles.....	14
(b) Application to this case	14
5.1.5. Non-applicability of Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement.....	15

6.	ADDRESSEES OF THIS DECISION	15
6.1.	Henkel	15
6.2.	P&G	16
6.3.	Unilever.....	16
7.	DURATION OF THE INFRINGEMENT	16
8.	REMEDIES.....	17
8.1.	Article 7 of Regulation (EC) No 1/2003	17
8.2.	Article 23(2) of Regulation (EC) No 1/2003	17
8.3.	The basic amount of the fine.....	18
8.3.1.	Calculation of the value of sales	18
8.3.2.	Determination of the basic amount of the fine.....	19
8.3.2.1.	Gravity.....	19
(a)	Nature.....	19
(b)	Combined market share.....	19
(c)	Conclusion on gravity	20
8.3.2.2.	Duration.....	20
8.3.3.	Determination of the additional amount.....	20
8.3.4.	Calculation and conclusions on basic amounts	20
8.4.	Adjustments to the basic amount of the fine.....	21
8.4.1.	Aggravating circumstances	21
8.4.2.	Mitigating circumstances	21
8.4.3.	Specific increase for deterrence	21
8.5.	Application of the 10% of turnover limit.....	21
8.6.	Application of the Leniency Notice	21
8.6.1.	Immunity from fines.....	21
8.6.2.	Reduction of fines	22
8.7.	Application of the Settlement Notice.....	22
8.8.	Conclusion: final amount of individual fines to be imposed in this Decision.....	22
9.	CONCLUSION	23

COMMISSION DECISION

of 13.4.2011

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement

(COMP/39579 – Consumer Detergents)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (hereinafter "TFEU"),

Having regard to the Agreement on the European Economic Area (hereinafter "the EEA Agreement"),

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 Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to 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 Treaty², as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 as regards the conduct of settlement procedures in cartel cases³, and in particular Article 10a thereof,

Having regard to the Commission decisions of 21 December 2009 and of 9 February 2011 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 Article 11(1) of Regulation (EC) No 773/2004,

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

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Article 81 of the EC Treaty has become Article 101 of the Treaty on the Functioning of the European Union ("TFEU"). The two provisions are in substance identical. For the purposes of this Decision, references to Article 101 of the TFEU should be understood as references to Article 81 of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

² OJ L 123, 27.4.2004, p. 18.

³ OJ L 171, 1.7.2008, p. 3.

Having regard to the final report of the Hearing Officer in this case⁴,

Whereas:

1. INTRODUCTION

1. The present Decision relates to a single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement. The single and continuous infringement, in which the addressees of this Decision participated, concerns heavy duty laundry detergent powders intended for machine washing and sold to consumers ("HDD low suds powder") and covered Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands. It was aimed at the stabilisation of market positions and price coordination and lasted from 7 January 2002 until 8 March 2005.
2. This Decision is addressed to the following companies:
 - a) Henkel AG & Co. KGaA (hereinafter also referred to as "Henkel");
 - b) The Procter & Gamble Company and Procter & Gamble International S.à.r.l. (hereinafter also collectively referred to as "P&G");
 - c) Unilever PLC and Unilever NV (hereinafter also collectively referred to as "Unilever").

2. PROCEDURE

3. The Commission's investigation in this case started following an immunity application lodged by Henkel on [...] under the Commission notice on immunity from fines and reduction of fines in cartel cases⁵ (hereinafter "Leniency Notice"). On 12 June 2008, Henkel was granted conditional immunity from fines pursuant to point 8(a) of the Leniency Notice.
4. Henkel's immunity application was followed by a number of subsequent submissions made between [...] 2008 and [...] 2009, [...].
5. In June 2008, the Commission carried out unannounced inspections at the premises of a number of detergent manufacturers, including P&G and Unilever. In April 2009, further inspections were organised at the premises of Unilever. The first requests for information were sent in July 2008 to the inspected manufacturers and a series of requests for information were sent at later stages, in particular to P&G and Unilever.

⁴ Final report of the Hearing Officer of 12 April 2011.

⁵ OJ C 298, 8.12.2006, p. 17.

6. On [...], P&G applied for leniency. P&G subsequently made a number of submissions consisting of [...] between [...] 2008 and [...] 2009. On [...], Unilever applied for leniency.
7. The Commission initiated proceedings against Henkel AG & Co. KGaA, The Procter & Gamble Company, Unilever NV and Unilever PLC pursuant to Article 11(6) of Regulation (EC) No 1/2003 on 21 December 2009 and, by letter of 23 December 2009, formally requested them to express in writing their interest to engage in settlement discussions. After all parties had confirmed their willingness to engage in settlement discussions, the discussions started on 3 June 2010. The Commission initiated proceedings against Procter & Gamble International S.à.r.l. pursuant to Article 11(6) of Regulation (EC) No 1/2003 on 9 February 2011.
8. Settlement meetings between the parties and the Commission took place between 3 June 2010 and 7 January 2011. During those meetings, the Commission informed the parties of the objections it envisaged raising against them and disclosed the evidence in the Commission file used to establish these objections. Between 8 June and 29 June 2010, the parties had access to the relevant file in the Commission premises, including all the [...]. The parties were also given [...] documents in the file and a copy of the evidence that had already been shown to them. Upon request, and in so far as it was justified for the parties to clarify their positions regarding a time period or any other aspect to the cartel, the parties were granted access to any additional document [...] in the case file. The parties were also provided with an estimation of the range of fines likely to be imposed by the Commission.
9. The parties gave their view on the objections which the Commission envisaged raising against them. The parties' comments were carefully considered by the Commission and, where appropriate, taken into account. At the end of the settlement discussions, all parties considered that there was a sufficient common understanding as regards the potential objections and the estimation of the range of likely fines to continue the settlement process.
10. On [...], the parties submitted to the Commission their formal request to settle pursuant to Article 10a(2) of Regulation (EC) No 773/2004.
11. In their settlement submissions, Henkel, P&G and Unilever acknowledged clearly and in an unequivocal manner their liability for an infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, describing its object, the main facts, their legal qualification, including the parties' roles and the duration of their participation, in accordance with the settlement discussions. The parent companies heading the groups acknowledged clearly and unequivocally that they are responsible for the behaviour of their subsidiaries which were involved in the cartel (hereinafter "relevant subsidiaries"). P&G introduced a settlement submission on behalf of both The Procter and Gamble Company and Procter & Gamble International S.à.r.l. In their respective settlement submissions, the parties confirmed that they had had access to the evidence supporting the objections and had been granted sufficient opportunity to have access to other documents in the Commission file. The parties also identified [...] the documents that were disclosed to them.
12. In their settlement submissions, in accordance with point 20 of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions

pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (hereinafter "the Settlement Notice"),⁶ the parties also confirmed:

- that they had been sufficiently informed of the objections the Commission envisaged raising against them and that they had been given sufficient opportunity to make their views known to the Commission.
 - that they did not envisage requesting access to the file or requesting to be heard again in an oral hearing, unless the Statement of Objections does not reflect their settlement submissions.
 - that they agreed to receive the Statement of Objections and the final decision in a given language, in this case in English.
13. The parties also indicated the maximum amount of the fine that they anticipated would be imposed by the Commission and which they would accept in the framework of a settlement procedure.
14. On 9 February 2011, the Commission adopted a Statement of Objections addressed to Henkel, Procter & Gamble and Unilever. All the parties replied to the Statement of Objections by confirming that it corresponded to the contents of their settlement submissions and that they therefore remained committed to following the settlement procedure. Having regard to the clear and unequivocal acknowledgments of all the parties to these proceedings described in their settlement submissions and to their clear and unequivocal confirmation that the Statement of Objections reflected their settlement submissions it is concluded that the addressees of this Decision are to be held liable for the infringement as described in Sections 4 to 7.

3. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

3.1. The product concerned by the cartel

15. The product concerned by the anticompetitive conduct in this case is HDD low suds powder.

3.2. The undertakings subject to the proceedings

3.2.1. Henkel

16. The relevant company is Henkel AG & Co. KGaA, with its registered office at Henkelstrasse 67, 40589 Düsseldorf, Germany, and its relevant 100% owned subsidiaries. Henkel is a manufacturer and supplier of laundry and home care products with a worldwide turnover of EUR 15 092 million in 2010.⁷

3.2.2. P&G

17. The relevant companies are The Procter & Gamble Company ("P&G Co") with its registered office at One Procter & Gamble Plaza, Cincinnati, OH 45202 USA,

⁶ OJ C 167, 2.7.2008, p.1.

⁷ Henkel's worldwide turnover in 2009 was EUR 13 570 million.

Procter & Gamble International S.à.r.l. ("PGI") with registered office at 26, Boulevard Royal, L-2449 Luxembourg, which is 100% owned by P&G Co, and the latter's relevant 100% owned subsidiaries. P&G Co. is a publicly listed, global manufacturer of consumer goods, including household care, beauty care, and health, baby and family care products. While P&G Co. itself does not conduct business outside the State of Ohio, it is the ultimate parent for a large corporate group involved in the manufacture and sale of heavy duty laundry detergents powders, including PGI under which the P&G group's European subsidiaries conduct business. The P&G group's worldwide turnover is EUR 56 400 million in financial year 2009/2010.

3.2.3. *Unilever*

18. As regards Unilever, the relevant companies are Unilever PLC with its registered office at Unilever House, 100 Victoria Embankment, London, EC4Y 0DY, United Kingdom, Unilever NV with its registered office at Weena 455, 3013 AL Rotterdam, The Netherlands, and their relevant subsidiaries over which they exercise decisive influence. Unilever is a manufacturer and supplier of fast-moving consumer goods with a worldwide turnover of EUR 44 262 million in 2010.⁸

3.3. **Inter-state trade**

19. There is a high level of cross-border shipments of HDD low suds powder in the EEA. Products are imported and exported and manufacturers are active throughout the EEA with international brands and centralised production facilities. There is accordingly a substantial volume of trade between Member States, as well as between the Contracting Parties to the EEA Agreement, as regards the product concerned.

4. **DESCRIPTION OF THE EVENTS**

4.1. **Overview of the cartel**

20. The infringement is connected to the implementation of an environmental initiative, which was launched in the EEA in 1997 by the main European detergent manufacturers through the "AISE" ("Association Internationale de la savonnerie, de la détergence et des produits d'entretien") trade association representing them. The AISE environmental initiative resulted in the launch of the Code of Good Environmental Practice for Household Laundry Detergents, which was a voluntary initiative designed to promote more sustainable consumption of laundry detergents in the then 15 Member States, Iceland, Liechtenstein, Norway and Switzerland and was endorsed by the Commission Recommendation of 22 July 1998 concerning good environmental practice for household laundry detergents.⁹
21. As a result of the implementation of the environmental initiative, dosage and weight reductions of heavy duty detergent powder and corresponding packaging material

⁸ Unilever's worldwide turnover in 2009 was EUR 39 823 million.

⁹ OJ L 215, 01.08.98, p. 73.

were implemented in four subsequent steps: AISE I, AISE II, AISE III and AISE IV. Detailed discussions on the reduction of weight ("compaction") and volume ("downsizing") took place between the undertakings and the various steps were implemented as a result of an industry agreement.

22. Although the AISE environmental initiative neither foresaw nor necessitated price discussions, the industry agreements and the discussions on the occasion of that initiative led to anticompetitive conduct among Henkel, P&G and Unilever, the ultimate aim of which was to achieve market stabilisation as well as to coordinate prices at European level.
23. Meetings and other contacts were organised between Henkel, P&G and Unilever at European level on a regular, continuous basis on the occasion of the AISE environmental initiative, during which the described anticompetitive behaviour took place.¹⁰
24. Henkel, P&G and Unilever sought to achieve market stabilisation by ensuring that none of them would use the environmental initiative to gain competitive advantage over the others and that market positions would remain at the same level as prior to actions taken within the environmental initiative (in particular the compaction of products).¹¹
25. As regards prices, Henkel, P&G and Unilever engaged in the following anticompetitive practices:
 - First, they agreed on indirect price increases. In practice, the parties agreed to keep the price unchanged during the implementation of the different phases of the environmental initiative. In particular, the parties agreed not to decrease prices when products were "compacted" (that is to say when the weight of the products was reduced), when the product quantity was downsized (that is to say when the product volume was reduced) or on some occasions when they collectively reduced the number of scoops (that is to say wash loads) per package. Within the ambit of these indirect price increases the parties also decided not to pass the benefit of cost savings (reduced raw materials, packaging and transport costs) on to consumers.¹²
 - Second, they agreed to restrict their promotional activity, which is also considered as a form of price collusion. In particular, the parties agreed on excluding specific types of promotions during the implementation of the different phases of the environmental initiative.¹³
 - Third, the parties agreed on a direct price increase towards the end of 2004, which was targeted at specific markets, to be implemented in the order of

¹⁰ [...]

¹¹ [...]

¹² [...]

¹³ [...]

market leadership, that is the market leader would implement first while the others would follow.¹⁴

- In addition, the parties exchanged sensitive information on prices and trading conditions, thereby facilitating the various forms of price collusion.¹⁵

26. Furthermore, the coordination by the parties, on the occasion of the environmental initiative, on various parameters related to the presentation of products (such as pack dimensions and fill levels), is also considered to be part of the infringement to the extent that it was used to facilitate the market stabilisation and price coordination.¹⁶

4.2. Geographic scope of the infringement

27. These proceedings concern a single and continuous infringement operated at European level and covering Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands.¹⁷

4.3. Duration of the infringement

28. The starting date of the cartel is considered to be 7 January 2002, as there is evidence confirming the participation of each of Henkel, P&G and Unilever in the cartel from at least that time.¹⁸ Between January 2002 and March 2005 there were continuous and regular contacts among the managers concerned to coordinate their pricing behaviour, as described in Section 4.1. The end date of the infringement is considered to be 8 March 2005.¹⁹

5. APPLICATION OF ARTICLE 101 OF THE TFEU AND ARTICLE 53 OF THE EEA AGREEMENT

29. Having regard to the facts as described in Section 4, the parties' clear and unequivocal acknowledgements of the facts and the legal qualification thereof contained in their settlement submissions, and their replies to the Statement of Objections, the legal assessment is set out as follows.

¹⁴ [...]

¹⁵ [...]

¹⁶ [...]

¹⁷ [...]

¹⁸ [...]

¹⁹ [...]

5.1. The nature of the infringement

5.1.1. Agreements and concerted practices

(a) Principles

30. Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement prohibit anticompetitive *agreements* between undertakings, *decisions by associations of undertakings* and *concerted practices*.²⁰
31. An *agreement* may 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. Although Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement draw a distinction between the concept of *concerted practice* and that of *agreements between undertakings*, the object is to bring within the prohibition of those articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition. Thus, conduct may fall under Article 101 of the TFEU and Article 53 of the EEA Agreement 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 coordination of their commercial behaviour.²¹
32. 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 those forms of illegal behaviour. The concepts of *agreement* and *concerted practice* are fluid and may overlap. It would be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall purpose into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time.²²

(b) Application to this case

33. As it emerges from the facts described above under Section 4, the parties to the infringement entered into an overall scheme of interlinked anticompetitive practices, the ultimate aim of which was to achieve stabilisation of market positions and price coordination, with evidence showing that Henkel, P&G and Unilever participated in such behaviour.

²⁰ The case-law of the Court of Justice and the General Court in relation to the interpretation of Article 101 of the TFEU applies equally to Article 53 of the EEA Agreement. See recitals 4 and 15 as well as Article 6 of the EEA Agreement and Article 3(2) of the EEA Surveillance and Court Agreement.

²¹ See Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, at paragraph 256. See also Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, at paragraph 64, and Joined Cases 40-48/73, 50/73, 54-56/73, 111/73 and 113-114/73 *Suiker Unie and Others v Commission* [1975] ECR 1663, at paragraphs 173-174.

²² See Case T-7/89 *Hercules v Commission* [1991] ECR II-1711, at paragraph 264.

34. The behaviour of the undertakings concerned may be characterised as a complex infringement consisting of various actions which can be classified as an agreement and/or concerted practice, whereby competitors knowingly substituted practical co-operation between them for the risks of competition. In addition, the undertakings participating in such concerting arrangements and remaining active on the market are presumed to take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period.²³ The behaviour in this case therefore presents all the characteristics of an agreement and/or concerted practice in the sense of Article 101 of the TFEU and Article 53 of the EEA Agreement.
35. The anticompetitive behaviour covered by these proceedings, which was operated at European level and covered Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands, therefore constitutes an agreement and/or concerted practice between undertakings within the meaning of Article 101 of the TFEU and Article 53 of the EEA Agreement.

5.1.2. *Single and continuous infringement*

(a) Principles

36. A complex cartel may properly be viewed as a single and continuous infringement for the time frame in which it existed. The General Court has pointed out that the concept of "single agreement" or "single infringement" presupposes a complex of practices adopted by various parties in pursuit of a single anticompetitive economic aim.²⁴ The cartel may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.
37. 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 anticompetitive object or 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 pursuant to 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 it and was prepared to take the risk.²⁵

²³ See Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 121.

²⁴ Joined Cases T-25/95 to 26/95, T-30 to 32/95, T-34 to 39/95, T-42 to 46/95, T-48/95, T-50 to 65/95, T-68 to 71/95, T-87 to 88/95 and T-103 to 104/95, *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 369.

²⁵ See Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraph 83.

(b) Application to this case

38. In this case, the conduct in question constitutes a single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, which continued without interruption between 7 January 2002 and 8 March 2005 in the HDD low suds powder product market and affected Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands.
39. The various anticompetitive practices described in Section 4 were interlinked and served the same goal: stabilisation of market positions and price coordination. Meetings and other contacts were organised between Henkel, P&G and Unilever at European level on a regular, continuous basis on the occasion of the AISE environmental initiative, during which the anticompetitive conduct took place. The aim of the anticompetitive conduct, the actions taken and the contacts followed the same pattern throughout the period of the infringement.
40. The respective managers met regularly and were in regular telephone contact, sometimes several times a month. Those contacts were part of the single overall infringement of stabilisation of market positions and price coordination.
41. The elements of the cartel are complementary in so far as they overlap temporally and they concern the same product market (HDD low suds powder) and the same forum (same individuals who had management responsibilities across Western Europe and met at industry meetings on the occasion of the AISE environmental initiative).
42. All the participants were, or at least should reasonably have been aware of the existence of the overall aim of the agreement and/or concerted practice and participated in the single and continuous infringement.
43. These elements taken together demonstrate that the undertakings concerned participated in a single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement.

5.1.3. *Restriction of competition*

(a) Principles

44. Article 101 of the TFEU and Article 53 of the EEA Agreement expressly prohibit as incompatible with the internal market all agreements and concerted practices which have as their object or effect the restriction of competition by directly or indirectly fixing prices or any other trading conditions. It is settled case-law that, for the purpose of the application of Article 101 of the TFEU 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 internal market. Consequently, it is not necessary to show actual anticompetitive effects where the anticompetitive object of the conduct in question is proved.²⁶ The same applies to concerted practices.²⁷

²⁶ See, for example, Case T-62/98 *Volkswagen v Commission* [2000] ECR II-2707, paragraph 178 and case-law cited therein.

(b) Application to this case

45. The participants to the cartel described in this Decision coordinated their behaviour to remove uncertainty between themselves, in particular in relation to pricing, in the HDD low suds powder market and ultimately to restrict competition. The conduct in question, which had an anticompetitive **objective**, was a sufficient basis for the participating undertakings to concert on their market behaviour and thus to successfully substitute practical cooperation between them for competition and the risks that that entails.
46. Therefore, the object of their behaviour was to restrict competition within the meaning of Article 101 of the TFEU and Article 53 of the EEA Agreement.

5.1.4. *Effect upon trade between Member States and between Contracting Parties to the EEA Agreement*

(a) Principles

47. Article 101 of the TFEU 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 internal market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area.
48. The application of Articles 101 of the TFEU 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 Member 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.
49. The European Union Courts have consistently held that, for an agreement between undertakings to affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. Article 101 of the TFEU does not require that agreements have actually affected trade between Member States, but it does require that it be established that the agreements are capable of having that effect.²⁸

(b) Application to this case

50. Henkel, P&G and Unilever are the three largest manufacturers and suppliers of HDD low suds powder in the EEA. They are active EEA-wide with international brands and centralised production facilities. Overall, there is a high level of cross-border

²⁷ See Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, at paragraphs 158-166.

²⁸ See for example Case 56/65, *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84, *Remia and Others* [1985] ECR 2545, paragraph 22; Joined Cases T-25/95 to 26/95, T-30 to 32/95, T-34 to 39/95, T-42 to 46/95, T-48/95, T-50 to 65/95, T-68 to 71/95, T-87 to 88/95 and T-103 to 104/95, *Cimenteries CBR and Others v Commission* [2000] ECR II-491, paragraph 3930 and Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 48.

shipments of these products in the EEA. During the period of the infringement, Henkel, P&G and Unilever manufactured and supplied HDD low suds powder with significant market shares in the geographic markets covered by these proceedings.

51. The infringement between the undertakings concerned was therefore capable of having an appreciable effect upon trade between Member States and the Contracting Parties to the EEA Agreement within the meaning of Article 101 of the TFEU and Article 53 of the EEA Agreement.

5.1.5. *Non-applicability of Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement*

52. The provisions of Article 101(1) of the TFEU and Article 53(1) of the EEA Agreement may be declared inapplicable pursuant to Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
53. Since restriction of competition is the sole object of the practices aimed at market stabilisation and price coordination described in Section 4, there is no indication that those restrictive practices of Henkel, P&G and Unilever entailed any efficiency benefits or otherwise promoted technical or economic progress. Complex infringements which aim to stabilise market positions and coordinate prices between producers, like the one which is the subject of this Decision, are, by definition, among the most detrimental restrictions of competition. They do not benefit consumers.
54. On the basis of the facts before the Commission, there are no indications that the conditions for exemption provided for in Article 101(3) of the TFEU and Article 53(3) of the EEA Agreement could be fulfilled by the restrictive practices described in this Decision, in respect of which the prohibition in Article 101(1) TFEU and Article 53(1) of the EEA Agreement remains fully applicable.

6. ADDRESSEES OF THIS DECISION

55. Having regard to the facts as described in Section 4, the parties' clear and unequivocal acknowledgements of the facts and the legal qualification thereof contained in their settlement submissions, as well as their replies to the Statement of Objections, this Decision should be addressed to the following legal entities and undertakings.

6.1. Henkel

56. Henkel AG & Co. KGaA is the ultimate parent company for Henkel subsidiaries established and operating in the manufacture and sale of heavy duty laundry detergent powders.

57. Henkel AG & Co. KGaA clearly and unequivocally acknowledges that it is as ultimate parent of all its relevant Henkel subsidiaries, in which it holds directly or indirectly 100% of the shares, liable for the single and continuous infringement for its own behaviour and for the conduct of its relevant subsidiaries. Liability for the single and continuous infringement is therefore imputed to Henkel AG & Co. KGaA for its conduct and the conduct of its relevant subsidiaries.

6.2. P&G

58. While the Procter & Gamble Company itself does not conduct business outside the State of Ohio and was not itself involved in the cartel, it directly or indirectly owns 100% of the shares of Procter & Gamble International S.à.r.l. ("PGI"), which in turn owns 100% of the relevant P&G subsidiaries involved in the cartel. The Procter & Gamble Company and PGI are therefore as ultimate and intermediate parents of the P&G group, jointly and severally liable for the single and continuous infringement for the conduct of their relevant subsidiaries. Liability for the single and continuous infringement is therefore imputed jointly and severally to the Procter & Gamble Company and PGI for the conduct of their relevant subsidiaries.

6.3. Unilever

59. Unilever PLC and Unilever NV are holding and service companies; many of the business activities of Unilever are carried out by their subsidiaries. A majority of the shares in these subsidiary companies are ultimately held by either Unilever PLC or Unilever NV, or jointly by the two companies in varying proportions. They are the ultimate parents of a group of companies, which manufacture and sell heavy duty laundry detergent powders.
60. Unilever PLC and Unilever NV clearly and unequivocally acknowledge that they are as ultimate parents of the Unilever group jointly and severally liable for the single and continuous infringement for their own behaviour and for the conduct of their relevant subsidiaries over which they exercise decisive influence such that those subsidiaries do not determine independently their own conduct on the market. Liability for the single and continuous infringement is therefore imputed jointly and severally to Unilever PLC and Unilever NV for their conduct and the conduct of their relevant subsidiaries.

7. DURATION OF THE INFRINGEMENT

61. Having regard to the facts as described in Section 4, the parties' clear and unequivocal acknowledgements of the facts and the legal qualification thereof contained in their settlement submissions, as well as their replies to the Statement of Objections, the starting date of the cartel for each of Henkel, P&G and Unilever is set at 7 January 2002 and the end date at 8 March 2005.

8. REMEDIES

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

62. Where the Commission finds that there is an infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
63. While it appears that the infringement may be considered to have ended on 8 March 2005, it is necessary to ensure that the infringement has been effectively terminated and is not re-commenced in the future. It is therefore necessary 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 any agreement and/or concerted practice which might have the same or a similar object or effect.

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

64. Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 of the TFEU and/or Article 53 of the EEA Agreement.²⁹ For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year.
65. In this case, on the basis of the facts described in Section 4, it appears that the infringement was committed intentionally. The infringement consisted of market stabilisation and price coordination with respect to HDD low suds powder. With respect to that type of obvious infringement, parties cannot claim that they did not act deliberately.³⁰
66. Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement, which are the two criteria explicitly referred to in the above mentioned Article. In doing so, the Commission sets the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement is assessed on an individual basis. The Commission reflects in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.
67. In setting the fines to be imposed, the Commission refers to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003³¹ (hereafter “Guidelines on fines”). Finally, the

²⁹ Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area “the Community rules giving effect to the principles set out in Articles 85 and 86 of the EC Treaty [now Articles 101 and 102 of the TFEU] [...] shall apply *mutatis mutandis*.” (OJ L 305, 30.11.1994, p. 6).

³⁰ See, e.g., Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, at paragraph 42; Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, at paragraph 50 and Case T-11/05 *Wieland-Werke v Commission*, judgment of 19 May 2010, at paragraph 140 (not yet published).

³¹ OJ C 210, 1.9.2006, p. 2.

Commission applies, as appropriate, the provisions of the Leniency Notice and the Settlement Notice.

8.3. The basic amount of the fine

68. In accordance with the Guidelines on fines, a basic amount is to be determined for each undertaking, which may be increased or reduced if there are found to be either aggravating or mitigating circumstances.

8.3.1. Calculation of the value of sales

69. The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of their sales³², that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area within the EEA.
70. In this case the relevant value of sales is the undertaking's retail sales of HDD low suds powder generated in the eight Member States covered by the infringement: Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands.
71. The Commission normally takes the sales made by the undertakings during the last full business year of their participation in the infringement³³. If the last year is not sufficiently representative, the Commission may take into account another year and/or other years for the determination of the value of sales. In this case, there is no reason to depart from the normal practice to take the undertakings' sales in the last full business year of their participation in the infringement. On the basis of the information provided by the parties, the undertakings' sales made in 2004 are used to calculate the basic amount. As P&G's financial year is not identical to the calendar year, for P&G the last full business year during which the infringement took place is the financial year July 2003 - June 2004. Each party has confirmed the relevant value of sales for the calculation of the fines in their settlement submission.
72. Accordingly, the value of sales for each undertaking concerned is as set out in Table 1:

³² Point 12 of the Guidelines on fines.

³³ Point 13 of the Guidelines on fines.

Table 1

Undertaking	Combined value of sales in € in the relevant eight Member States
Henkel	[500 000 000 – 550 000 000]
P&G	[660 000 000– 730 000 000]
Unilever	[225 000 000 – 250 000 000]

8.3.2. *Determination of the basic amount of the fine*

73. The basic amounts of the fine for each party result from the addition of a variable amount and an additional amount. The variable amount results from a percentage of up to 30% of the value of the undertaking's relevant sales, depending on the degree of gravity of the infringement and multiplied by the number of years of the undertaking's participation in the infringement. The additional amount is calculated as a percentage between 15% and 25% of the value of the undertaking's relevant sales, irrespective of duration.³⁴

8.3.2.1. Gravity

74. The gravity of the infringement determines the percentage of the value of sales taken into account in setting the fine. In assessing the gravity of the infringement, the Commission may have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and/or whether or not the infringement has been implemented.³⁵ The relevant elements in this case are assessed as follows.

(a) Nature

75. The addressees of this Decision participated in a single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement the aim of which was to achieve market stabilisation as well as to coordinate prices, as described in Section 4.
76. That type of anticompetitive behaviour is by its very nature a very serious violation of Article 101 of the TFEU and Article 53 of the EEA Agreement.

(b) Combined market share

77. The undertakings participating in the infringement had a high combined market share [...] in the majority of the Member States concerned by the infringement.

³⁴ Points 19-26 of the Guidelines on fines.

³⁵ Points 21-22 of the Guidelines on fines.

(c) Conclusion on gravity

78. Given the specific circumstances of this case, taking into account the nature of the infringement and the combined market share of the parties, the proportion of the value of sales to be taken into account should be 16%.

8.3.2.2. Duration

79. According to point 24 of the Guidelines on fines, the amount determined on the basis of the value of sales made by the undertaking during the last full business year of its participation in the infringement is multiplied by the number of years of participation in the infringement in order to take fully into account the duration of the participation of each undertaking in the infringement individually³⁶.
80. For that purpose, the starting date for the participation in the infringement of each addressee is 7 January 2002 and the end date 8 March 2005.
81. In this case, the actual duration of participation in the infringement of the undertakings concerned is taken into account, rounded down to the month. The duration of the infringement in this case is consequently 3 years and 2 months. Accordingly, the basic amount of the fine is multiplied by 3,16.

8.3.3. Determination of the additional amount

82. Point 25 of the Guidelines on fines provides that, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales, on the basis of the factors listed in Section 8.3.2.1 with respect to the variable amount, in order to deter undertakings from even entering into such illegal practices.³⁷
83. Taking into account the factors indicated in Section 8.3.2.1 relating to the nature of the infringement and the combined market share of the parties, the percentage to be applied for the purposes of calculating this additional amount is 16%.

8.3.4. Calculation and conclusions on basic amounts

84. Based on the criteria explained above, the basic amount of the fine for each undertaking is presented in Table 2:

Table 2

Undertaking	Sales in €	Duration	Basic Amount in €
Henkel	[500 000 000 – 550 000 000]	3 y 2 m (3,16)	[310 000 000 – 360 000]
Unilever	[225 000 000 – 250 000 000]	3 y 2 m (3,16)	[150 000 000 – 170 000 000]
P&G	[660 000 000 – 730 000 000]	3 y 2 m (3,16)	[440 000 000 – 490 000 000]

³⁶ Point 24 of the Guidelines on fines.

³⁷ Point 25 of the Guidelines on fines.

8.4. Adjustments to the basic amount of the fine

8.4.1. Aggravating circumstances

85. The basic amount of the fine may be increased where there are aggravating circumstances. Point 28 of the Guidelines on fines sets out a non-exhaustive list of such circumstances.
86. There are no aggravating circumstances in this case.

8.4.2. Mitigating circumstances

87. The basic amount of the fine may be reduced where there are mitigating circumstances that result in a reduction of the basic amount. Point 29 of the Guidelines on fines sets out a non-exhaustive list of such circumstances.
88. There are no mitigating circumstances in this case.

8.4.3. Specific increase for deterrence

89. Particular attention should be paid to the need to ensure that fines have a sufficiently deterrent effect; to that end, the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates may be increased.³⁸
90. In this case, in order to ensure deterrence in accordance with point 30 of the Guidelines on fines, it is appropriate to apply a multiplier factor to the fines imposed, based on the size of the undertakings concerned. On that basis, the fine to be imposed on P&G (which has a world-wide turnover of EUR 56 400 million) is multiplied by 1.1.

8.5. Application of the 10% of turnover limit

91. Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking must not exceed 10% of its total turnover in the preceding business year. In this particular case, the adjusted basic amounts do not exceed 10% of the total turnover of any of the undertakings concerned. Therefore, it is not necessary to adjust the amounts in the light of the undertakings' turnover.

8.6. Application of the Leniency Notice

8.6.1. Immunity from fines

92. Henkel submitted an immunity application on [...] under the Leniency Notice. Henkel was the first undertaking to inform the Commission about the present cartel concerning HDD low suds powder. Henkel was granted conditional immunity from fines on 12 June 2008. Henkel's cooperation fulfilled the requirements in the Leniency Notice. Henkel is therefore granted immunity from fines in this case.

³⁸ Point 30 of the Guidelines on fines.

8.6.2. *Reduction of fines*

93. In this case, every submission has significantly strengthened the Commission's ability to prove the existence of the infringement as well as its specific nature and its scope. It is only due to each and every submission from the leniency applicants that the Commission is able to demonstrate the existence of the cartel aiming at the stabilisation of market positions and price coordination, as well as each participant's involvement in the cartel.
94. However, the timing of the cooperation is also an important factor which needs to be taken into account under points 23 to 26 of the Leniency Notice to determine the amount of the reduction.
95. As regards P&G, considering both the quality of its application and its timely cooperation from the beginning of the investigation, it should benefit from the maximum reduction foreseen for the first undertaking to provide significant added value, that is a reduction of 50%. As regards Unilever, considering the delay in its cooperation, in particular the fact that it made its first submission only in [...] 2009, which is more than one year after the start of the investigation, it is not justified to grant it the maximum percentage of reduction foreseen for the second undertaking to provide significant added value. In view of the quality and the timing of its application, a reduction of 25% is therefore granted to Unilever.
96. In the light of the above, P&G is granted a 50% reduction of the fine and Unilever is granted a 25% reduction of the fine.

8.7. Application of the Settlement Notice

97. As foreseen in point 32 of the Settlement Notice, the reward for settlement results in a reduction of 10% of the amount of the fine to be imposed on a party after the 10% of turnover cap has been applied having regard to the Guidelines on fines. Pursuant to point 33 of the Settlement Notice, when settled cases involve leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward.
98. Accordingly, the amount of the fine to be imposed on P&G and Unilever is reduced by 10%.

8.8. Conclusion: final amount of individual fines to be imposed in this Decision

99. The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 are set out in Table 3:

Table 3

Undertaking	Fines
Henkel	EUR 0
P&G	EUR 211 200 000
Unilever	EUR 104 000 000

9. CONCLUSION

HAS ADOPTED THIS DECISION:

Article 1

The following undertakings infringed Article 101 of the TFEU and Article 53 of the EEA Agreement by participating, from 7 January 2002 until 8 March 2005, in anti-competitive practices covering Belgium, France, Germany, Greece, Italy, Portugal, Spain and The Netherlands, aimed at achieving stabilisation of market positions and amounting to price coordination, in respect of heavy duty laundry detergent powders intended for machine washing and sold to consumers:

- (a) Henkel AG & Co KGaA;
- (b) The Procter & Gamble Company;
- (c) Procter & Gamble International S.à.r.l.;
- (d) Unilever PLC;
- (e) Unilever NV.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

- (a) On Henkel AG & Co KGaA: 0 EUR;
- (b) On The Procter & Gamble Company and Procter & Gamble International S.à.r.l. jointly and severally: 211 200 000 EUR;
- (c) On Unilever PLC and Unilever NV jointly and severally 104 000 000 EUR.

The fines shall be paid in EURO within three months of the date of notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT

1-2, Place de Metz

L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref: European Commission – BUFI/COMP/39579

After the 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.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 85a(1) of Commission Regulation (EC, Euratom) No 2342/2002.³⁹

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringement referred to in that Article insofar 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:

- a) Henkel AG & Co. KGaA, Henkelstrasse 67, 40589 Düsseldorf, Germany
- b) The Procter & Gamble Company, One Procter & Gamble Plaza, Cincinnati, OH 45202 USA
- c) Procter & Gamble International S.à.r.l., 26, Boulevard Royal, L-2449 Luxembourg
- d) Unilever PLC, Unilever House, 100 Victoria Embankment, London, EC4Y 0DY, United Kingdom,

³⁹ OJ L 357, 31.12.2002, p. 1.

e) Unilever NV, Weena 455, 3013 AL Rotterdam, The Netherlands

This Decision shall be enforceable pursuant to Article 299 of the TFEU and Article 110 of the EEA Agreement.

Done at Brussels, 13.4.2011

For the Commission

Joaquín Almunia

Vice-President